Date: 20020327
Docket: CAC 169701

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. S.F.A., 2002 NSCA 42]

Bateman, Freeman and Hamilton, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

S. F. A.

Respondent

REASONS FOR JUDGMENT

Counsel:	Kenneth W.F. Fiske, Q.C. for the appellant Bradley G. Sarson for the respondent
Appeal Heard:	March 27, 2002
Judgment Delivered:	March 27, 2002
THE COURT:	Appeal allowed per oral reasons for judgment of Freeman, J.A.; Bateman and Hamilton, JJ.A. concurring.

FREEMAN, J.A. (Orally):

[1] This is a Crown appeal from dismissal on January 22, 2001, of an application to require the respondent, who had been sentenced to three concurrent four-year terms of incarceration after pleading guilty to two counts of aggravated assault and one of unlawful confinement, to provide a sample of his DNA for forensic purposes pursuant to s. 487.052 of the **Criminal Code**.

[2] Section 487.052 provides:

> 487.052 (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the *Young Offenders Act*, of a designated offence committed before the coming into force of subsection 5(1) of the DNA Identification Act, the court may, on application by the prosecutor, make an order in Form 5.04 authorizing the taking, from that person or young person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1), if the court is satisfied that it is in the best interests of the administration of justice to do so.
>
> (2) In deciding whether to make the order, the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

[3] For offences which would be primary designated offences if they occurred after the **DNA Identification Act** came into effect on June 30, 2000, such as those for which the respondent was convicted, the order sought by the Crown would have been mandatory unless the court were satisfied, pursuant to s. 487.051(2), that:

> . . . the person or young person has established that, were the order to be made, the impact on the person’s or young person’s privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

[4] On the hearing of the application before Justice Cacchione the respondent's counsel advised the court:

> Mr. A. is not vehemently opposed or vehemently in favour. I think his position is is that if the Crown has the burden, they should show why his DNA should be taken and I'm just saying that, under the circumstances, the type of offence it was and with his background, that I'd ask you not to use your discretion and order the DNA sample from him.

[5] The trial judge stated:

> The Crown has also requested an order pursuant to s. 487.05(2) [sic--s. 487.052(2)] of the **Criminal Code**. This is commonly known as an order for a DNA sample and subsection 487.05(2) [sic] requires that the court consider the criminal record of the offender, the nature of the offence, and the circumstances surrounding its commission together with the impact that such an order would have on the offender's privacy and security of the person.
>
> The accused's prior record involves an offence of theft, one of sexual assault for which he was given a discharge, causing a disturbance and possession of a weapon. The circumstances of the offences before this court are horrendous. However, nothing in the commission of these offences indicates that the accused in any way attempted to disguise who he was or what his motives were. In fact at the conclusion of the commission of the offence the accused had the victims drive him to where he was staying. As such there was no question as to the identity of the offender.
>
> His criminal record is not extensive nor is it of such a nature as to require such an order. I also consider that the offender, as a result of this sentencing, will be deprived of his liberty and the security of his person may well be in jeopardy given that he is going to a federal institution. I see no reason why the state should be more invasive with regard to the security of his person than it already has been. The Crown's application for an DNA order is denied.

[6] This court has considered the amendments to the **Criminal Code** resulting from the **DNA Identification Act** in **R. v. Jordan**, [2002] N.S.J. No. 20 and **R. v. Murrins,** [2002] N.S.J. No. 21, both of which followed two Ontario Court of Appeal cases, **R. v. Briggs** (2001), 157 C.C.C. (3d) 38 (Ont. C.A.) and **R. v. P.R.F.**, [2001] O.J. No. 5084 (C.A.). None of the four cases was available at the time the present case was decided. This is unfortunate, for together they outlined the manner in which concerns for the interests of the administration of justice are to be balanced with considerations more personal to the respondent in determining

whether an order is granted or declined. In particular, the role played by the issue of identification in the case for which an offender is convicted is not in itself a critical factor. Neither is the personal safety of incarcerated persons; Parliament must have contemplated that individuals convicted of primary designated offences might be imprisoned. The respondent was "not vehemently opposed" to providing a DNA sample, and while his psychological profile was before the court, he did not provide cogent evidence as to how a DNA order would adversely impact on his privacy and security of the person.

[7] In **R. v. P.R.F. (supra)** the Ontario Court of Appeal overturned refusals of DNA orders in four separate cases involving five offenders. With respect to one of the decisions Rosenberg, J.A. stated:

> On balance, I would expect that in the vast majority of cases it would be in the best interests of the administration of justice to make the order under . . . s. 487.052.

[8] In my view the trial judge considered irrelevant factors and did not adequately take the best interests of the administration of justice into consideration, therefore he improperly exercised his discretion refusing the order I would allow the appeal and grant the order sought by the Crown.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Hamilton, J.A.