IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Hafez 2006 NSPC 13

Date: 2006/03/10
Docket: 1480037
Registry: Halifax

Between:

Her Majesty the Queen

v.

Chadi Hafez

Application for an Order to provide DNA sample
pursuant to s.487.051(a) of the Code

Judge:	The Honourable Judge Jamie S. Campbell
Heard:	March 10, 2006, in Halifax, Nova Scotia
Charge:	CC. 267(a)
Counsel:	Mr. Christopher Morris for Her Majesty the Queen Mr. Roger Burrill for Chadi Hafez

By the Court:

[1] Chadi Hafez has been charged and found guilty of assault with a weapon contrary to *s. 267(a)* of the *Criminal Code of Canada*,(the "*Code*"). He was sentenced to a conditional discharge.

[2] The issue for consideration is whether an order should be made requiring him to provide a DNA sample pursuant to *s. 487.051(a)* of the *Code.*

[3] That section makes the provision of such a sample mandatory for those convicted of such primary designated offences, unless the offender can bring himself within the exception set out in *ss. 487.051(2).* To do that the offender must show that the impact on his privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders. The onus is clearly on the offender.

The Facts:

[4] Mr. Hafez was convicted of having struck another bar patron over the head with a beer bottle. The incident occurred at the Palace, a local nightclub. Mr. Hafez saw another young man making what he believed to be unwanted advances to one of the female friends with whom he had come to the establishment. Mr. Hafez became involved. Words and pushes were exchanged. Mr. Hafez eventually struck the young man on the head with a bottle of beer. The intervention of calmer friends insured that the two were separated without further incident.

[5] Mr. Hafez represented himself at trial. He admitted to the essential elements of the offence in a forthright manner. He was eager to provide the court with his explanation. His reaction, motived as it was by a misguided sense of honour was certainly wrong. Chivalry even in it's modern form does not involve the use of beer bottles as weapons. Mr. Hafez escalated the level of violence beyond that which could allow the situation to be characterized as a consensual fight. The incident, however, was the product more of misjudgement than of criminality. It was an act of violence but not of viciousness.

[6] Mr. Hafez has no criminal record. He has no record of violent behaviour and there is no reason to believe that he will engage in violent behaviour again.

[7] According to the Presentence Report Mr. Hafez is 26 years old and the eldest of 6 children now living with their mother in the family home in Halifax. He has Grade 11 education and has worked in the food industry, including some time as a cook. Mr. Hafez has been described as friendly, polite and honest. His probation officer has found nothing to dispute those characterizations of him and nor has the court in hearing this matter.

Legal and Legislative Context:

[8] Assault with a weapon is a primary designated offence. Those are offences which have been deemed to be so serious that there is a presumption that an order for the provision of a DNA sample will be made. A court may refuse the order only if the impact of taking the sample would be "grossly disproportionate" to the public interest. Other primary designated offences include piracy, hijacking, terrorism, sexual interference, incest, infanticide, murder, sexual assault, kidnapping, aggravated assault and assault with a weapon or causing bodily harm.

[9] In making the determination of whether the impact would be grossly disproportionate the court must consider a number of factors individual to the case and give each of them appropriate weight. That must be done bearing in mind the legislative context in which the decision is being made. Those are considerations that will be present in every case. Contextual issues include the purpose of the DNA sample, the objectives of the DNA bank and the nature of the privacy and security of the person rights that are to be infringed.

[10] When a sample is taken it is sent to the National DNA Data Bank of Canada. The sample is processed and unique a DNA sequence is determined. That profile then goes on the data base which is called the Convicted Offenders Index. Information from that index can be compared with information from another data base which contains information profiles regarding unsolved crimes.

[11] The manner in which DNA samples are taken is set out in *s. 487.06(1)* of the *Code.* The three permitted methods involve plucking hairs, taking buccal swabs by swabbing lips, tongue and inside cheeks, or taking blood by pricking the skin surface with a sterile lancet. The court must bear in mind that, as noted by the Nova Scotia Court of Appeal in *R. v. Jordan, [2002] N.S.J. 20, 2002 NSCA 11, para.50*, these methods are physically invasive only to a very limited extent. As the Court of Appeal pointed out, the authorizing judge may also set out terms to insure that the taking of samples is done in a way that is reasonable in the circumstances.

[12] The issue must also be considered in light of the broader purposes of the DNA provisions of the *Code*. The purpose of the DNA data bank is set out in the *DNA Identification Act*, *S.C. 1998, c.37, s.3*, as being to help law enforcement agencies identify persons alleged to have committed offences. It further states that DNA profiles can help to achieve early detection, arrest, and conviction of offenders.

[13] As the Court of Appeal noted in *R. v. Jordan, supra., section 3* of the *Act* is not an exhaustive statement of the legislative purpose of the overall scheme. The system was also intended to deter potential offenders, promote the safety of the community, streamline investigations, and assist the innocent by early exclusion from investigative suspicion.

[14] To the legal and legislative context should be added the privacy and security of the person of the offender. There is a reasonable expectation of privacy with respect to the informational content of one's blood. *(R. v. Borden [1994] 3 S.C.R. 145,161)*. That is contextual information that will be relevant in every case.

[15] La Forest J. wrote in *R. v. Dyment [1988] 2 S.C.R.417, 431,* " the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of human dignity." In that case, the protection was described as being against not so much the physical search as the indignity of the search and the invasion of the person in the moral sense. It violates " the sanctity of the body which is essential to the maintenance of human dignity". *(R. v. Stillman [1997] 1 S.C.R. 607, para 51).*

[16] Part of the context is that as a starting presumption the balance is tipped in favour of making the order with respect to individuals who have been convicted of primary designated offences. The Nova Scotia Court of Appeal in *R. v. Jordan*, has stated that there is a reduced expectation of privacy and security of the person for people who have been convicted of those offences. Considerations that would apply to those who are presumed innocent, such as in search cases, do not necessarily apply.

[17] The Court did not suggest however, that there was no expectation of privacy or security of the person in those situations. The *Code* provisions indicate that the right to privacy and security of the person of the offender must be taken into consideration. The protections afforded by the system respecting improper use of data, the very limited intrusiveness of the process involved in obtaining samples and the purpose and public benefits of the system must be weighed against the diminished expectation of privacy and security of the person. At the outset of the analysis of case specific factors, the balance lies tipped in favour of making the order.

The Balance:

[18] At this point factors which are case specific come into consideration. The Court of Appeal in *Jordan, supra*, set out two such factors to determine whether the balance is "grossly disproportionate". One factor is whether the court in the exercise of its discretion in setting conditions regarding the manner in which samples are taken, can restore an appropriate balance. In this case, there are no measures, either individual to Mr. Hafez or more generally that have been proposed to change the balance.

[19] Mr. Hafez is not affected as an individual more significantly that others who provide such
samples. The concern here is not a concern regarding an unauthorized release of private data or a concern regarding the manner in which samples are obtained. The issue is the affect on Mr. Hafez personal dignity and the intrusion in principle.

[20] The Alberta Court of Appeal in *R. v. Wigley, [2005] A.J. No.1191, 2005 ABCA 295,* held that in the absence of case specific evidence to indicate that the impact on the offender was grossly disproportionate to the public interest, the DNA order should be granted. The lack of evidence to address the impact on the privacy and security of the individual offender as opposed to offenders in general meant that the requirements of the exception had not been met. This analysis presumes that in the absence of evidence as to disproportionate individual impact the balance remains firmly tipped toward requiring the sample to be given.

> *There was nothing in the limited evidence pointing to any adverse impact on the respondent's privacy and security rights. The reasons for judgment address privacy and security concerns generally, but not those particular to the respondent. Given the lack of evidence or submissions as to any impact on the respondent's privacy and security interests, the trial judge erred in finding that the respondent had discharged his onus. (Para. 7)*

[21] There is no evidence to indicate how the privacy and security interests of Mr. Hafez would be affected in any way distinct from those of other offenders. The test however is not whether the impact is disproportionate to the impact on other offenders but whether it is grossly disproportionate to the public interest.

[22] In Nova Scotia there is no requirement for case specific individual impact to be established. The Court of Appeal in *R. v. D.B.M. 2006 NSCA 18*, applied it's own analysis of *R. v. Jordan, supra*., to an application brought pursuant to the *Sex Offender Information Registration Act, S.C. 2004, c.10 (SOIRA)*. The Crown applied to have an offender registered and the offender sought an exception under *s. 490.012(4)* of the *Code*. That provision was noted by the Court at paragraph 9, as involving at least a very similar test as is under consideration here.

[23] The Court concluded at paragraph 12, that, based on the Supreme Court of Canada decision in *R. v. R.C. supra*, evidence of the specific impact of the order on the offender was not required. The Court held that the Supreme Court of Canada in *RC* implicitly rejected the view that it was insufficient to rely on "generic considerations" about impact rather than on evidence of how disproportionate the impact was on the offender.

[24] In this case, there is no evidence of specific impacts on Mr. Hafez that would be unique or unusual. The only impacts are those which arise from the legal and legislative context, or the impact on his dignity and his albeit reduced expectation of privacy.

[25] There is a second factor that is of considerable importance in this case. That is the comparison of the majority of cases with the particular circumstances of the case before the court. " If the circumstances of the particular offender or the offence or the risk of a breach of privacy or security of the person vary markedly from the sort of cases which Parliament may be

presumed to have had in mind in devising the legislative scheme, the impact of the order will be grossly disproportionate." *(R. v. Jordan, supra., para 59)*

[26] The list of designated offences includes ones within which there is a fairly broad band of degrees of seriousness. The intent was not that only the most serious offences would require a DNA order, otherwise these broad band offences would not have been included in the list of designated offences. There is a recognition however that there are a very limited number of cases in which designated offences have been committed, the circumstances of which vary markedly from the circumstances that surround the vast majority of such offences.

[27] For example, assault with a weapon may range from a very serious crime committed by a dangerous repeat offender using a knife or firearm to minor assault by a first time offender using an implement the use of which as a weapon could be seen as incongruous in normal circumstances because of its inherently nondangerous nature. The issue is whether the circumstances of the case are markedly different from the vast majority, given the nature of the broad band offences included as designated offences.

[28] The Supreme Court of Canada in *R. v. R.C. [2005] S.C.J. No.62, at para.31*, cautioned that the inquiry is;

> "necessarily individualized and the trial judge must consider the circumstances of the case."

[29] Those circumstances include but are not limited to the criteria set out regarding secondary designated offences in *s. 487.051(3)* of the *Code.* Those are the criminal record of the accused, the nature of the offence and the impact of such an order on the offender's right to privacy and security of the person.

[30] Mr. Hafez has no criminal record. It is not likely that he will reoffend.

[31] It is unlikely that he will be involved in the kind of offences for which DNA identification is generally considered to be a useful investigative tool.

[32] The DNA bank does not have as it sole purpose the identification of offenders. The legislation does not require an individualized assessment of the likelihood that an offender will reoffend. DNA technology may advance so that the bank serves even further purposes. Yet, Mr. Hafez's record and the nature of this offence are such that I am able to conclude that Mr. Hafez is not a danger to society such that the interference with his rights to privacy and security of the person, even diminished as they are by his conviction of a primary designated offence, can be justified, even in light of the tipping of the balance at the outset in favour of making such an order.

[33] The nature of the offence and the circumstances surrounding it are of more importance. The list of designated offences suggests that the focus of attention is on violent or sexual offenders. The list of crimes contains those which society considers to be most repugnant. Mr. Hafez actions were not typical of the general nature of the offences listed, but that is not the test. More importantly varied markedly from the kinds of circumstances surrounding the offences listed.

[34] This was a bar fight, in which Mr. Hafez , in a moment of remarkably bad judgement, escalated the level of violence by using what he had in his hand, a beer bottle, as a weapon. The offence involved a momentary lapse and was over in a matter of seconds. It was not premeditated. He did not seek out a weapon but reacted with what he had readily at hand. At trial he admitted to what he had done. This did not appear to be an act of a violent person but an act of a young man caught up in a combination of alcohol, a misguided sense of honour, the need to perform for the crowd and misjudgement.

[35] A third factor for consideration is the impact on a person's privacy and security of the person . As I have outlined I am aware of the systemic protections with regard to both privacy and security of the person. In Mr. Hafez's case, he is at no greater risk than anyone else.

[36] While the balancing must consider the import legislative objectives of the DNA data bank
system, the presumption with regard to those convicted of primary designated offences, the very limited practical or physical intrusion on the body and the privacy of the offender and the reduced expectation of privacy and security, those Charter protected rights are still present and are of value. The invasion here is in the moral sense and an invasion of the dignity of the offender. This is in some respects a matter of principle.

[37] Given the nature of the offence and the surrounding circumstances, Mr. Hafez has not entirely forfeited or compromised his Charter protected rights to privacy and security of the person. There is a reduced expectation of privacy and security but there is an expectation in a society that respects the rule of law, that after committing offence of this kind, the offender retains the right to a level of dignity. That is a right worth protecting. Society is measured by how well it respects the dignity of it's people and how carefully it considers any intrusion upon that dignity. The real test often lies in matters which may appear to be of little practical consequence or involving those who are deemed to have forfeited some aspects of those rights.

[38] The benefit of having Mr. Hafez's information on the system, in light of the nature of the offence, his very limited criminal record and the low likelihood of his reoffending, are minimal at best and are only slightly greater than the convenience of having the DNA profile of every citizen recorded for the same reasons. The offence to his Charter protected human dignity is grossly disproportionate to the value of having his most intensely private information on record.

[39] In balancing the benefits to be achieved by providing a DNA sample and the individual rights of the offender, the balance is weighted in favour of the public interest. Even in light of that weighting, I am satisfied that this is one of those rare situations contemplated by the legislative scheme in which the infringement of the offender's individual rights are not justified and consequently an order requiring Mr. Hafez to provide a DNA sample will not be made. While there has been no evidence of the specific impact of an order on the individual rights of Mr. Hafez, he does retain a right to security of the person and an expectation of privacy albeit diminished by his conviction of the primary designated offence. The circumstances of the offence and the offender distinguish this case from the vast majority of situations contemplated by the legislative scheme.

[40] The order will not be granted.