

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Agra*, 2018 NSPC 34

Date: 2018-10-25

Docket: 8049744, 8049746

Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Francis Louie Agra

Judge:	The Honourable Judge Paul Scovil, JPC
Heard:	September 25, 2018, in Bridgewater, Nova Scotia
Decision	October 25, 2018
Charge:	266 and 264.1(a) of the Criminal Code of Canada
Counsel:	Leigh-Ann Bryson, Crown Attorney Alan Ferrier, for the Defence Attorney

By the Court:

[1] Sentencing is a task that often provides, for judges, a difficulty in achieving a result that strikes the proper balance between the individuality of the accused, the expectations of the public and the overarching concern that all aspects of the administration of criminal justice are met. This is such a case. The Crown and Mr. Agra have put forward a range of sentence for an assault and threat in a domestic context. This range is from an 18-month period of probation to an absolute discharge. The following decision hopefully strikes the proper balance within that range.

Facts:

[2] Mr. Agra was convicted by this court of one count of threats under section 264.1 of the **Criminal Code of Canada**. As well, he was convicted of an assault under section 266 of the **Criminal Code**. Both counts are within the domestic context.

[3] Mr. Agra is a Pilipino who came to Canada two years prior to arranging for his wife to immigrate. During that time, he had an affair and fathered a child. Mrs. Agra arrived in Canada and found out about the affair and the resulting child.

This resulted in somewhat of a strain on the marriage. Mrs. Agra began texting her best friend's husband who was living in Washington State in the United States of America. This led to Mrs. Agra texting intimate photos to the man. Mr. Agra found out about these photos, which caused intense arguments between he and Mrs. Agra.

[4] The incident in question arose when Mr. Agra threatened to cut Mrs. Agra's cheek with a knife he held to her face unless she told her friend what was going on between Mrs. Agra and her friend's husband. Mrs. Agra declined to advised to her best friend and in the ensuing struggle Mrs. Agra received a scratch on her cheek. She was not sure at trial whether that scratch was as a result of Mr. Agra's fingernails or from the knife. Mr. Agra was consequently convicted of common assault as opposed to assault with a weapon. The threat was the basis for the conviction under section 264.1 of the **Criminal Code**.

Sentencing Background:

[5] The accused was the subject of a presentence report dated the 3rd day of August 2018. As indicated earlier, Mr. Agra is a Philippine national. He and Mrs. Agra were married in 1999 and have two children, ages 18 and 8. The accused

moved to Canada in 2011 to pursue employment opportunities. It was only in 2016 when the remainder of his family was able to emigrate to Canada.

[6] Mr. and Mrs. Agra have reconciled and continue to live together. It appears from the pre-sentence report that the accused is remorseful and he along with his wife have been attending couples counselling. As well, there appears to be family support in the form of a brother of Mr. Agra, who resides in Halifax.

[7] The accused is a professional nurse who intends to pursue a Masters degree in psychiatric nursing. He is currently employed as a registered nurse working two jobs. Both jobs are at senior homes within the Lunenburg County area.

[8] The pre-sentence report details that the accused attended for anger management counselling after the incident and he has attended approximately 12 sessions with a clinical therapist in the Bridgewater area.

[9] The accused has no prior record.

[10] A victim impact statement was filed by Mrs. Agra. It shows that the arrest and trial of an Mr. Agra has had an great impact on the family, which they are

working to overcome. As she stated the biggest impact that she felt was the loneliness of being apart from her husband.

[11] Two letters were received from Ms. Joan Reeves, who is of the ongoing counsellor for the Agra's. It indicates that the accused is sincere in his commitment to pursuing a healthy relationship. He has accepted responsibility for his behaviour.

Sentencing Law:

[12] The primary starting point for any sentencing of the codified provisions of section 718 of the **Criminal Code** stated as follows:

Purpose

718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

Fundamental principle

718.1. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other Sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[13] Given that the accused is requesting a discharge, I must also consider the provisions under section 730(1) of the **Code** which states as follows:

730. (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in

the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

Discharges

[14] The law relating to the gravity of discharges, either conditionally or absolutely begins with *R. v. Fallofield [1973] B.C.J. No. 559 B.C.C.A.* There Justice Farris stated at paragraph 21 as follows:

21 From this review of the authorities and my own view of the meaning of s. 662.1, I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion.

- (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
- (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
- (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
- (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or [*455] to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

(6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

(7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.

(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[15] As stated above in *Followfield*, a discharge may be used in respect of any offence other than offenses where there is a minimum penalty or it is otherwise proscribed by law. It is also clear that in cases of domestic assault, the public interest is not preclusive of a discharge. That being said, the societal concerns relating to domestic violence demands that general deterrence be given weight in assessing the circumstances of a spousal assault and whether a discharge would be appropriate. (*See R. v. Daley [1997] N.S.J. No. 325 (N.S.S.C.)*)

[16] In relation to the question of whether a discharge is not contrary to the public interest it is useful to note the factors which, while not exhaustive, should be considered as set out by the Alberta Court of Appeal in *R. v. MacFarlane [1996] A.J. No. 429*, which are as follows:

1. What is the nature of the offence?
2. The prevalence of the offence as it may exist in own community.
3. Did the accused stand to make some personal gain at the expense of others.

4. Is it a property offence?
5. Was the committal of the crime a matter of impulse or was it calculated?
6. Should the offence be a matter of record relating to the accused?

[17] At the end of the day, it is clear that a court must make a decision, carefully balancing the interests of the accused and the interests of society. This balancing must be done to achieve a sentence which encompasses all the criteria have examined above. It is a difficult task.

The Sentence

[18] What then should I do with Mr. Agra?

[19] Mr. Agra committed a serious domestic assault designed to humiliate and instil fear in his spouse. Spousal assaults are often seen in our courts. Parliament has seen fit to designate as an aggravating feature in sentencing which an offence is domestic in nature. Based on the nature of the offence and the need for deterrence, I find that in this matter it would be contrary to the public interest to grant an absolute discharge. I say that taking in account all factors before me in the sentencing involving those favorable to Mr. Agra.

[20] In relation to a conditional or absolute discharge, such a disposition is clearly in the interest of the accused.

[21] As to the second ground under *Followfield* and others, I must consider if it is not contrary to the public interest to grant such a discharge. I have noted the seriousness of the offence above. Domestic assaults are prevalent in Canada. I also note that the offence occurred after an escalation of domestic dysfunction. It appeared to be somewhat impulsive, given the facts before me.

[22] I must also consider that he and the victim have reconciled and are attempting to re-engage as a family. Such rehabilitative efforts should be encouraged by the court. It is also the situation where the accused is without record, gainfully employed and seeking to further his studies in nursing. To ensure that Mr. Agra continues his productive employment, that he advances in his profession, and importantly, he and the victim can heal their relationship, is surely not contrary to the public interest.

[23] Given all the above, I find that it is not contrary to the public interest to grant a discharge, conditional upon completion of a probationary period.

[24] I therefore sentence Mr. Agra to a conditional discharge and an 18-month period of probation. At the successful end of which would be granted a discharge. The terms of the probation order will be the statutory terms, together with the following:

- Report to a probation officer at 99 High Street, Bridgewater, Nova Scotia, (543-4721) on or before 4:00 pm today or within 2 days from today's date and thereafter as directed by your probation officer.

- Attend for, participate in and successfully complete any and all counselling, assessment, treatment or program as direct by your probation officer, including but not limited to:
 - 1 – mental health
 - 2 – anger management
 - 3 – violence intervention and prevention program – spousal/partner related
- You are to have no direct or indirect contact or communication whatsoever with Pamela Agra, except with her prior and ongoing consent.
- Pay victim fine surcharge on each count in the amount of \$100.00 within 18 months.

P. Scovil, JPC