

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. W. H. A., 2011 NSSC 166

**Date:** 20110429

**Docket:** CRAT-336695

**Registry:** Antigonish

**Between:**

Her Majesty the Queen

v.

W. H. A.

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**Restriction on publication:** Section 486.4 of the *Criminal Code*

**Judge:** The Honourable Justice Peter P. Rosinski

**Heard:** April 27, 2011, in Antigonish, Nova Scotia

**Counsel:** Catherine Ashley and Darlene Oko, for the  
Provincial Crown

Coline Morrow, for the Accused

**By the Court:**

[1] Mr. A. is being tried before a jury, for sexual assault—or what was previously referred to as “rape.”

**Issue**

[2] Should I permit Mr. A. to be restrained by leg shackles in the presence of the jury and should he be permitted to sit at counsel table?

**Case Law**

[3] These are some of the principles that emerge from the case law:

**1. Presumption of No Restraint**

**2. Onus on Crown if it Seeks Restraint** - to satisfy the Court that there are reasonable grounds for concern about courtroom safety or escape of the accused.

**3. Discretion of the Trial Judge** - balancing the need to ensure the safety of all participants in the courtroom, while preserving the appearance of fairness towards the accused, having regard to the presumption of innocence, and the dignity that all persons should be accorded. A hearing should be held to determine the issue if there is a dispute.

[4] Some of the relevant cases are: *R. v. McNeill* (1996) 108 CCC (3d) 364 (Ont. C.A.) at paras 4 and 7; *R v. McArthur* [1996] O.J. No. 2974 (Sup. Ct.) At para 9; *R. v. Vickerson* [2006] O.J. No. 351 (Sup. Ct.) At paras 11, 18, 33-40; *R. v. F.D.J.F.* (2005) 197 CCC (3d) 365 (Ont. C.A.). While these cases are helpful, as they are all from Ontario, I keep in mind that in Ontario a prisoner dock is standard in courtrooms and therefore the security issues are different. Where here in Nova Scotia there is no dock, prisoners are more commonly restrained by leg shackles, hand cuffs and increased sheriff's presence, especially in non-jury trials.

[5] The Criminal Record of Mr. A. (offences of violence only) was read into the record:

March 1990	- s. 267(a)	4 months jail
	- s. 267(b)	6 months consecutive

August 1993	- s. 344	3 years jail
	- s. 87	1 year concurrent
Jan 1998	- s. 267(a)	9 months jail
Feb 1998	- s. 89	1 month jail
August 2001	- s. 266	5 months jail
April 2004	- s. 266	14 days jail
	- s. 266	14 days jail concurrent
Sept 2006	- s. 152	2 months jail consecutive
Jan 2010	- s. 267(b)	9 months jail

### **Defence Evidence**

[6] We heard from Mr. A.. He testified that the shackles were uncomfortable and made him feel that the jurors who might have seen him would consider him “guilty”.

[7] We also heard from Deputy Sheriff, Thomas MacRae, who has dealt with Mr. A. in the past, many times, and yesterday as well. He testified (my paraphrasing):

1. Ms. Morrow made an inquiry of him at about 9:00 a.m., April 26, 2011, about whether the shackles would be removed (notably this issue was not raised in the court/counsel pre-trial meeting at 9:15 a.m., April 26, 2011);

2. In the past, and yesterday, he has not had any problems with Mr. A.'s behaviour in the Courthouse.

### **Crown Position**

[8] That Mr. A. should be in shackles and not seated at counsel table. They point to his record of violence and the very close quarters in this particular courtroom.

### **Defence Position**

[9] They argue Mr. A. should not be in shackles and should be seated at counsel table.

[10] He has not previously posed safety or escape risk concern and his record, though it contains violence, is also not continuous, not all that recent, and not “on the high end”, to use Ms. Morrow’s words.

## Analysis

[11] Some of the concerns about courtroom safety are more significant in this case because the Courthouse is an historic building, not designed with modern security in mind. The area available for counsel tables is quite small. The accused necessarily sits in proximity to all counsel.

[12] Mr. A. has an extensive criminal record. His record for violence is as listed by the Crown. These are some quite serious convictions and sentences contained therein.

[13] There is no doubt a legitimate concern for the safety of courtroom participants here.

[14] The question is, how demonstrably significant is that concern when weighed against the fair trial concerns in this case?

[15] When a juror sees Mr. A., flanked by a sheriff on either side of him, and in shackles, a reasonable person could be inclined to conclude that Mr. A. is dangerous and/or a serious escape risk.

[16] At the end of the trial, such a belief would be difficult to erase from juror's minds, even with a strong instruction from me that directed them to ignore what they saw, in their consideration of the evidence in the case, and in deciding whether Mr. A. is guilty or not guilty.

[17] I acknowledge that jurors will notice that Mr. A. always enters the court escorted by sheriffs and see him sit with sheriffs, from which they might infer he is in custody at this time.

[18] Adding shackles on top of that picture of Mr. A. creates a real risk that trial fairness could be adversely affected.

**Conclusion**

[19] In balancing the competing concerns, I conclude it is appropriate in this case that:

1. Absent a change in circumstances, Mr. A. will not be shackled inside the courtroom or in the view of jurors;
2. Absent a change in circumstances, Mr. A. will continue to sit at counsel table where he has so far; and
3. Sheriffs be present around Mr. A. while he is in the courtroom.



## **Warning to Jury**

Ladies and Gentleman:

One Matter I wanted to bring to your attention right away: while selecting the jury, you may have seen Mr. A. was flanked by two sheriffs in the courtroom and that he was wearing leg shackles.

Courtroom security is my decision, but made in consultation with sheriffs' staff. It is not uncommon in jury trials for accused persons to be flanked by sheriffs in the courtroom. That may be said to be the "norm" in every case like this.

The use of shackles is an extra, but not entirely unusual, precaution, and one which I did not have an opportunity to fully consider that day as it was a very long and busy court day.

Having turned my attention to the issue the next day, in consultation with sheriffs' staff, I have concluded that the extra precaution of leg shackles in this case was not/and is not required, and Mr. A. should not have had leg shackles on the other day. That was an oversight on my part, and I regret that Mr. A. was so shackled and possibly seen by you in that state.

I am satisfied that Mr. A. poses no concerns beyond those associated with any person who appears in this court in similar circumstances.

I remind you that Mr. A. is presumed innocent, until, he is proven guilty beyond a reasonable doubt based only on the evidence.

Therefore you should completely disregard the fact that the other day he was wearing leg shackles.

Thank you.

**J.**