SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. ElGebeily*, 2021 NSSC 236

Date: 20210708
Docket: CRH No. 474876
Registry: Halifax

Between:

Her Majesty the Queen

v.

Hossameldin ElGebeily

Restriction on Publication: s. 486.4, 486.5, and 539(1) C.C.

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	January 28, 29; February 1, 2; March 4; June 17, 2021
Oral Decision:	July 8, 2021
Counsel:	Sarah Kirby, for the Provincial Crown Eugene Tan and Madeline Smillie-Sharp, for the Accused

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be

published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences

(2.1) The offences for the purposes of subsection (2) are

(a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

Application and notice

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

Factors to be considered

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

Conditions

(8) An order may be subject to any conditions that the judge or justice thinks fit.

Publication prohibited

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

Order restricting publication of evidence taken at preliminary inquiry

539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or

(d) if he or she is ordered to stand trial, the trial is ended.

By the Court (Orally):

[1] After a four day trial, Hossameldin ElGebeily was convicted of having sexually assaulted DM, contrary to Section 271 of the *Criminal Code*.

[2] The evidence establishing the facts that led to Mr. ElGebeily's conviction are set out in my decision given orally on March 4, 2021, which was released in writing on March 31, 2021.

[3] A summary of these facts are set out in the Sentencing Briefs filed by the Crown and Defence Counsel in advance of this hearing.

[4] I would like to correct one minor error found in the Brief filed by Crown Counsel which stated that the victim "and Mr. ElGebeily did not know each other before the night of March 31, 2017." In actual fact, the victim testified that she had worked side by side with Mr. ElGebeily for about an hour during the week leading up to the sexual assault that occurred in the early morning hours of April 1, 2017. The victim and the offender were being driven to their respective addresses in a taxi cab they shared after spending several hours together at a downtown bar along with another co-worker.

[5] Other than this, I accept the summary of facts presented by Crown Counsel. In reaching my decision regarding the guilt of Mr. ElGebeily, I found the victim's

recollection of events to be both credible and reliable. I also found that the accused in giving his testimony admitted to some of the allegations made against him that amounted to an admission of guilt albeit in a sanitized version that attempted to minimize the seriousness of the sexual assault he perpetrated on the victim.

[6] In my decision, I stated that I did not accept Mr. ElGebeily's denial of having sexually assaulted the victim. I further stated that I accepted the evidence of the complainant when she testified that Mr. ElGebeily persisted with efforts to try to kiss her even to the point of grabbing her face and turning it towards his own to try and kiss her before she exited the cab.

[7] My decision should not create any doubt whatsoever as to which version of events I accepted as factual and truthful in reaching the verdict I arrived at.

[8] Mr. ElGebeily was found guilty of not simply trying to kiss the victim but also of non-consensual touching of her vaginal area and thigh.

Crown's Position on Sentencing:

[9] The Crown argues for a suspended sentence with 24 months probation. The conditions of probation proposed are:

- Report to a probation officer within 2 days;

- No direct or indirect contact or communication with the victim;
- To stay at least 5 metres away from any place of residence, employment or education of the victim;
- Not to possess, use or consume any alcoholic beverages;
- To attend for counselling as directed by a probation officer;
- To complete 50 hours of community service as directed by a probation officer.

[10] In addition to the foregoing, the Crown also requests a DNA Order pursuant to s. 487.051(1) of the *Criminal Code* and a SOIRA Order under s. 490.011(1)(a) for a period of 20 years.

Defence's Position on Sentencing:

[11] The Defence submits that a just and appropriate sentence should be a conditional discharge along with a Probation Order for 6 months with the following conditions:

- Report to a probation officer within 2 days;
- No direct or indirect contact or communication with the victim;

- To not be on or within 5 metres of any place of residence, employment or education of the victim.

[12] The Defence further asks that Mr. ElGebeily be exempted from the DNA and SOIRA orders requested by the Crown.

Purpose and Principles of Sentencing – Criminal Code Provisions:

[13] The *Criminal Code* has a number of provisions that deal with the purpose and principles of sentencing. They are found in sections 718 and 718.3 of the *Criminal Code*. Section 718 sates:

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

Section 718.1 states:

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

Section 718.2 states:

> 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,
>
> (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
>
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
>
> (v) evidence that the offence was a terrorism offence
>
> shall be deemed to be aggravating circumstances.

[14] I will have more to say about this particular provision later in my decision.

[15] Returning now to Section 718.2 of the *Code*, sub-paragraphs (b), (d) and (e) have relevance to the matter now before me:

> ...

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.
>
> Section 718.3 deals with punishment generally and need not be recited here in detail other than to say that the Court has considered the general intent of this particular section in reaching its decision today.

[16] In her sentencing brief, Crown Counsel set out the objectives and principles of sentencing by quoting from a decision of the Supreme Court of Canada in the case of *R. v. M. (L.)*, [2008] 2 SCR 163, as follows:

> [17] Far from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge's competence and expertise. The trial judge enjoys considerable discretion because of the individualized nature of the process (s. 718.1 *Cr. C.*; *R. v. Johnson*, [2003] 2 S.C.R. 357, 2003 SCC 46, at para. 22; *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 82). To arrive at an appropriate sentence in light of the complexity of the factors related to the nature of the offence and the personal characteristics of the offender, the judge must weigh the normative principles set out by Parliament in the *Criminal Code* :
>
> - the objectives of denunciation, deterrence, separation of offenders from society, rehabilitation of offenders, and acknowledgment of and reparations for the harm they have done (s. 718 *Cr. C.*) (see Appendix);
>
> - the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1 *Cr. C.*); and
>
> - the principles that a sentence should be increased or reduced to account for aggravating or mitigating circumstances, that a sentence should be similar to other sentences imposed in similar circumstances, that the least restrictive sanctions should be identified and that available sanctions other than imprisonment should be considered (s. 718.2 *Cr. C.*).

[17] This very succinctly captures the essence of what sentencing is all about. There is no "one size, fits all" kind of approach. The Court must not only consider the nature of the offence and the degree of responsibility of the offender, it must also apply the provisions of the *Criminal Code* that deal with the purpose and principles of sentencing. They provide a framework for the Court to consider in arriving at a fit and just determination that is appropriate in the circumstances.

[18] The maximum term of imprisonment for sexual assault, according to Section 271 of the *Code* is ten (10) years unless the complainant/victim is under the age of sixteen (16) years. The complainant in this case had just turned nineteen (19) when these events took place. There is no minimum sentence for sexual assault leaving it to the Court to consider the full panoply of sentencing options provided for in the *Criminal Code* including a suspended sentence with probation as recommended by the Crown and a conditional discharge with an order of probation as suggested by the Defence.

Sentence Objectives in matters involving sexual assault:

[19] Both the Crown and Defence recognize and acknowledge that in matters of sexual assault, the case law is clear – priority should be given to the objectives of denunciation and deterrence.

[20] Deterrence has two branches – one is specific deterrence and the other is general deterrence. Since the conviction was entered, Mr. ElGebeily's franchise agreements by which he operated two restaurants – one in Sydney and one in Truro – have been terminated resulting in the closure of both outlets.

[21] This, combined with the likelihood that his permanent resident status in Canada would be revoked, if the Court is not persuaded to grant a conditional discharge with probation as advanced by the defence, would adequately send a message of specific deterrence. There can be little doubt of that but would it fail to send a message of general deterrence and denunciation given the circumstances of this case and this offender.

[22] Before considering the cases offered by the Crown and the Defence in support of their respective positions, I will set out the provision in the *Code* that provides for a conditional and absolute discharge.

[23] Section 730(1) reads as follows:

> **730 (1) Conditional and absolute discharge -** 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).

[24] The preconditions for consideration of a conditional or absolute discharge are met in this case. The accused/offender is an individual not an organization.

[25] The offence, as previously stated, does not carry a minimum sentence nor is it punishable by imprisonment for fourteen (14) years or for life. Again and, as previously stated, sexual assault contrary to Section 271 carries with it a maximum sentence of ten (10) years imprisonment.

[26] If these preconditions exist, subsection 730(1) states that:

> "…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)."

[27] Counsel have referred to previously decided cases dealing with the phrase "not contrary to the public interest".

[28] Crown Counsel in her brief filed with the court on June 7, 2021, cited the case of *R. v. K.J.C.*, 2021 NSCA 5, where the Nova Scotia Court of Appeal considered the "not contrary to the public interest" criterion for a conditional sentence in a case that involved a low-level sexual assault. At paragraphs 84 to 87, the Court of Appeal wrote:

> [84] An offender does not have to establish that a discharge is in the public interest (*R. v. Sellars*, 2013 NSCA 129, at para. 27). An offender has to show that a discharge will not be "deleterious" to the public interest (*R. v. D'Eon*, 2011 NSSC 330, at para. 25). A discharge

> will be deleterious to the public interest if it fails to satisfy the objectives being pursued in sentencing.
>
> [85] In *Sellars*, this Court found that the factors to be considered in relation to the "public interest" component and the weight to be given to them "will vary depending on the circumstances of the offence and of the offender" (at para. 37). The Court referenced the Newfoundland Court of Appeal's comments in *R. v. Elsharawy*, [1997] N.J. No. 249, that the "public interest" component involves "a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law" (at para. 3).
>
> [86] In considering KJC's submissions on sentence, the trial judge explicitly addressed the "not contrary to the public interest" requirement for a conditional discharge. Her statements about the gravity of sexual assault indicate why she found the public interest would not be served by a discharge in KJC's case. She essentially found that a conditional discharge would not give sufficient effect to the sentencing principles of denunciation and general deterrence.
>
> [87] There is no basis for appellate intervention in KJC's sentence. The trial judge's reasons show she was persuaded by the seriousness of the offence and the public interest in respecting women's dignity and right to sexual integrity that a conditional discharge was inappropriate in this case. Her concerns and the emphasis she gave them in imposing a suspended sentence with probation are entitled to deference.

[29] Defence Counsel also cited the case of *R. v. Sellars*, 2013 NSCA 129, where at paragraph 27, the Court of Appeal stated that an offender does not have to establish that a discharge is in the public interest.

[30] The court has to be satisfied that a discharge is in the best interests of the accused and not contrary to the public interest. [Reference to s. 730(1)]

[31] The cases provided by both Crown and Defence demonstrate that, depending on the circumstances of the particular case, a discharge, either absolute or conditional, might or might not be appropriate. It all depends.

Aggravating & Mitigating Circumstances:

[32] I will next turn my attention to the aggravating and mitigating circumstances that exist in this case.

[33] Section 718.2 requires the court to take into consideration various principles including "any relevant aggravating or mitigating circumstances relating to the offence or the offender, …". A list of aggravating circumstances is provided at paragraphs (a)(i) to (vi) of this Section.

[34] The only aggravating circumstances that appears on this list and which exists in this case is (iii.1) which states:

> "Evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation."

[35] Although the victim chose not to file a Victim Impact Statement as permitted by Section 722 of the *Code*, the Court listened to and observed her as she testified at trial. There can be no doubt that the events that led to the charge against Mr. ElGebeily had a significant impact on the victim. I would not go so far as to suggest she had been traumatized by the assault but she certainly suffered both emotionally and financially by what happened to her.

[36] Her decision to leave a job that she enjoyed and, was apparently successful at, was her choice based on what she felt was a lack of support from her employer. It, however, cannot be totally divorced from the assault itself. There is a causal link connecting it to the assault itself. Regardless of this, the emotional stress it caused was apparent from her time on the witness stand. So I accept this is an aggravating circumstance that should be considered for purposes of sentencing.

[37] There are a number of mitigating circumstances that must, too, be considered.

[38] First and foremost is the fact that Mr. ElGebeily, in his Pre-Sentence Report, stated "that he takes responsibility" for his conduct and "that he is sorry for what happened". He further stated he would like to apologize to the victim and feels terrible for what he has done.

[39] Mr. ElGebeily, as is his right, spoke directly to the Court. He indicated that although he, initially, thought he was innocent he, nonetheless, accepts the verdict of the Court.

[40] He also expressed remorse for any harm done to the victim. He added that he never intended to harm her. He further added he is trying to get his life back together. He has not consumed alcohol since the events, that resulted in his conviction, took place.

[41] He concluded by indicating that whatever sentence the Court imposes will be respected.

[42] In addition to this, Mr. ElGebeily testified during the sentencing hearing about the significant financial impact his conviction has had. The franchise agreements which allowed him to operate a restaurant in Sydney and another in Truro were both terminated. This has resulted in the closure of the restaurants although the Sydney location remains with Mr. ElGebeily's company and he hopes to re-open it under a different banner.

[43] Until then, Mr. ElGebeily remains unemployed and without a source of income. He has to rely on the financial assistance and the support of his family as well as his new wife who works as a dental assistant. She and Mr. ElGebeily just recently got married and are expecting their first child. Mrs. ElGebeily is from Cape Breton and hence a Canadian citizen as will be their child when delivered – one hopes safely and in good health.

[44] Mr. ElGebeily is not a Canadian citizen – at least not yet. He has the status of "permanent resident" under out Country's immigration laws. There is a serious risk that his conviction will result in him being declared "inadmissible" on grounds

of serious criminality pursuant to Section 36, subsection (1) of the *Immigration and Refugee Protection Act*.

[45] This could possibly lead to a deportation hearing and ultimately his removal from Canada.

[46] The ramifications of that would have serious repercussions for not only Mr. ElGebeily but also for his wife and their unborn child.

[47] I will speak more about this later in my decision. Suffice to say, the fallout from Mr. ElGebeily's bad behaviour has caused him significant financial losses that he will have great difficulty recovering from with the added possibility that he might be physically separated from his wife and the child that she is carrying – a child that he is the father of.

[48] There are other mitigating circumstances present in this case.

[49] While serious – as all sexual assaults are – this one is on the low end of the spectrum. I do not mean to diminish the impact it had on the victim – I have already dealt with that.

[50] The assault involved touching – the touching was momentary and did not involve digital penetration of the victim's intimate areas. Nonetheless, it still amounted to an assault of a sexual nature which cannot be condoned.

[51] As previously stated, Mr. ElGebeily expressed remorse for his actions and stated that he never intended to cause harm to the victim.

[52] Throughout the course of the trial, Mr. ElGebeily demonstrated respect for the Court. He took matters seriously and remained composed and cooperative. He continues to show respect to the Court by indicating that he accepts the Court's verdict and is prepared to accept whatever sentence is imposed.

[53] The Pre-Sentence Report prepared by Correctional Services provides a very favourable assessment of Mr. ElGebeily. He comes from and has the full support of a close-knit family.

[54] Like his parents and his two siblings, Mr. ElGebeily is highly educated.

[55] He is described by his brother, a physician, his wife and a former co-worker as being quiet and respectful of others.

[56] The actions for which he has been convicted seem totally out-of-character and contrary to the way he was raised by two loving and devoted parents. Mr. ElGebeily

remains close with his parents and his brother and sister and often seeks their advice and wise counsel. He is, indeed, very fortunate to have such support.

[57] He also has the love and support of his wife who continues to express confidence in him and can also attest to his quiet nature and kind disposition.

[58] And, despite the business and financial set back he has endured, Mr. ElGebeily has not given up on his dream of developing a restaurant business in Canada should he be permitted to stay.

[59] Based on his education and the values instilled in him by his parents and with two other highly successful and hardworking siblings who he sees as role models, Mr. ElGebeily stands an excellent chance of succeeding.

[60] It should also be noted that Mr. ElGebeily does not have a criminal record. This appears to be the very first time he has been involved with the criminal justice system in Canada.

[61] I expect that we will not see Mr. ElGebeily brought before the courts ever again. His actions were no doubt fueled by alcohol consumption during the evening leading up to the assault. While drunkenness is not a defence to sexual assault, it does help to explain how one's inhibitions can be put by the wayside resulting in behaviour that is out-of-character.

[62] I commend Mr. ElGebeily for recognizing this and deciding to abstain from any further alcohol consumption since the event happened more than 4 years ago.

[63] I asked Counsel to provide further submissions regarding:

1. The applicability of mandatory SOIRA and DNA orders in the context of discharges;
2. The immigration consequences of a conviction; and,
3. How should any immigration consequences be considered in sentencing.

[64] I thank both Crown and Defence Counsel for their supplemental written submissions on these issues.

[65] Based on a plain reading of Section 487.051(1) of the *Criminal Code*, a DNA order is mandatory in cases involving primary designated offences (of which sexual assault is one) even if the Court orders a discharge.

[66] The same cannot be said for SOIRA orders under Section 490.012(1). Counsel referred to several cases that support this. One of the cases, *R. v. Bansil*, 2020 BCPC 34, was most instructive on this issue.

[67] I take it from the cases referred to by Counsel, that the Court has the discretion to either grant or refuse to grant a DNA order in cases where the final disposition is a discharge, either absolute or conditional.

[68] The same discretion, however, does not apply to a SOIRA order. If the offender receives a discharge, Section 490.012(1) does not apply. (Also see the case of *R. v. Henry*, 2019 ONSC 4978, at paragraph 40.)

[69] In regard to the immigration consequences of a conviction, the *Immigration and Refugee Protection Act* (*IRPA*) creates the distinct possibility that the offender's status as a permanent resident in Canada would be placed in significant jeopardy – if a conviction was entered.

[70] Section 36(1) raises the possibility that a permanent resident, such as Mr. ElGebeily, could be declared inadmissible on grounds of serious criminality if convicted of sexual assault. However, as Crown Counsel, pointed out in her supplemental brief, being characterized as inadmissible would not necessarily result in deportation from Canada.

[71] Section 44(1) and (2) of the IRPA are permissive and not directive. The case of *Tran v. Canada (Public Safety and Emergency Preparedness)*, [2017] 2 SCR 289 was cited in support of this.

[72] In advancing this case, Crown Counsel did, however, agree that a criminal conviction would put Mr. ElGebeily's immigration status in jeopardy.

[73] I would add that it would not only put him in jeopardy, it would also have a significant impact on his marriage and his ability to remain a presence in the life of the family that he and his wife have already begun.

[74] Potential immigration consequences are characterized as collateral consequences. The Supreme Court of Canada case of *R. v. Pham*, 2013 SCC 15 was referenced. The SCC indicated that while collateral consequences are neither aggravating nor mitigating, they may be considered when applying the principles of individualization and parity.

[75] At paragraph 19 of *Pham*, the Court adopted the position of Doherty, J.A. in *R. v. Hamilton*, 2004, 72 O.R. (3d) 1 (Ont. C.A.), where, at paragraph 156, the learned appeal court judge stated:

> … the risk of deportation cannot justify a sentence which is inconsistent with the fundamental purpose and the principles of sentencing identified in the Criminal Code. The sentencing process cannot be used to circumvent the provisions and policies of the Immigration and Refugee Act. As indicated above, however, there is seldom only one correct sentencing response. The risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender. …

[76] Given the nature and seriousness of the crime perpetrated by Mr. ElGebeily which I place at the lower end of the scale; and, after taking into consideration his prior unblemished criminal record; his solid upbringing and strong family supports; his strong educational background; his stated remorse for his wrong-doing; his otherwise exceptional character; and, the very real possibility that a conviction could lead to his eventual deportation from this Country resulting in a disruption to his marriage and imminent family, I feel a conditional discharge with 12 months probation including the conditions recommended by Crown Counsel in her original brief filed with the Court on June 7, 2021 (at page 6) (with one minor variation), is the appropriate disposition. The distance Mr. ElGebeily is ordered to stay away from the victim's place of residence, employment or education should be 50 metres and not 5. I believe this results in a fair and just sentence that is proportional and upholds the objectives and principles of sentencing including deterrence (both specific and general) and denunciation.

[77] In addition to this, the Court grants the Crown's request for a DNA order pursuant to Section 487.051(1) of the *Criminal Code*. The request for a SOIRA order is denied.

McDougall, J.