SUPREME COURT OF NOVA SCOTIA
Citation: *R v. N.J.A.*, 2023 NSSC 417

Date: 20230511
Docket: 513061
Registry: Bridgewater

Between:

His Majesty the King

v.

N.J.A.

Restriction on Publication: pursuant to s. 486.4 of the *Criminal Code*
A ban on publication of any information that could disclose the identity of the victim and/or complainant

Judge:	The Honourable Justice Diane Rowe
Heard:	May 11, 2023, in Bridgewater, Nova Scotia
Oral Decision:	May 11, 2023
Counsel:	Leigh-Ann Bryson, for the Crown Michael Power, for the Offender

Section 486.4 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 162.1, 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)** as soon as feasible, inform any witness under the age of 18 years and the victim of the right to make an application for the order;
- **(b)** on application made by the victim, the prosecutor or any such witness, make the order; and
- **(c)** if an order is made, as soon as feasible, inform the witnesses and the victim who are the subject of that order of its existence and of their right to apply to revoke or vary it.

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that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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;
- **(b)** on application of the victim or the prosecutor, make the order; and
- **(c)** if an order is made, as soon as feasible, inform the victim of the existence of the order and of their right to apply to revoke or vary it.

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.

Inquiry by court

(3.1) If the prosecutor makes an application for an order under paragraph (2)(b) or (2.2)(b), the presiding judge or justice shall

- **(a)** if the victim or witness is present, inquire of the victim or witness if they wish to be the subject of the order;
- **(b)** if the victim or witness is not present, inquire of the prosecutor if, before the application was made, they determined if the victim or witness wishes to be the subject of the order; and
- **(c)** in any event, advise the prosecutor of their duty under subsection (3.2).

Duty to inform

(3.2) If the prosecutor makes the application, they shall, as soon as feasible after the presiding judge or justice makes the order, inform the judge or justice that they have

- **(a)** informed the witnesses and the victim who are the subject of the order of its existence;
- **(b)** determined whether they wish to be the subject of the order; and
- **(c)** informed them of their right to apply to revoke or vary the order.

Limitation

(4) An order made under this section does not apply in either of the following circumstances:

- **(a)** the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or
- **(b)** the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

Limitation — victim or witness

(5) An order made under this section does not apply in respect of the disclosure of information by the victim or witness when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim or witness.

By the Court, orally:

[1] There is a publication ban in the proceeding pursuant to s. 486.4 of the *Criminal Code*. As was submitted by the Crown, and agreed upon by the Offender's counsel, this ban will continue in full force and effect, despite the dismissal of the other counts in the indictment. As the Supreme Court of Canada noted in *R v. Adams* SCC 1995 CanLii 56, the ban is intended to continue, even in an acquittal of an Accused, which is not the case in this matter. The Court does not have inherent jurisdiction to remove the ban, in accordance with this jurisprudence in order, to ensure certainty for victims of crime in coming forward with reporting a sexual offence. There is no application by the Offender or by the Complainant to have the ban removed. It shall continue.

[2] N.J.A has entered a guilty plea to Count 3 of in the Indictment. The other counts were dismissed by the Court on the first day of trial as the Crown, having reviewed the matter, determined that there was no realistic prospect for conviction and did not lead evidence on Counts 1, 2, and 4. The Crown confirmed that the Complainant had been informed about their decision to not proceed to trial on these counts.

[3] Mr. Power made a motion to dismiss those counts, and indicated that his client was prepared to plead guilty to the third count.

[4] N.J.A. then entered a guilty plea in regard to the charge that he had committed an assault on M.H., in contravention of s. 266 of the *Criminal Code*, on or about September 18, 2020 in the region of the Municipality of Lunenburg, Nova Scotia.

Facts

[5] The facts are brief, with Crown and Defence counsel confirming their agreement concerning them. They are:

1. N.J.A and M.H. are former common law spouses.
2. In September of 2020, N.J.A. and M.H. went away for the weekend for N.J.A.'s birthday.
3. An argument began in the car and continued on arrival at a cabin in the Municipality of Lunenburg.
4. N.J.A. "got in M.H.'s face" and she said, "What are you going to do? You going to hit me?"
5. N.J.A. then pushed M.H.

6. M.H. told him to “get the fuck out” and said she did not want him touching her because this is assault. N.J.A. said, “I don’t fucking care,” and got in her face again.

7. M.H. walked away and went to the bathroom to remove herself from the situation.

8. N.J.A. then left the cabin and walked down the road for about 30 minutes.

[6] The elements of the offence for assault are made out in the facts, as N.J.A applied force directly to M.H.’s person without her consent by pushing her. This was paired with an element of threat to apply further force to her when she said she did not want him touching her and had assaulted her, by responding with, “I don’t fucking care.”

Pre-Sentence Report

[7] The Court has received a Pre-Sentence Report (PSR) prepared by Probation Services and dated March 22, 2023. Counsel did not raise issues in regard to its contents.

[8] The PSR indicates that N.J.A. is employed, with a Grade 12 education. He is an active parent to his two young children with M.H., with his parenting facilitated by M.H.'s mother.

[9] N.J.A. indicated that he has engaged in counselling for anger management on his own initiative, and paid for personally. The Crown notes in regard to this that there is no verification, although the PSR addresses Probation Services' attempts to contact the Counsellor, which were not successful.

[10] N.J.A.'s former mother-in-law made a statement quite supportive of him, as she provides him with accommodation and assists him with parenting time contact with his children, shared with her daughter.

[11] N.J.A. is characterized as very family oriented, despite a challenging childhood with family breakup as an element.

[12] He has steady employment in a few areas. His current employer is aware and informed of the charges before the Court. The employer has remarked to Probation Services that N.J.A. is one of his best workers and has an intent to continue his employment.

[13] The PSR does not disclose that N.J.A. has any current issues with drugs or alcohol. Alcohol did play a part in a prior conviction for an offence of driving

while impaired with alcohol, with sentencing occurring in May of 2015. The penalty in that matter was a fine of $1000.00, with a one year driving prohibition on driving and suspension of license.

[14] The conclusion of Ms. Romkey-Howlett, for Probation Services, was positive, with indications N.J.A. has expressed remorse and accepted responsibility for his action. The PSR stated that N.J.A. was a suitable candidate for community supervision and would be able to conform with any other sanctions the Court may impose.

Victim Impact

[15] The Court also received and read the Victim Impact Statement of M.H., dated April 3, 2023.

[16] M.H. indicates that the offence impacted her emotionally and quite severely, and that it resulted in estrangement from her own family.

[17] She indicates she was bruised from the impact of being pushed to the floor, but chose not to seek medical attention. M.H. indicates she did not do so, in an attempt to calm the situation down for the cabin trip, which was intended to celebrate N.J.A.’s birthday.

[18] She states that she lacks confidence now to participate in the community, more broadly, as she fears negative judgement from others who may have formed views about her character and the volatile end of their intimate relationship. She continues to receive counselling.

Legal Principles

[19] The purpose of sentencing is set out in s. 718 of the *Criminal Code:*

> **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

[20] The objectives of sentencing are then set out in subsections (a) through to (f) of s. 718 of the *Code*. The stated objectives include denunciation, deterrence, separation of offenders from society where necessary, rehabilitation, and the promotion of a sense of responsibility in offenders and an acknowledgement by them of the harm they caused, with all ultimately designed to protect the public and to promote a peaceful society.

[21] The Court must also consider sentencing in accordance with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the Offender.

Submissions by Crown

[22] The Crown draws the Court's attention to s. 718.2(a)(ii) of the *Code*, which mandates that the Court must consider as an aggravating factor in sentencing that the Offender committed the offence against an intimate partner.

[23] The Crown also informs the Court that s. 109 of the *Code* requires a mandatory minimum of a 10 years prohibition of firearms and related items upon conviction of an offence where violence was used against an intimate partner.

[24] In regard to a DNA Order, the Crown is not requesting such an Order but notes that the Court has discretion to proceed with such an Order.

[25] In regard to sentence, the Crown submits that a suspended sentence of probation for a period of 12 months from the date of today's order is appropriate. The conditions for the proposed Probation Order were shared with N.J.A. I did not receive further submissions disputing the contents of those proposed terms of probation, save for a request for clarity concerning N.J.A.'s continued parenting

time as was set out in the Supreme Court (Family Division) Order, issued January 19, 2023.

[26] The Crown submits that the conditional discharge of N.J.A. would not prove to be in his best interests, as there is no evidence before the Court of a negative impact of an additional entry upon his criminal record concerning his employment or education prospects. Further, the Crown submitted that the public interest in regard to societal interests concerning deterrence of intimate partner violence would also weigh against a conditional discharge in these circumstances.

Submissions by Defence

[27] N.J.A. submitted that the Court consider the individual offender, in the circumstances of the offence. It was highlighted that the trauma of the breakup of his family was difficult, particularly in light of his earlier childhood experiences.

[28] N.J.A. submits that he has a concern that a suspended sentence appearing on a criminal record may limit his future employment opportunities or future voluntary opportunities with his children, as they become older.

[29] He highlights his ongoing positive relationship with his mother-in-law, and commitment to his children, despite the difficult interpersonal relationship with their mother.

[30] It was submitted that the Court consider *R v. Fallofield* (1973) 13 CCC (2d) 450 (BCCA) in determining whether this matter is one that would be appropriate for an order of conditional discharge, after a period of probation of 12 months.

[31] N.J.A. submits that he has a very limited criminal record on an unrelated charge and is unlikely to reoffend. The interpretation of the application of the first part of *Fallofield, supra,* in this matter, in which the Court is to consider the "best interests of the offender" would at this stage, he submits, indicate a suspended sentence is not appropriate as the impact may be disproportionate to the offence, as the offence was pushing M.H. on one occasion, with potential negative impacts on N.J.A., including potential negative impacts on employment and voluntary opportunities with his children. Further, in regard to the second test in *Fallofield, supra*, it was submitted that it would not be contrary to the "public interest" to order a conditional discharge in the circumstances.

Analysis

[32] The most significant aggravating factor in this matter is that N.J.A. assaulted an intimate partner, with this assault having a significant emotional effect on the victim. He continues to have a co-parenting relationship with the victim and her statement indicates she feels that there is a continuing negative social and familial impact as a result of the offence. The children involved in the familial relationship are quite young, and this co-parenting relationship will continue for years to come.

[33] In regards to mitigation, the Court noted that N.J.A. does have a criminal record, but for an unrelated offence, that is dated by approximately five years. In regard to the first portion of the test in *Fallofield, supra,* I have certainly considered whether this additional charge would have a negative impact, and would or would not be in the best interest of the Offender.

[34] N.J.A. has mitigated by entering a guilty plea, and making expressions of remorse as noted in the PSR. There are indications that he is seeking counselling to improve his relationship and communication skills with a rehabilitative effect certainly demonstrates awareness of the circumstances surrounding the offence.

[35] The Crown submitted cases in which *Fallofield, supra,* was applied in Nova Scotia, specifically *R v. Nomm* 2009 NSSC 367, *R v. Agra* 2018 NSPC 34 , and *R*

v. Bowser 2019 NSSC 154. The Defence relied fully on *Fallofield, supra,* but did not draw the Court's attention to other cases that were analogous.

[36] The Crown submitted that the decision of Chipman, J. in *R v. Bowser, supra,* and its citation with approval of *R v. Leonard* 2018 NLSC, was most applicable on the casts of this matter. In *R v. Bowser, supra,* the defendant was convicted of assault in an intimate partner relationship, with a suspended sentence and 12 months probation, with the Court taking into account the full circumstances of the assault.

[37] As was held by the Court in *R v. Leonard, supra,* at para 27:

> [27] The same does not hold true with respect to the offence of common assault, however. The principle reason mitigating against granting a conditional discharge in these circumstances is that the assault was committed against Mr. Leonard's domestic partner. Although the assault was relatively minor in nature, it must have been terrifying for the victim. At the trial she testified that she felt safe returning to her home that morning because the offender had never before been physically violent. It is the breach of the sanctity of physical safety in one's home that is behind section 718.2(a)(ii) of the *Criminal Code*. Domestic violence is a serious societal problem and is rightly viewed with disapprobation. I certainly have sympathy for the offender and the circumstance in which he finds himself. Nevertheless, the public interest in eliminating or reducing domestic violence through the principles of denunciation and deterrence would not be well served by a conditional discharge in this case.

[38] The circumstances in this matter that is before the Court today with N.J.A. extend beyond that of a single incident in which the force was applied by one person was simply a push of another, done in the heat of a singular argument.

[39] The forceful push was made in the context of an argument between two people who were then common law spouses, struggling with one another within their lengthy intimate relationship. There was an implication of further threat in that moment, made in anger.

[40] The continuation of that intimate relationship, and the quality of it, will also have a direct impact on their two very young children. While the Offender and the victim are now longer intimate partners, they will continue their relationship as co-parents. That was not the case in *R v. Bowser, supra,* in which the relationship was of short duration, without dependents and without extended familial relationships that are continuing. In that matter, Chipman, J. felt it was appropriate to order a suspended sentence with a period of probation of 12 months.

[41] Parliament, in enacting these provisions in the *Criminal Code* concerning intimate partner violence, directs the sentencing judge to consider the broader context as it is an aggravating factor, and a quite serious one, with broad deterrence of intimate partner violence as a societal goal.

[42] There was no evidence presented to the Court to support the speculation concerning the negative impact of the sentence on N.J.A.'s possible future employment or volunteering opportunities with his children. The Court does note

that the Supreme Court's Family Division Order is recently concluded, with N.J.A. continuing to meet his parenting responsibilities as facilitated by his mother-in-law, who is the parent of the victim.

Sentence

[43] The Court will impose a suspended sentence, for a period of 12 months from the date of this Order. The terms and conditions include that N.J.A. shall report to Probation Services today. The Court is declining to order a DNA Order.

[44] There is a mandatory imposition pursuant to s. 109 of the Code, prohibiting him from owning or possessing any weapons and other items as set out in the *Criminal Code*. He is to attend counselling directed at violence intervention and prevention targeted for spousal and partner relationships.

[45] He will have no contact with the victim, save as may be provided by Court Order or separation agreement of the Family Court.

[46] That concludes the decision on sentence in this matter.

[47] N.J.A., please stand.

[48] You have plead guilty to one count of assault contrary to s. 266 of the *Criminal Code.*

[49] I have considered the submission of both the Crown and the defence in this matter and impose the following sentence, for the reasons that I have just canvassed, as follows:

[50] A suspended sentence, for a period of 12 months from the date of this Order subject to terms of a Probation Order.

[51] The Order will provide that you are:

1. To report to a probation officer today on or before 4:00 p.m.;
2. You are not to own, possess, or carry any weapon, firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, or explosive substance as those items are defined in the *Criminal Code*;
3. To attend, participate in, and complete any and all counselling, assessment, treatment, or program as directed by your Probation Officer, including but not limited to: violence intervention and prevention program that is spousal and partner related;
4. Have no direct or indirect contact or communication with M.H., except in accordance with the written separation agreement or court order for access to a child or children;

5. To not be within 20 metres of the premises to be known as the residence or place of employment of M.H.

Diane Rowe, J.