

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. S.F.M.*, 2024 NSCA 2

**Date:** 20240102

**Docket:** CAC 513675

**Registry:** Halifax

**Between:**

S.F.M.

Appellant

v.

His Majesty the King

Respondent

**Restriction on Publication: ss. 486.4 and 486.5  
of the *Criminal Code***

**Judge:** Bourgeois, J.A.

**Motion Heard:** December 7, 2023, in Halifax, Nova Scotia in Chambers

**Held:** Motion for state-funded counsel granted

**Counsel:** S.F.M., appellant, on his own behalf  
Glenn Anderson, K.C., for the Attorney General of Nova  
Scotia  
Glenn Hubbard, for the respondent, on watching brief

## **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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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.

## **Decision:**

[1] The appellant, S.F.M., has filed a motion requesting the appointment of state-funded counsel pursuant to s. 684(1) of the *Criminal Code*. The Attorney General of Nova Scotia (the “AG”) opposes the motion.

[2] The motion was heard on December 7, 2023, and my decision reserved. For the reasons to follow, I grant the motion and order the appellant be provided with legal counsel for his appeal.

## **Background**

[3] In April, 2019, the appellant was charged with three counts of sexual assault contrary of s. 271 of the *Criminal Code*, a charge of assault contrary to s. 266 of the *Criminal Code*, and a charge of uttering a threat contrary to s. 264.1(1)(a) of the *Criminal Code*. The complainant in all five matters was the appellant’s estranged wife.

[4] Pre-trial applications and the trial proper were spread over 16 days, commencing on February 28, 2020 and concluding on July 6, 2021, when the appellant was convicted of assault and two counts of sexual assault.

[5] On March 2, 2022, the appellant was sentenced to a term of 3 years and 3 months in relation to the first sexual assault conviction, a concurrent term of 18 months in relation to the second sexual assault conviction, a further concurrent term of 30 days in relation to the assault conviction and ancillary orders.

[6] The appellant’s legal counsel (not trial counsel) filed a Notice of Appeal on March 24, 2022 in which he challenged the convictions. The Crown filed a Notice of Cross-Appeal on April 7, 2022 in which it challenged the sentence imposed by the trial judge, and sought an increased term of incarceration.

[7] The advancement of the appeal has been significantly delayed which, in turn, has delayed the cross-appeal. In considering the motion for the appointment of counsel, the delay in having the appeal resolved is relevant. As such, I note the following:

- A Motion for Date and Directions was held on April 28, 2022. At that time, the appellant’s legal counsel advised the Appeal Book would be

filed by June 24, 2022. Based on this representation, the appeal hearing was scheduled for October 12, 2022. A Motion for Bail Pending Appeal was heard on the same day, and dismissed;

- The appellant's counsel did not file the Appeal Book as directed on June 24, 2022. Nor did he contact the Court to request an extension of the deadline. As a result, Court staff emailed the appellant's counsel on June 27, 2022 to inquire as to the whereabouts of the Appeal Book;

- The appellant's counsel emailed the following day and advised:

I intend to ask for an extension. Unfortunately the trial transcripts that were provided to me were incomplete and I'm trying to get an estimate on when they can be available. I will send formal correspondence shortly.

- The appellant's counsel did not send formal correspondence as promised;

- On July 26, 2022, the Registrar followed up with the appellant's counsel via email. She wrote:

I still have no word from you with respect to the appeal book, which is now over a month late. As you are surely aware, the appellant's factum is due July 29.

I am writing to provide you notice that, if you do not make a motion for an extension of filing deadlines and you miss your factum filing due date, **I will be making a motion to dismiss your appeal for failure to perfect in accordance with Rule 90.43(3).**

(Emphasis in original)

- On the same day the appellant's counsel replied:

I do apologize for the delay. There have been a few issues on our end getting the materials in place. I will be making a motion to extend filing deadlines and seeking an adjournment of the scheduled appeal date.

Again, my sincerest apologies – this will not happen again.

- The Registrar again reached out to appellant's counsel on August 3, 2022. She wrote:

The Court has not received your promised motion for extension/adjournment. **Please advise when this will be filed.**

You have now missed the filing of your appeal book and the appellant's factum, which makes your appeal ripe for a motion to dismiss by the Registrar or the Respondent.

(Emphasis added)

- Three weeks later, on August 24, 2022, the appellant's counsel filed a Motion seeking to adjourn the hearing date and assign new filing dates. The motion was heard on August 31<sup>st</sup>. The hearing date was re-scheduled until January 23, 2023. The new filing date for the Appeal Book was set as September 29, 2023;
- The appellant's counsel did not file the Appeal Book as directed. Rather, on September 29, 2023, the appellant's counsel wrote to the Registrar requesting, with the consent of the Crown, a new filing date of October 27, 2023. The request was granted;
- On October 27, 2022, the appellant's counsel wrote to the Registrar regarding the status of the Appeal Book:

I can file the electronic version of my Appeal Book on time today, but I may need an extension for the hard copies. I've got one copy completely printed out, but am now getting error messages trying to print subsequent copies. Given that it's about 1700 pages, it may be that my printer is overheating. Would it be acceptable to file the electronic copy first and then the hard copies either Friday or early next week if I have to go to a print shop to have the rest of the copies completed? Please let me know your thoughts and I will proceed accordingly;

- The same day the Registrar, with consent of the Crown, replied that appellant's counsel could "file the hard copy(ies) of the appeal book by November 2, 2022";
- The appellant's counsel did not file a hard copy of the Appeal Book on November 2, 2022. Nor did he contact the Court to request a further extension;
- On November 15, 2022, the Court Clerk wrote to appellant's counsel inquiring as to the whereabouts of the Appeal Book. Appellant's counsel did not reply;
- On November 17, 2022, the Court Clerk wrote to appellant's counsel in follow up to her November 15<sup>th</sup> correspondence requesting filing of the Appeal Book, as well as electronic copies of the appellant's factum. There was no reply;
- On November 22, 2022, the Registrar emailed the appellant's counsel asking: "Can you please reply to the emails the court has been sending you in relation to your filings?";
- On November 24, 2022, the appellant's counsel emailed the Registrar, attaching the electronic copy of the factum. No mention was made of the Appeal Book, which had been directed to be filed on November 2<sup>nd</sup>;
- On December 1, 2022, the Court forwarded the following correspondence to the appellant's counsel (copied to the Crown):

I write on behalf of Justice Beveridge. He directs you appear in Chambers on Thursday, December 8, 2022 at 10:00 a.m. to explain your delay in filing a hard copy of the Appeal Book and your lack of communication with Court officials;
- The hard copies of the Appeal Book were filed by the appellant's counsel on December 8, 2022;

- On January 6, 2023, the appellant's counsel filed a Motion to Withdraw as Counsel, indicating that the appellant no longer wished to continue his representation. The motion was heard on January 12, 2023 at which time the appellant confirmed he had lost faith in counsel. The motion was granted. The appeal hearing, scheduled for January 23, 2023 was adjourned to permit the appellant to seek new representation;
- The appellant made application to Nova Scotia Legal Aid. After several months reviewing the application, it was determined that counsel would be provided for the Crown's cross-appeal, but not for the appellant's conviction appeal. The appellant unsuccessfully appealed Nova Scotia Legal Aid's decision in September, 2023;
- The appellant subsequently filed the present motion for state-funded counsel.

## Legal Principles

[8] Section 684(1) of the *Criminal Code* provides:

### **Legal assistance for appellant**

**684(1)** A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

[9] The approach to be taken when considering a motion under s. 684(1) is well established. There are two inquiries:

1. whether an appellant has sufficient means to obtain legal assistance;  
and
2. whether it is desirable in the interest of justice that the appellant have legal assistance with the appeal.

[10] The interest of justice inquiry engages a number of considerations, including:

- i) the merits of the appeal;
- ii) the complexity of the appeal;
- iii) the appellant's capability;
- iv) the Court's role to assist; and
- v) the responsibility of the Crown to ensure that the applicant is treated fairly.

[11] I will now apply the above principles to the matter before me.

### **Analysis**

[12] The AG concedes the appellant presently lacks the financial means to obtain private counsel. I agree. Both parties focused on the second inquiry, whether it was desirable in the interest of justice for the appellant to have legal assistance with his appeal.

[13] The AG says the appellant does not require the assistance of legal counsel to advance his appeal. In these circumstances, the appellant has the benefit of the factum filed by his former counsel and the arguments contained therein. Further, the appellant is intelligent, articulate and capable of expressing himself clearly, including identifying legal issues he wishes to advance. The appeal will not be unduly complex for the appellant to undertake on his own. The AG does however, indicate that should the motion be granted, it intends to engage the same counsel who is representing the appellant on the cross-appeal.

[14] The appellant agrees he presents well, is articulate and intelligent, but says he does not have the capabilities to knowledgably argue the issues arising on the appeal. Further, he says that he had no input into the grounds of appeal advanced by his former counsel, and has no faith in the legal arguments advanced by him in the factum. He does not want to rely on the adequacy of the arguments advanced by his former counsel. The appellant says there are additional grounds of appeal

that he wanted to have included in the Notice of Appeal, but they were not included by his former counsel. He says he wants to advance them, but he lacks the knowledge to do so. He says his lawyer for the cross-appeal has agreed to represent him should the motion be successful.

[15] I asked the appellant to describe the nature of the issues he wished to bring forward. He explained that it would include his concerns about the ineffectiveness of his trial counsel; his inability to participate meaningfully in the trial and provide timely instruction to his counsel due to the COVID protocols in place at the time; and the trial judge's improper use of the tenets of his faith in finding him more likely to have committed sexual assault upon his wife.

[16] Given the history outlined above, it is reasonable for the appellant to have concerns regarding the adequacy of his former counsel's representation in advancing his appeal. Further, although I have not delved into the merits of the additional grounds the appellant wants to raise, his explanation of the issues satisfy me that not only are the grounds in the Notice of Appeal arguable, but some of the others may be as well.

[17] With respect to the complexity of the appeal, I note that in order to advance new grounds, the appellant will be required to file a motion to amend the Notice of Appeal, which may or may not be contested. Given the appellant is incarcerated, preparing and advancing such a motion adds an additional level of complexity.

[18] Of greatest significance however, is the delay that has already plagued the advancement of this appeal and cross-appeal. Having reviewed the advancement of the appeal earlier, I am satisfied that the appellant was not the source of the delay, and should not be faulted for it. It is important that the conviction appeal and cross-appeal now be dealt with in a timely fashion. I am concerned that should the appellant be required to move forward on his own with the motion to amend and the preparation of additional written arguments, further delay will be inevitable. The interests of timely justice will be better served by the appellant being assisted by legal counsel.

[19] Although the appellant is certainly a person of obvious intellect, given the nature of the issues to be advanced, I am satisfied that he should have the benefit of legal counsel to assist in the timely advancement of his appeal.

## **Conclusion**

[20] For the reasons above, I grant the motion. The AG shall provide the appellant with legal representation in relation to his appeal. I would ask the Crown to bring the matter back before the Court in chambers for a report on the appointment of counsel, and the scheduling of the motion for amendment.

Bourgeois, J.A.