Date: 2001 03 22
Docket: S-1-CR-2001000024

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF AN INDICTMENT dated February 12, 2001 alleging that on or about the 27th day of December, 2000, at or near the City of Yellowknife in the N.W.T., EDWARD AUGER did wound Doris Kendi thereby committing an aggravated assault contrary to section 268 of the *Criminal Code;*

AND IN THE MATTER OF AN APPLICATION pursuant to section 774 of the *Criminal Code* for an Order in lieu of *certiorari* quashing the committal of EDWARD AUGER to stand trial made by His Honour Judge R.M. Bourassa at a preliminary inquiry on February 1, 2000;

BETWEEN:

EDWARD AUGER

Petitioner

- and -

HER MAJESTY THE QUEEN

Respondent

Application for an order in lieu of *certiorari* to quash the Applicant's committal for trial on a charge of aggravated assault.

Heard at Yellowknife, NT on March 15, 2001

Reasons filed: March 22, 2001

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Petitioner (Applicant): Scott Duke
Counsel for the Respondent: Sadie Bond

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REASONS FOR JUDGMENT

[1] This is an application for an order in lieu of certiorari to quash the Applicant's committal for trial on a charge of aggravated assault. For the reasons that follow, I have come to the conclusion that if there was any error made by the Territorial Court Judge at the preliminary inquiry, it was an error made within his jurisdiction and not one that is subject to review on certiorari.

[2] The Crown began its case at the preliminary inquiry by entering, by agreement with the Applicant's counsel, a hospital discharge summary and a number of

photographs of the Applicant's common-law wife (the "complainant") and the inside of their home. This evidence demonstrated that the complainant had sustained injuries to the head and face, particularly a serious laceration to the lower lip, and that there appeared to be considerable amounts of blood in various places throughout the home.

[3] The complainant was the Crown's first witness. She testified that she had caused the injuries to herself, that she did not know how, that she was high on dope and drunk on the night in question, and that she "guessed" that she stumbled down the stairs and then into the bedroom and hit her lip.

[4] Crown counsel then told the preliminary inquiry Judge that it was the Crown's position that the evidence being presented to him was "incorrect" and that the Crown wished to enter into a voir dire for a ruling on prior statements made by the complainant to other people that would normally be inadmissible as hearsay. Crown counsel stated that she would seek the admission of those statements as proof of the truth of their contents either under the res gestae exception to the hearsay rule or the principled approach to the admission of hearsay evidence.

[5] There followed discussion between the Judge and Crown counsel about the proper procedure to be followed. Crown counsel said that she did not have a written statement on which to cross-examine the complainant under s. 9(2) of the *Canada Evidence Act* and that she did not intend to go so far as to ask that the complainant be declared hostile or adverse. The preliminary inquiry Judge expressed concern that in those circumstances, there was no basis upon which to enter into a voir dire at that point, that is, during the complainant's direct examination. Crown counsel wanted to ask the complainant about her contact with the police and stated to the Judge that "her attitude towards that might assist you in determining whether or not the res gestae statements are necessary". At that point, the Judge allowed her to enter into a voir dire to determine the admissibility of the prior statements.

[6] On the voir dire, the complainant was asked whether she had spoken to any police officers at the hospital. She answered that she had refused to give a statement to the police because, "... I would give a false statement if I said [the Applicant] is the one that marked me up, but he didn't".

[7] On cross-examination, the complainant was asked about the night in question and reiterated that she had had quite a bit to drink and had fallen down the stairs. She agreed with defence counsel's suggestion that the Applicant never hit her that day.

[8] The Crown then called a police officer who had gone to the scene on the night in question. He testified about the complainant's condition and her level of intoxication. He testified that he overheard the complainant tell the ambulance attendant who came to the scene that she had been hit "with his fists". He also testified that later that night he spoke to the complainant at the hospital and she told him, amongst other things, that she did not want to charge the Applicant because they were going to get married, that she and the Applicant had been drinking and he had become irate and started striking her and dragged her down the stairs. She would not provide the officer with a formal statement.

[9] The Crown then called the ambulance attendant who also gave evidence about the complainant's condition and about the statements she made to him about having been beaten by fist about an hour prior to his arrival at the scene. He said she also told him, "He hit me, I don't know why".

[10] The final Crown witness was a police officer who attempted to obtain a statement from the complainant at the hospital the day after the incident. She testified that the complainant told her that she had been thinking a lot about what had happened, but that she had been drinking and did not remember anything and would not provide a formal statement.

[11] The preliminary inquiry Judge admitted the statements made by the complainant about being hit by fist and about the Applicant striking her. In his ruling, he referred to both of the grounds put forward by the Crown for admissibility: res gestae and the principled approach based on necessity and reliability as enunciated by the Supreme Court of Canada in *R. v. Starr*, 2000 SCC 40. He reviewed the evidence about the complainant's intoxication, concluding that there was no question that she was intoxicated but that the degree of her intoxication was not clear. He concluded that the statements made to the ambulance attendant were admissible under the res gestae rule because they occurred very quickly after the event.

[12] He then dealt with the requirements of necessity and reliability under *Starr*. On the question of necessity, the Judge observed that a number of women are beaten and

then come to court and recant for various reasons. He referred to the police officer's testimony that the complainant told him that she did not want the Applicant charged. He then concluded that the ground of necessity was met because it was necessary for the Court to find the truth as to what transpired.

[13] He then went on to address the reliability factor. He referred again to the evidence of the complainant's intoxication. He ruled out, on the facts, any likelihood of concoction of the statements made at the scene and, referring to the testimony of the final police witness about her conversation with the complainant the day after the incident, concluded that "thinking a lot" is what leads to concoction. He ruled that the statements made at the scene and the narrative given to the first police officer at the hospital were reliable and therefore admissible.

[14] No further evidence was presented at the preliminary inquiry. The Applicant's counsel argued against committal for trial on the basis that the prior statements were not reliable, despite having been ruled so for purposes of their admissibility. The Judge ruled that a properly instructed jury would have to decide whether to believe the complainant's testimony or her earlier statements and that there was sufficient evidence for a committal.

[15] On this certiorari application, counsel for the Applicant took the position that the preliminary inquiry Judge erred in admitting the complainant's prior statements and, since they were the only evidence of an assault by the Applicant, as a consequence he had no jurisdiction to commit for trial.

[16] Crown counsel took the position that if the preliminary inquiry Judge erred at all, the error was simply one of admissibility of evidence or the procedure used on the voir dire and was therefore within his jurisdiction and certiorari does not lie to quash the committal. Alternatively, she argued that the Judge made no errors.

[17] Counsel referred to a number of cases which deal with the availability of certiorari for review of proceedings at a preliminary inquiry. Those cases make it clear that certiorari will only lie to quash a committal where the preliminary inquiry judge lacks jurisdiction. This usually arises in situations where the judge loses jurisdiction rather than lacks it altogether. A preliminary inquiry judge will lose jurisdiction if he or she fails to observe a mandatory provision of the *Criminal Code* or acts in such a way as to deny natural justice: *Forsythe v. The Queen*, [1980] 2 S.C.R. 268. A judge also

commits jurisdictional error in committing an accused at a preliminary inquiry in the absence of any evidence on an essential element in a charge because "no evidence" on an essential element of the charge against the accused cannot amount to "sufficient evidence" under what is now s. 548 of the *Criminal Code*, which requires that the judge order the accused to stand trial if, in his opinion, there is sufficient evidence to put him on trial: *R. v. Skogman*, [1984] 2 S.C.R. 93.

[18] A wrong decision concerning the admissibility of evidence does not affect jurisdiction: *The Attorney General of the Province of Quebec v. Cohen*, [1979] 2 S.C.R. 305; *Forsythe v. The Queen*, *supra; R. v. Norgren* (1975), 27 C.C.C. (2d) 488 (B.C.C.A.).

[19] The Applicant argued, however, that where the preliminary inquiry Judge errs in the admission of evidence which is the only evidence against the accused, the resulting committal for trial may be reviewed and quashed because of the error. He relied in part on the majority decision in *R. v. Wilson* (1995), 38 C.R. (4th) 209, where the Nova Scotia Court of Appeal held that a committal for trial should be quashed where the judge at the preliminary inquiry allowed a child to testify without having been sworn and without promising to tell the truth as required by s. 16(3) of the *Canada Evidence Act*. In the majority decision, Freeman J. A. reasoned that s. 540 of the *Criminal Code* requires the preliminary inquiry judge to take the evidence under oath and that the exceptions to that rule are found in the *Canada Evidence Act*, for example, section 16(3) which provides that if a child who does not understand the nature of an oath or affirmation is able to communicate the evidence, he or she "may testify on promising to tell the truth". The child's promise to tell the truth was a statutory requirement standing in place of an oath. Without the promise, Freeman J.A. held, the evidence is not before the court.

[20] I understand *Wilson* to be a case where failure to comply with a statutory requirement resulted in the preliminary inquiry judge's loss of jurisdiction. Because the child's evidence was the only evidence inculpating the accused, the committal could not stand. The case did not involve the admissibility of evidence, but rather the qualification of the witness to give any evidence at all.

[21] In *R. v. Norgren*, *supra*, it was alleged that the preliminary inquiry judge erred in the test he used for admissibility of a confession which was the sole evidence against the accused. The Court held that even if he erred in admitting the confession

into evidence, "such an error was at most an error in the exercise of the jurisdiction properly possessed by [the judge], and it does not go to or affect his jurisdiction. By making such an error he did not lose his jurisdiction or exceed it - and *certiorari* will not lie to review his decision."

[22] Counsel for the Applicant also referred to *R. v. Skogman* on this issue, arguing that if the result of an error as to admissibility of evidence is that there is "no evidence", then the preliminary inquiry judge loses jurisdiction if he or she commits for trial on that evidence. The extract from Ewaschuk's *Criminal Pleadings and Practice in Canada* (2d) quoted in *Wilson* might be read as suggesting that, as might remarks made by the Alberta Court of Appeal in *R. v. Waite*, [1991] A.J. No. 168. In the latter case, the Court said that the committing judge is bound by the rules of evidence, including those about admissibility, and further that "... it is possible that evidence sufficient for committal might be before the judge quite apart from evidence the admissibility of which is in dispute. In such a case, an error about the admissibility of that evidence is not a jurisdictional error".

[23] The Court in *Waite* referred to *Re Stillo and The Queen* (1981), 60 C.C.C. (2d) 243 (Ont. C.A.). In *Stillo*, the committal for trial was quashed because the unsworn evidence of the child complainant was not corroborated as required by the *Criminal Code*. Since the relevant *Code* provision required corroboration for a conviction, there was no "evidence upon which a reasonable jury properly instructed could return a verdict of guilty", the accepted test for committal for trial as set out in *The United States of America v. Sheppard*, [1977] 2 S.C.R. 1067. In *Waite*, the Court referred to no case which sets out the proposition that any error as to the admissibility of evidence becomes jurisdictional error where that is the only evidence which can support a committal and I respectfully decline to read *Waite* as pronouncing on that issue.

[24] In my view, jurisdictional error only results where the error in admitting or acting on evidence arises from failure to comply with a mandatory statutory provision, as was the case in *Stillo* and *Wilson*, and there is no other evidence to support the committal. If, as in the two cases I have just referred to, the only evidence before the preliminary inquiry judge capable of supporting a conviction is admitted or acted on despite a

statutory bar, then there is "no evidence" before the judge and the judge does not have jurisdiction to order the committal.

[25] Where, however, the error is instead one in the application of legal principles or rules of evidence, and there is no failure to comply with a statutory provision, the preliminary inquiry judge acts within his or her jurisdiction and the error does not result in loss of that jurisdiction, even if the evidence in question is the only evidence in the case, as it was in *Norgren*.

[26] In my view, the above approach is consistent with what was stated by the Supreme Court of Canada in *Dubois v. The Queen* (1986), 25 C.C.C. (3d) 221 (at p. 229):

> In summary, it is clear enough that no jurisdictional error is committed where the justice incorrectly rules on the admissibility of evidence or incorrectly decides that a particular question or line of questioning cannot be pursued at the preliminary inquiry. This is, of course, subject to the important condition that rulings in the course of a preliminary hearing on evidentiary questions as to the extent of limitation on the basic right to cross-examine or to call witnesses, may develop into a violation of natural justice and fall within the condemnation of *Forsythe, supra*, and hence be subject to judicial review ... . Jurisdictional error is committed where "mandatory provisions" of the *Criminal Code* are not followed, and in the context of s. 475 [now s. 548], this means at least that there must be some basis in the evidence, proffered for the justice's decision to commit. There is no jurisdiction to act "arbitrarily". However, where there is some evidence, it is clearly within the justice's jurisdiction to come to a decision as to whether that evidence is of sufficient weight to commit.

[27] To hold that an error in the admissibility of evidence does become jurisdictional error where the evidence in question is the only evidence against the accused would, I think, be tantamount to expanding supervisory remedies in a way that was disapproved of in *Dubois* (at p. 227):

> However, the reason underlying the court's restriction of supervisory remedies is equally valid in both cases [of committal and discharge]. It has been said numerous times that the objective of holding a preliminary inquiry is merely to determine whether there is enough evidence against the accused to justify ordering him to stand trial. It is not intended to determine, finally or otherwise, the accused's guilt or innocence. Therefore, it is inappropriate to allow the expansion of supervisory remedies designed to correct errors of law made in the course of preliminary inquiries which relate, for example, to the

> admission of evidence, the questioning of witnesses, or the production of documents. A preliminary hearing "is not a trial and should not be allowed to become a trial" ... . The questioning of errors of law is therefore as inappropriate in proceedings to quash a discharge as it is in proceedings to quash a committal. Errors which go to the preliminary hearing judges's jurisdiction are, however, different. Superior courts, from the earliest days in our law, have exercised their inherent authority to enforce compliance with the law by lower tribunals which must exercise fully without exceeding their statutory jurisdiction. Such is the position of a preliminary hearing tribunal.

[28] Accordingly, I conclude that even if the preliminary inquiry Judge did err in admitting the complainant's prior statements for substantive use, it was an error within the exercise of his jurisdiction and not one that caused him to lose jurisdiction. I need not, therefore, decide whether he did in fact err.

[29] The Applicant also argued that the procedure used to put the prior statements before the preliminary inquiry Judge was incorrect. He argued that there was no basis established for the need to adduce evidence of those statements. He says something more than what happened here was required, for example, that the complainant should have been recalled after the voir dire. In other words, there must be something more than the Crown simply putting the complainant on the witness stand and eliciting one version of events from her and then putting other witnesses on to say that at other times she gave other versions, and then asking the court to pick the one the Crown prefers.

[30] I do not wish to comment extensively on what procedure should be used in a case such as this, or whether there is only one correct procedure, as that will be for the trial judge to determine. However, I will say that I think the preliminary inquiry Judge was probably correct when he suggested to Crown counsel that she should apply to have the complainant declared adverse. That procedure may be available at common law and there is also the procedure under s. 9(1) of the *Canada Evidence Act*, as was used by the Crown for prior inconsistent verbal statements of its own witness in *R. v. Cassibo* (1982), 70 C.C.C. (2d) 498 (Ont. C.A.). I would think that at some point during cross-examination on the verbal statements, Crown counsel would seek to have them admitted as substantive evidence and the voir dire would then proceed to deal with the issues of necessity and reliability, much as a s. 9(2) application may evolve into an application for a "K.G.B." statement to be admitted as substantive evidence. Indeed, in *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740, the Supreme

Court of Canada does not restrict the procedure described only to statements which fall under s. 9(2).

[31] In any event, any defect in the procedure used in this case did not go to the jurisdiction of the preliminary inquiry Judge as this is not a case of non-compliance with a mandatory statutory provision governing his powers. At most, it was a defect in a procedure over which he had discretion: *Cohen, supra*, and *Forsythe, supra*. Further, it seems to me that it was open to him to infer from the evidence he heard on the voir dire that the complainant was recanting her earlier statements to the police and ambulance attendant, even though the complainant was not actually confronted with those statements. However, since a witness' explanation for any change in his or her story will normally be relevant to reliability [*R. v. U. (F.J.)* (1995), 101 C.C.C. (3d) 97 (S.C.C.)], a judge having to rule on the admissibility of prior statements, or a trier of fact having to decide whether to accept them as the truth, should not be left to make inferences without any attempt being made to elicit that explanation.

[32] Since I have concluded that even if the preliminary inquiry Judge did err, either in ruling the complainant's prior statements admissible, or in allowing the statements to be introduced in the manner they were in this case, he did not err in a manner which caused him to lose jurisdiction, this means that certiorari is not available. Having admitted the prior statements for the truth of their contents, there was then some evidence before him upon which, acting judicially, he could form the opinion that the evidence was sufficient to commit for trial.

[33] Accordingly, the application for an order quashing the committal is dismissed.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT,
this 22nd day of March 2001

Counsel for the Petitioner (Applicant): Scott Duke
Counsel for the Respondent: Sadie Bond

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