

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

MITCHELL SHAE

Transcript of the Ruling delivered by The Honourable Justice L.A. Charbonneau, sitting with a jury, at Norman Wells, in the Northwest Territories, on the 19th day of May, 2016.

APPEARANCES:

Mr. D. Praught: Counsel for the Crown
Mr. J. Walsh: Counsel for the Accused

(Charges under s. 271 of the *Criminal Code of Canada*)

No information shall be published in any document or broadcast or transmitted in any way which could identify the victim or a witness in these proceedings pursuant to s . 486 . 4 of the *Criminal Code of Canada*

1 THE COURT: I am not going to say a lot
2 more than what I said when I ruled on this at the
3 time the application was made. But just so the
4 record is a little bit more complete, I will say
5 that in dealing with this *Corbett* application, I
6 essentially followed the same principles as the
7 ones that I followed in my decision in *R. v.*
8 *Gargan, 2012 NWTSC 42*. I will not repeat what I
9 said in that decision. I adopt what I said about
10 the applicable principles at paragraphs 4 to 12
11 in that decision.

12 In this particular application, Mr. Shae's
13 record include a number of convictions spread out
14 over a period of about eight years. There are a
15 number of convictions for break and enter,
16 mischief, theft, breaches of court orders; and,
17 at different points in the record, there are also
18 assault convictions.

19 My understanding of the defence position on
20 the *Corbett* application was that the assault
21 convictions were the only ones that defence was
22 concerned about. It was not an application to
23 prevent cross-examination on the criminal record
24 completely. Rather it was an application to have
25 those three assault convictions edited out of the
26 record.

27 Although the Crown made full submissions on

1 the *Corbett* application, the Crown, at the
2 outset, indicated that it was less concerned
3 about the prospect of the assault convictions
4 being edited out of the record than it would have
5 been about being prevented from cross-examining
6 Mr. Shae on the complete record. As such, this
7 was not the most hotly contested *Corbett*
8 application that I have had occasion to hear.

9 Just to reiterate what I said yesterday, I
10 think the Crown is correct in saying that the
11 starting point of his application is that
12 cross-examination of the record is permitted
13 under the *Evidence Act*, and it is only when the
14 prejudicial effect of that cross-examination
15 outweighs the probative value of the record that
16 it should be prevented.

17 In this case, the convictions that defence
18 asked me to edit out are convictions for a type
19 of offence that has very little probative value
20 on credibility.

21 Moreover, taking those convictions out of
22 the record would not create an artificial gap or
23 a wrong impression or a potential distortion for
24 the jury about the pattern of criminal behaviour
25 that is evidenced by the record over the years.

26 I also considered the fact that the matter
27 in which the defence challenged the Crown's case

1 in this particular trial was not focused on
2 criminal records of Crown witnesses. Editing out
3 some of the convictions on Mr. Shae's record
4 would not create the kind of imbalance that the
5 case law talks about when the credibility of
6 Crown witnesses has been attacked on the basis of
7 criminal records.

8 Those were the reasons why I concluded, on
9 the whole, that the factors set out in *Corbett*
10 weighed in favour of permitting the
11 cross-examination but editing out those three
12 assault convictions.

13 The only other comment I want to make goes
14 back to something I also said earlier this week:
15 It was suggested in submissions that perhaps one
16 way of dealing with this issue would be to simply
17 refer to the dates of the convictions for the
18 assault charges and simply get Mr. Shae to
19 acknowledge that on those dates he had been
20 convicted of a criminal offence. And, as I said
21 earlier this week, I have seen this done in
22 another case recently which proceeded without a
23 jury.

24 The concern I would have had in doing this
25 and the concern I would generally have in doing
26 this with a jury is that if the jury hears a
27 person being cross-examined specifically on

1 certain types of offences such as the theft, the
2 mischief, failures to comply with court orders,
3 and then, all of a sudden, there is reference to
4 someone being convicted of a "criminal offence"
5 without specifying what it is, I think this
6 raises a very real risk that the jury will wonder
7 why they are not hearing about the details of
8 that particular conviction. It could lead to
9 speculation that could be very prejudicial to the
10 accused person.

11 In addition to that, the law requires judges
12 to tell juries, in instructions, that in deciding
13 how much weight to attribute to the criminal
14 record in their assessment of credibility, they
15 have to consider the type of offence the person
16 has been convicted of. So I do not know how
17 helpful it is for a trier of fact to hear about
18 the fact that someone has been convicted of a
19 "criminal offence", because then there is really
20 no information to help them decide whether this
21 is a conviction that is actually relevant to
22 credibility or not relevant to credibility.

23 Those were the reasons why I declined to
24 adopt that approach.

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CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 24th day of January, 2017.

Certified Pursuant to Rule 723

Of the Rules of Court



Jenna Mearns, CSR(A)

Court Reporter