*R v Gauthier, Maie and Maye*, 2024 NWTSC 2

**S-1-CR-2022-000110**

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HIS MAJESTY THE KING**

**- v -**

**JOYCE GAUTHIER, FATHI MOHAMED MAIE and**

**ABDULLAH OMAR MAYE**

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**Transcript of the Reasons for Decision of the Honourable Chief Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 8th day of December, 2023**

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**APPEARANCES:**

B. Wun: Counsel for the Crown

E. McIntyre: Counsel for the Defendant appearing

via teleconference

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Charges under s. 354(1), 95(1), 108(1)(b), 88(1), 94(1), 92(1), 90(1). 117.01(1) and 108(1)(b) of the *Criminal Code* and s. 5(2) of the

*Controlled Drugs and Substances Act*

**I N D E X**

**PAGE**

**RULINGS, REASONS**

Reasons for decision 1

Order re granting of *certiorari* and *mandamus* 14

Adjournment 14

(TELECONFERENCE COMMENCES)

THE CLERK: Order. All rise. This sitting of the Supreme Court of the Northwest Territories is now in session, the Honourable Chief Justice Smallwood presiding. Please be seated.

THE COURT: Good afternoon.

B. WUN: Good afternoon.

THE COURT: All right. Mr. McIntyre, I understand you are on the line?

E. MCINTYRE: I am, Your Honour. Good afternoon.

THE COURT: Good afternoon. This is an application by the Crown for *certiorari* and *mandamus* in relation to Joyce Steinwand-Gauthier’s discharge at preliminary inquiry on seven offences. The Crown is seeking to quash Joyce Gauthier’s discharge on those seven offences and is seeking an order of *mandamus* requiring the Territorial Court to commit Ms. Gauthier to stand trial on those charges.

Joyce Gauthier was charged along with three co-accused, Dawson Tecomba, Fathi Mohamed Maie and Abdulah Omar Maye on an Information with 11 offences, eight of which were applicable to Joyce Gauthier: Count 1, section 354(1)(a) of the *Criminal Code*, possession of property obtained by crime; count 2, section 5(2) of the *Controlled Drugs and Substances Act*, possession of a controlled

substance -- in this case cocaine -- for the purposes of trafficking; count 3, section 95(1) of the *Criminal Code*, possession of a loaded prohibited or restricted firearm without a licence; count 4, section 108(1)(b) of the *Criminal Code*, possession of a firearm with an altered or defaced serial number; count 5, section 88(1) of the *Criminal Code*, possession of a weapon for a purpose dangerous to the public peace; count 6, section 95(2) of the *Criminal Code*, being an occupant of a motor vehicle in which they knew there was a prohibited or a restricted firearm; count 7, section 92(1) of the *Criminal Code*, unauthorized possession of a prohibited or restricted firearm; and count 8, section 90(1) of the *Criminal Code*, carrying a concealed weapon.

All of these charges arose from a traffic stop conducted by the RCMP on October 25, 2021, in Yellowknife where Joyce Gauthier was the driver of a motor vehicle along with the three co-accused who were passengers. During a search of the vehicle, the RCMP located cocaine, money alleged to be the proceeds of crime, a loaded handgun and other items.

Ms. Gauthier and the three other occupants of the vehicle were arrested and charged with a number of offences. Ms. Gauthier elected trial by judge and jury and requested a preliminary inquiry which was held on November 22 and 23, 2022, and December 20, 2022, in Territorial Court.

Following the preliminary inquiry, the Territorial Court judge committed Ms. Gauthier to stand trial on the *CDSA* charge, the possession for the purpose of trafficking charge, which was count 2 on the Information but discharged her on the *Criminal Code* offences which were counts 1, 3 through 8 on the Information.

In discharging the accused on the other counts, the preliminary inquiry judge stated:

In a case like this if the evidence at the inquiry in respect of the main transaction that the same facts and witnesses cannot meet the low threshold required for committal, it would be contrary to the intent of Parliament, in my opinion, to have these charges sent up to the Superior Court involving further delay and a second involvement of judicial resources and time and effort, energy of witnesses and the victims.

Where the charges are so related to the plus-14 offences like the case here, I am of the opinion that I have the power under 548(2) to discharge where there is no sufficient case to put the accused on trial, applying the test that has been cited many times.

In 2019 the *Criminal Code* was amended to restrict the availability of preliminary inquiries to offences punishable by 14 years or more of imprisonment. Of the offences that Ms. Gauthier was charged with, the *Criminal Code* offence is punishable by less than 14 years of imprisonment, the *CDSA* offence punishable by imprisonment for more than 14 years.

The issue is not whether the preliminary inquiry judge made the correct decision to discharge the accused on the seven other offences, but it is whether the preliminary inquiry judge had jurisdiction to inquire into the other offences which were on the Information, that is, the offences for which the maximum punishment was imprisonment for less than 14 years.

For the reasons that follow, I conclude that the preliminary inquiry judge did not have jurisdiction to inquire into those offences and he exceeded his jurisdiction by doing so.

As mentioned, in 2019 the *Criminal Code* was amended to restrict the availability of preliminary inquiries. The relevant provisions of the *Criminal Code* are section 535 of the *Criminal Code* which now states:

If an accused who is charged with an indictable offence that is punishable by 14 years or more of imprisonment is before a justice and a request has been made for a preliminary inquiry under subsection 536(4) or 536.1(3), the justice shall in accordance with this Part inquire into the charge and any other indictable offence in respect of the same transaction founded on the facts that are disclosed by the evidence taken in accordance with this Part.

Section 536(4) of the *Criminal Code* states in part:

If an accused referred to in subsection (2) elects to be tried by a judge without a jury or by a court composed of a judge and jury, the justice shall on the request of the accused or the prosecutor hold a preliminary inquiry into the charge.

Under section 548(1) of the *Criminal Code* when all of the evidence has been taken, the judge shall either:

1. if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction order the accused to stand trial or
2. discharge the accused if in his opinion on the whole of the evidence, no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.

If there is sufficient evidence to put the accused on trial, the preliminary inquiry judge must commit the accused to stand trial. At a preliminary inquiry the Crown must present some evidence against the accused on every essential element of the offence in order for the accused to be committed to stand trial.

The preliminary inquiry serves as a screening purpose to ensure that there is sufficient evidence to commit the accused to stand trial. It also allows the accused to discover the Crown’s case and to assess the nature and strength of the Crown’s case, but it is not meant to decide the accused’s guilt or innocence. *R v Russell*, 2001 SCC 53 at paragraph 20.

A preliminary inquiry is a process conducted by a statutory court that can only exercise the power that has been granted by the *Criminal Code*. There is no constitutional or stand-alone right to a preliminary inquiry. *R v R.S.*, 2019 ONCA 906 at paragraphs 48 to 50.

With respect to preliminary inquiries in *R v Sazant*, 2004 SCC 77, the Supreme Court of Canada considered the application of *certiorari* in the context of preliminary inquiries, stating at paragraph 14:

The purpose of the preliminary inquiry is to ensure that there is sufficient evidence to commit the accused to trial. The preliminary inquiry is therefore a pretrial screening procedure that also serves as a discovery mechanism to the accused. Guilt or innocence is determined at trial.

The preliminary inquiry judge’s decision to discharge or commit the accused to trial cannot be appealed. While the decision can be challenged by way of *certiorari*, the reviewing court should only intervene where the preliminary inquiry judge committed a jurisdictional error.

The scope of review on *certiorari* is limited and is mainly limited to jurisdictional review by a superior court. *Certiorari* permits review only where a lower court or tribunal has acted in excess of its statutory jurisdiction. *Russell* at paragraph 19.

The availability and scope of a preliminary inquiry is determined by the wording of the relevant provisions of the *Criminal Code*. On a review of the wording of section 535, it is clear that a prerequisite to requesting a preliminary inquiry is that the accused be:

Charged with an indictable offence that is punishable by 14 years or more of imprisonment.

An accused person who is charged with an indictable offence that is not punishable by 14 years or more of imprisonment is not entitled to request a preliminary inquiry. That is apparent on a plain reading of this section and is something that has been confirmed by a number of courts across Canada since the amendments to the *Criminal Code*. See, for example, *R v C.T.B*., 2021 NSCA 58 and *R.S.* at paragraph 14.

The legislative amendments with respect to preliminary inquiries have been considered by a number of courts in a variety of factual circumstances. In this case the accused has been charged with multiple offences on the same Information, one of which is eligible for a preliminary inquiry, as it is an offence for which the maximum punishment is 14 years or more, and there are also seven offences, which are not eligible for a preliminary inquiry because their maximum punishment is not 14 years imprisonment or more.

This is the same issue that was faced in *R v Davis*, 2019 ONCJ 679 where the accused was charged with 16 offences pursuant to both the *Criminal Code* and the *CDSA*. Four of those offences had a maximum punishment of 14 years or more, while the remaining 12 counts had a maximum punishment of less than 14 years.

In *Davis* the Court held that “the charge” referred to in section 536(4) referred to the charge in subsection (2), namely, an indictable offence punishable by 14 years or more and at section 536(4) did not refer to an inquiry into the Information as a whole. This supported an interpretation where the preliminary inquiry is restricted to offences which are punishable by imprisonment of 14 years or more.

I agree that a plain reading of section 536(4) requires a judge to hold a preliminary inquiry into the charge which is an indictable offence punishable by 14 years or more imprisonment. That

is not in issue here; the issue is the scope of that inquiry.

The defence argues that because section 548 was not amended by Parliament in 2019, that section gives a preliminary inquiry justice jurisdiction to discharge the accused on “any other indictable offence in respect of the same transaction.”

The argument is that once a preliminary inquiry is requested on an indictable offence punishable by 14 years or more of imprisonment, the preliminary inquiry judge can then inquire into all of the counts on the Information in respect of the same transaction, whether they are eligible for a preliminary inquiry or not. This was the reasoning of the preliminary inquiry judge.

He viewed the plain reading of section 548(1) as granting him the authority to discharge on the other offences. The preliminary judge in his decision reviewed the other relevant sections of the *Criminal Code* as well as the case law which had been provided to him before ultimately concluding that if there was not sufficient evidence for committal on the other offences:

It would be contrary to the intent of Parliament, in my opinion, to have these charges sent up to the superior court.

In my view, that statement was an error. The issue was not whether there was sufficient evidence but whether he had the jurisdiction to consider those offences at the preliminary inquiry stage. The preliminary inquiry judge went on to conclude that he did have jurisdiction, stating:

Where the charges are so related to the plus-14 offences like the case here, I am of the opinion that I have the power under 548(2) to discharge.

The wording in section 548 is similar to the wording in section 535, which also refers to an inquiry into the charge and:

Any other indictable offence in respect of the same transaction.

Section 535 differs in that it goes on to limit the inquiry to:

Founded on the facts that are disclosed by the evidence.

Section 535 directs an inquiry into both the 14-plus charge and any other indictable offence in respect of the same transaction as the 14-plus offence. Section 548 also mandates that the justice consider committal and discharge on the 14-plus charge but also in respect of any other indictable offence in respect of the same transaction.

This could mean that the scope of the inquiry would extend beyond the 14-plus offences and include any other indictable offences in respect of the same transaction, including other indictable offences on an Information which are not 14-plus offences. That is a plausible reading of these provisions.

This would require the Crown to call sufficient evidence on not just the 14-plus offence or offences but for all other indictable offences in respect of the same transaction. So instead of the Crown calling evidence on just the offence or offences for which a preliminary inquiry was available, they would have to call evidence relating to all of the charges on the Information in order to ensure committal.

This would have the effect of lengthening preliminary inquiries and this is not a situation which would be rare or unique. It is not uncommon for multiple offences to be charged on an Information and for offences which have a maximum term of imprisonment of 14 years or more and offences with less than 14 years imprisonment to be on the same Information.

This approach would seem to be contrary to the wording of section 536(4), which states that the preliminary inquiry is into “the charge.” It would also seem contrary to common sense that an accused person could be discharged for an offence for which they were not entitled to a preliminary inquiry in the first place.

In *R.S.*, the Ontario Court of Appeal stated at paragraph 13 that:

The jurisdiction to conduct a preliminary inquiry depended not only on the election for trial in a superior court but also on the requirement that the charge be punishable by 14 years imprisonment or more.

It would also seem to be contrary to Parliament’s intention, which was stated in the legislative backgrounder for Bill C-75, the bill which amended the preliminary inquiry provisions as being to restrict the availability of preliminary inquiries to offences liable to a maximum term of imprisonment of 14 years, which would greatly reduce the number of preliminary inquiries and free up court time while alleviating the burden on some witnesses and victims by preventing them from having to testify twice.

As stated in *Davis* at paragraph 39:

In restricting preliminary inquiries, Parliament sought to expedite proceedings, to protect vulnerable witnesses from being examined and cross-examined twice and to preserve the screening and disclosure functions of the preliminary inquiry for the most serious offences. All of those purposes are advanced by restricting the scope of preliminary inquiries only to offences punishable by 14 years or more.

It does not seem that Parliament’s intent was to permit preliminary inquiries in some situations for offences which would not be otherwise eligible for a preliminary inquiry. That would not accord with Parliament’s stated intention to reduce the number of preliminary inquiries and to free up court time.

If Parliament wanted to proceed in that manner, then that exception could have been stated in section 536. The interpretation advanced by the defence would not comply with section 536(4), which requires that the preliminary inquiry be held into the charge, and it does not meet Parliament’s objective of restricting the availability of preliminary inquiries to 14‑plus offences.

Restricting the availability of preliminary inquiries to the offences which are punishable by 14 years or more imprisonment reflects Parliament’s decision that certain indictable offences which carry a maximum penalty of less than 14 years are no longer subject to the screening function of a preliminary inquiry. That is Parliament’s choice to make.

In order to meet the requirements of the *Criminal Code* and the legislative intent of Parliament, I find that the scope of the preliminary inquiry is limited to 14-plus offences, and this includes where there is an Information which includes both 14-plus offences and offences which have a maximum punishment of less than 14 years.

As such, the Crown’s application for *certiorari* is granted, and the discharge on counts 1, 3 through 8 on the Information is quashed and the matter is remitted to the Territorial Court with an order of mandamus requiring the Territorial Court to commit the accused to stand trial on those charges.

So that concludes the decision. I know that --

E. MCINTYRE: Thank you, Your Honour.

THE COURT: Thank you. I know there is a pretrial conference set for Monday I think afternoon on this matter. I do not know if there is anything else that needs to be addressed at this time, Mr. Wun?

B. WUN: No, thank you.

THE COURT: Okay. Thank you. Mr. McIntyre?

E. MCINTYRE: Nothing for the defence at this time. Thank you.

THE COURT: Okay. Thank you. All right. So we will adjourn. Thank you, counsel, for your submissions on this matter.

E. MCINTYRE: Have a good day.

THE COURT: Thank you.

THE CLERK: All rise.

(TELECONFERENCE CONCLUDES)

**(PROCEEDINGS ADJOURNED TO DECEMBER 11, 2023, YELLOWKNIFE)**

**CERTIFICATE OF TRANSCRIPT**

Veritext Legal Solutions, Canada, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 11th day of January, 2024.

Veritext Legal Solutions, Canada

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