

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HIS MAJESTY THE KING

- v -

JOHNATHAN GEORGE CASAWAY

Transcript of the Reasons for Judgment delivered by the Honourable Judge J.E. Scott, sitting in Yellowknife, in the Northwest Territories, on the 26th day of February, 2024.

APPEARANCES:

S. Straub:

Counsel for the Crown

S. Emery:

Counsel for the Defence (by video)

Charges under s. 320.14(1)(a) and (b) of the *Criminal Code*

INDEX

PAGE

RULINGS, REASONS

Reasons for Judgment

1

1 THE COURT: Mr. Casaway is charged that on
2 September 16th, 2022, in Yellowknife, in the Northwest
3 Territories, he had within two hours after ceasing to
4 operate a conveyance a blood alcohol concentration
5 that was equal to or exceeded 80 milligrams of alcohol
6 in 100 millilitres of blood.

7 The trial of this matter was heard on January 3rd
8 and January 4th of 2024. The Crown called only one
9 witness to testify at trial, Constable Grimshaw, who was
10 both the lead investigator and the qualified technician in
11 this case.

12 Constable Grimshaw testified on January 3rd.
13 He provided his evidence in-chief in the morning and a
14 number of exhibits were tendered by the Crown. He
15 was cross-examined by defence counsel in the
16 afternoon. I then heard submissions from counsel and
17 the matter was adjourned to the following day to permit
18 defence counsel to file caselaw and written
19 submissions. Defence counsel did submit a written
20 brief overnight referencing the cases she wished to rely
21 on.

22 On January 4th, the matter was addressed
23 again briefly in court in the afternoon. I raised several
24 questions with counsel and invited further written
25 submissions from both parties. The matter was again
26 adjourned to permit those written submissions. The
27 matter is in court today for me to give my decision.

1 In the end, there are two main issues to be
2 decided in this case. Those issues are: 1) whether the
3 Crown has proven that Mr. Casaway was given a copy
4 of the Certificate of a Qualified Technician to the
5 requisite evidentiary standard for the certificate to be
6 received into evidence in these proceedings; and
7 2) whether my conduct during the proceedings raised a
8 reasonable apprehension of bias and requires that I
9 order a mistrial.

10 I will review briefly the facts of this case.
11 Constable Grimshaw testified that at approximately
12 11:45 p.m. while on a routine patrol on September 16th,
13 2022, in Yellowknife, he observed a white commercial
14 type vehicle drive through a red light on Franklin
15 Avenue and turn left onto 54th Street. Constable
16 Grimshaw pulled the vehicle over and had a
17 conversation with the driver who identified himself as
18 Mr. Casaway.

19 Constable Grimshaw testified that during the
20 conversation with Mr. Casaway, he smelled liquor
21 coming from his breath and that Mr. Casaway indicated
22 to him that he had been drinking earlier in the day.
23 Constable Grimshaw testified that with this information
24 he formed a reasonable suspicion that Mr. Casaway
25 had alcohol in his system and that he detained him for
26 an impaired driving investigation for the purposes of
27 administering a roadside test.

1 Constable Grimshaw administered the approved
2 screening device test which resulted in a fail.
3 Constable Grimshaw then arrested Mr. Casaway for
4 impaired driving and transported him to the police
5 detachment a short drive away. Once at the
6 detachment, Constable Grimshaw assumed the role of
7 the qualified breath technician in this investigation and
8 another officer assisted with the observation period.

9 Constable Grimshaw testified that Mr. Casaway
10 provided two samples of his breath into an approved
11 instrument, the first at 030 hours and the second at 051
12 hours.

13 The Crown tendered a Certificate of Qualified
14 Technician through Constable Grimshaw. The
15 certificate was marked as Exhibit 1 in these
16 proceedings with the caveat that the Crown was not
17 relying on the certificate to prove that the target value of
18 the alcohol standard used in the analysis in this case
19 was certified by an analyst. Counsel referred to this as
20 the *Goldson* issue.

21 The Crown subsequently tendered a Certificate
22 of Analyst pursuant to section 320.22 of the *Criminal*
23 *Code* as proof that the target value was certified by an
24 analyst. The Certificate of Analyst was marked as
25 Exhibit 3.

26 Defence takes no issue with the admissibility of
27 the Certificate of Analyst in this case. The defence

1 does, however, challenge the admissibility of the
2 Certificate of a Qualified Technician on the basis that
3 the Crown has failed to prove that Constable Grimshaw
4 gave a true copy of that certificate to Mr. Casaway as is
5 required under section 320.32(2) of the *Criminal Code*
6 as a precondition for the certificate to be received into
7 evidence.

8 Counsel agree that if I find that the certificate is
9 admissible into evidence, then the Crown has proven
10 its case and Mr. Casaway should be found guilty of the
11 offence charged. If the certificate is not admissible,
12 then the issue becomes whether the Crown has proven
13 its case with the remaining evidence before the court.

14 I will address first the application by defence that
15 I order a mistrial in this case on the basis that my
16 conduct during the trial demonstrated a lack of
17 impartiality and created a reasonable apprehension of
18 bias against Mr. Casaway. Defence says that the
19 reasonable apprehension of bias arises here mainly in
20 two respects. First, that I entered the fray by asking
21 questions of counsel during submissions on
22 January 4th which they say raised new arguments that
23 could lead to a conviction; and second, that I prejudged
24 the issue of whether Mr. Casaway was given a copy of
25 the Certificate of a Qualified Technician before hearing
26 full argument from counsel, suggesting that I had a
27 closed mind on the issue.

1 Counsel filed several decisions which deal with
2 the legal principles that apply in cases where a claim of
3 reasonable apprehension of judicial bias is made. A
4 clear summary of the test for reasonable apprehension
5 of bias is found at paragraphs 49 and 50 in the 2015
6 Alberta Court of Appeal decision of *Schmaltz*, 2015
7 ABCA 4, which was filed in the defence Book of
8 Authorities (references omitted):

9
10 The test for reasonable apprehension of bias is
11 well-settled:

12
13 [The] test is “what would an informed
14 person, viewing the matter realistically
15 and practically - and having thought the
16 matter through - conclude. Would he
17 think that it is more likely than not that
18 [the decision-maker], whether
19 consciously or unconsciously, would not
20 decide fairly?”

21
22 While the threshold for finding reasonable
23 apprehension of bias is similar to that for finding
24 trial fairness, the burden on the appellant here is
25 higher, since that threshold is to be measured
26 against a strong presumption that judges
27 discharge faithfully their oath to deliver justice

1 impartially. “Cogent” evidence demonstrating
2 that a judge has done something to give rise to a
3 reasonable apprehension of bias is necessary to
4 displace that presumption.

5 As the Supreme Court explained in *RDS*
6 (at para 113):

7
8 Regardless of the precise words used to
9 describe the test, the object of the
10 different formulations is to emphasize that
11 the threshold for a finding of real or
12 perceived bias is high. It is a finding that
13 must be carefully considered since it calls
14 into question an element of judicial
15 integrity.

16
17 This is consistent with the Court's statement in
18 *Hodgson* that a finding of bias is reserved to the
19 “clearest of cases”.

20
21 I have carefully reviewed the transcripts of the
22 proceedings and find that there is no evidence that
23 could lead a reasonable person to conclude that I acted
24 partially in my dealings with counsel during
25 submissions or in any way that would give rise to a
26 reasonable apprehension of bias in this case. I did not
27 intervene with counsel during examination or cross-

1 examination of the witness on January 3rd. On that
2 same afternoon, I heard submissions from both
3 defence and Crown and asked questions of counsel to
4 clarify my understanding of the evidence and of their
5 argument.

6 The main issues outstanding at the close of the
7 proceedings on January 3rd was whether the Crown
8 had proven that Mr. Casaway had been given a copy of
9 the Certificate of a Qualified Technician and what
10 burden of proof should apply to that issue. My
11 comments at the close of the proceedings on
12 January 3rd suggested an open mind on those
13 remaining issues before the court. I informed counsel
14 that I would take some time to consider the arguments
15 and that I would like to review the caselaw that they
16 were relying on. There is nothing on the record that
17 suggests that I had prejudged the issue or that I had
18 engaged in excessive or one-sided interventions with
19 counsel.

20 Overnight, defence counsel did submit a written
21 brief and identified cases they were relying on. On
22 January 4th, the matter was again addressed in court. I
23 signalled specifically to counsel that I had concern with
24 the defence assertion that the Crown had failed to
25 prove that Mr. Casaway was given a copy of the
26 Certificate of a Qualified Technician based on what I
27 had read so far, and I invited further submissions on

1 that point.

2 At this point in the proceedings, all of the
3 evidence was concluded. I had heard oral submissions
4 from both parties the day prior and had received written
5 submissions from defence counsel on this point.
6 Nonetheless, I stated that I had not made a final
7 determination and that it was still a live issue for me at
8 that stage in the proceedings. I further identified to
9 counsel my other questions with respect to the
10 submissions and what use I could make of the
11 evidence before the court.

12 The Alberta Court of Appeal made clear in its
13 2020 decision of *Teed*, 2020 ABCA 335, that trial
14 judges are entitled to raise questions of concern with
15 counsel during submissions. In that case, the Court
16 wrote at paragraph 18:

17
18 Having regard to the whole of the record, in our
19 view the interventions complained of cannot be
20 seen to create a reasonable apprehension of
21 bias. The trial judge was not “entering the fray”
22 when he posed questions to the appellant or
23 other witnesses; he asked questions for
24 clarification and repeated answers to ensure
25 understanding. The trial judge’s questions did
26 not obstruct counsel in his questioning. The trial
27 judge was also entitled to raise areas of concern

1 with counsel during submissions, and we view
2 nothing improper in his doing so. There is, in
3 our view, nothing on the record that would
4 render this trial unfair.

5
6 At the close of the proceedings on January 4th,
7 counsel were invited to submit further submissions in
8 writing and a transcript of Constable Grimshaw's
9 evidence was ordered. I do not see anything in the
10 transcript that suggests that I have any preconceived
11 judgment or bias or that I expressed any such thing
12 during these proceedings. There is nothing in my
13 words or actions that would give rise to a reasonable
14 apprehension of bias to an informed and reasonable
15 observer or that otherwise would render this trial unfair.
16 I therefore dismiss the mistrial application.

17 I will turn next to the issue of the admissibility of
18 the Certificate of a Qualified Technician as tendered by
19 the Crown in this case. To permit the certificate to be
20 received into evidence by the court, the Crown must
21 satisfy the statutory preconditions that are set out in
22 section 320.32(2) of the *Criminal Code*. That section
23 states that:

24
25 No certificate shall be received into evidence
26 unless the party intending to produce it has,
27 before the trial, given to the other party

1 reasonable notice of their intention to produce it
2 and a copy of the certificate.

3
4 Defence argues that the Crown must prove
5 service of a true copy of the certificate beyond a
6 reasonable doubt and says that the Crown has failed to
7 do so in this case because the officer did not prepare
8 the copy himself and the copy was never compared
9 against the original before the certificate was served.
10 As a result, the defence argues that the certificate
11 cannot be received into evidence and the Crown
12 cannot rely on it to prove the offence alleged.

13 The Crown argues that service of a copy of the
14 certificate on Mr. Casaway must be proven only on a
15 balance of probabilities. This, because section
16 320.32(2) deals only with the preliminary question of
17 admissibility of the certificate. So those requirements
18 deal only with the preliminary question of admissibility.

19 The Crown argues that, nonetheless, it has
20 discharged its burden to prove service of the certificate
21 on Mr. Casaway and it has done so on either standard
22 with the testimony of Constable Grimshaw.

23 I have reviewed all of the cases filed by counsel
24 for the Crown and defence. I find that the burden of
25 proof that attaches to the preconditions of admissibility
26 for the Certificate of a Qualified Technician as set out in
27 section 320.32(2) is on a balance of probabilities. I

1 make this finding relying on the reasoning set out in the
2 2014 Alberta Court of Appeal decision in *Redford*, 2014
3 ABCA 336. In that case, the Alberta Court of Appeal
4 dealt squarely with this issue under the former
5 section 258(7) of the *Criminal Code*. The Court states
6 at paragraphs 34 and 35:

7
8 As has been noted previously, the Supreme
9 Court has made clear that preliminary matters
10 governing the use of evidence are established
11 on a balance of probabilities, even where the
12 evidence is crucial to a finding of guilt. In the
13 absence of compelling policy reasons that make
14 a particular matter a “vital issue”, there is no
15 principled reason to depart from that general
16 rule.

17
18 The purpose of s. 258(7) is to provide an
19 accused with reasonable notice of the Crown’s
20 intention to introduce into evidence the
21 Certificate of Analyses and to provide a copy of
22 the certificate to the accused. The provision
23 governs only admissibility; it does not, without
24 more, trigger any presumption. It is purely
25 procedural. To take the benefit of a
26 presumption, the Crown must go on to prove
27 compliance with the prerequisites under

1 s. 258(1)(g) and then compliance with the
2 prerequisites under s. 258(1)(c).

3
4 Section 258(7) does not establish facts which
5 trigger a presumption with respect to a vital
6 issue relating to innocence or guilt. It is only the
7 threshold for admissibility.

8
9 The wording of the former section 258(7)
10 contains the same requirements for threshold
11 admissibility of certificates as is contained in the new
12 section 320.32(2) which is at issue in this case. I find
13 nothing in the 2018 amendments to the *Criminal Code*
14 dealing with offences relating to conveyances, nor in
15 the Alberta Court of Appeal's 2021 decision in *Goldson*,
16 2021 ABCA 193, that disturbs the civil standard of proof
17 for admissibility of certificates that was decided in
18 *Redford*.

19 I have reviewed the transcript of Constable
20 Grimshaw's testimony in full and with particular
21 attention to his evidence on the issue of service of the
22 Certificate of a Qualified Technician. Constable
23 Grimshaw testified that after the testing was complete,
24 he notified Mr. Casaway of his results, did up the
25 paperwork, and then fingerprinted and released
26 Mr. Casaway.

27 He testified that before he released

1 Mr. Casaway, he served copies of the documents,
2 including the Certificate of a Qualified Technician, on
3 Mr. Casaway, and that the original stayed on the police
4 file. In cross-examination, he was again asked if he did
5 anything in particular when he served the documents.
6 Constable Grimshaw, with reference to his notes,
7 confirmed again that he released Mr. Casaway, served
8 him with a copy of the Certificate of a Qualified
9 Technician, asked Mr. Casaway if he had any
10 questions about it, Mr. Casaway said no, and then
11 Mr. Casaway put his paperwork in his pocket and left
12 with it.

13 Constable Grimshaw gave no evidence of
14 having compared the original certificate with the copy
15 he says he served on Mr. Casaway. In cross-
16 examination, Constable Grimshaw agreed that it was
17 possible that someone else, in fact, made the
18 photocopy of the certificate and that it was possible that
19 he had not in fact fingerprinted Mr. Casaway on the day
20 in question because the fingerprinting machine wasn't
21 working.

22 I find that photocopies are inherently reliable in
23 the same way that carbon copies of forms were found
24 to be inherently reliable in the summary conviction
25 appeal decisions filed by counsel that is the decision of
26 the Alberta Court in *St. Jules*, 2013 ABQB 447, and
27 *Metzger*, (K.C.) (2015), 479 Sask.R. 144 (QB), a

1 Saskatchewan decision 2015. In both those decisions,
2 the summary conviction appeal courts held that there
3 was no further requirement for the Crown to prove that
4 the copy be compared against the original where the
5 copy is inherently reliable. In the decision of *St. Jules*
6 at paragraph 41, the Alberta Court wrote:

7
8 In the case at bar, there is no evidence of any
9 comparison and there is also no evidence of any
10 defect on the certificate in question. In my view,
11 in such circumstances, there is no legal
12 requirement for a comparison and the pre-
13 carbonated forms carry with them a sufficient
14 guarantee of reliability unless otherwise
15 challenged.

16
17 In my view, the fact that the copy of the
18 Certificate of a Qualified Technician was created by a
19 photocopy in this case satisfies me that the copy that
20 was given to Mr. Casaway was inherently reliable and a
21 true copy, regardless of whether it was Constable
22 Grimshaw or another person who made the copy. The
23 fact that Constable Grimshaw is not able to recall
24 specifically whether it was him or another person that
25 made the copy, or whether he fingerprinted
26 Mr. Casaway before his release or on a later date does
27 not cause me to question the overall reliability of his

1 evidence. I accept his testimony that he explained the
2 results of the testing to Mr. Casaway and gave
3 Mr. Casaway a copy of the Certificate of a Qualified
4 Technician before his release.

5 I am satisfied that based on the evidence of
6 Constable Grimshaw that Mr. Casaway was given a
7 copy of the Certificate of a Qualified Technician. His
8 evidence leaves me with no reasonable doubt on this
9 point. I am satisfied therefore that the Crown has
10 proven this fact both on a balance of probabilities and
11 also beyond a reasonable doubt. I make this finding
12 relying solely on the evidence of Constable Grimshaw
13 and not based on any observation of the use of the
14 documents by counsel during the proceedings.

15 The Crown having proven the statutory
16 preconditions required under section 320.32(2), I find
17 that the Certificate of Qualified Technician can be
18 received into evidence and that the testing revealed
19 that Mr. Casaway's blood alcohol concentration on the
20 day in question was 180 milligrams of alcohol in
21 100 millilitres of blood. As a result, I will record a
22 finding of guilt.

23 There were several other issues addressed by
24 counsel in oral and written submissions that dealt with
25 what use I could make of other evidence before the
26 court if the Certificate of Qualified Technician was
27 found to be inadmissible. I thank counsel for their

1 submissions and the corresponding caselaw that was
2 provided. The submissions were thorough and
3 appreciated and I reviewed all of the materials that
4 were filed.

5 Given my finding that the certificate is
6 admissible, however, it is not necessary for me to deal
7 with the further issues in this decision.

8

9 **(REASONS FOR JUDGMENT CONCLUDED)**

10

11 **CERTIFICATE OF TRANSCRIPT**

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

17

18

19 Dated at the City of Toronto, in the Province of Ontario, this
20 16th day of April, 2024.

21

22

23 *Veritext Legal Solutions, Canada*

24

25 _____
Veritext Legal Solutions, Canada

26

27