***R. v. Casaway*, 2024 NWTTC 03 T-1-CR-2022-001683**

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HIS MAJESTY THE KING**

**- v -**

**JOHNATHAN GEORGE CASAWAY**

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**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.**

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**APPEARANCES:**

S. Straub: Counsel for the Crown

S. Emery: Counsel for the Defence (by video)

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

**I N D E X**

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**RULINGS, REASONS**

Reasons for Judgment 1

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

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

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

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

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

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

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

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

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

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

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

Defence takes no issue with the admissibility of the Certificate of Analyst in this case. The defence does, however, challenge the admissibility of the Certificate of a Qualified Technician on the basis that the Crown has failed to prove that Constable Grimshaw gave a true copy of that certificate to Mr. Casaway as is required under section 320.32(2) of the *Criminal Code* as a precondition for the certificate to be received into evidence.

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

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

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

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

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

While the threshold for finding reasonable apprehension of bias is similar to that for finding trial fairness, the burden on the appellant here is higher, since that threshold is to be measured against a strong presumption that judges discharge faithfully their oath to deliver justice impartially. “Cogent” evidence demonstrating that a judge has done something to give rise to a reasonable apprehension of bias is necessary to displace that presumption.

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

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

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

I have carefully reviewed the transcripts of the proceedings and find that there is no evidence that could lead a reasonable person to conclude that I acted partially in my dealings with counsel during submissions or in any way that would give rise to a reasonable apprehension of bias in this case. I did not intervene with counsel during examination or cross-examination of the witness on January 3rd. On that same afternoon, I heard submissions from both defence and Crown and asked questions of counsel to clarify my understanding of the evidence and of their argument.

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

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

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

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

Having regard to the whole of the record, in our view the interventions complained of cannot be seen to create a reasonable apprehension of bias. The trial judge was not “entering the fray” when he posed questions to the appellant or other witnesses; he asked questions for clarification and repeated answers to ensure understanding. The trial judge’s questions did not obstruct counsel in his questioning. The trial judge was also entitled to raise areas of concern with counsel during submissions, and we view nothing improper in his doing so. There is, in our view, nothing on the record that would render this trial unfair.

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

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

No certificate shall be received into evidence unless the party intending to produce it has, before the trial, given to the other party reasonable notice of their intention to produce it and a copy of the certificate.

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

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

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

I have reviewed all of the cases filed by counsel for the Crown and defence. I find that the burden of proof that attaches to the preconditions of admissibility for the Certificate of a Qualified Technician as set out in section 320.32(2) is on a balance of probabilities. I make this finding relying on the reasoning set out in the 2014 Alberta Court of Appeal decision in *Redford*, 2014 ABCA 336. In that case, the Alberta Court of Appeal dealt squarely with this issue under the former section 258(7) of the *Criminal Code*. The Court states at paragraphs 34 and 35:

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

The purpose of s. 258(7) is to provide an accused with reasonable notice of the Crown’s intention to introduce into evidence the Certificate of Analyses and to provide a copy of the certificate to the accused. The provision governs only admissibility; it does not, without more, trigger any presumption. It is purely procedural. To take the benefit of a presumption, the Crown must go on to prove compliance with the prerequisites under s. 258(1)(g) and then compliance with the prerequisites under s. 258(1)(c).

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

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

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

He testified that before he released Mr. Casaway, he served copies of the documents, including the Certificate of a Qualified Technician, on Mr. Casaway, and that the original stayed on the police file. In cross-examination, he was again asked if he did anything in particular when he served the documents. Constable Grimshaw, with reference to his notes, confirmed again that he released Mr. Casaway, served him with a copy of the Certificate of a Qualified Technician, asked Mr. Casaway if he had any questions about it, Mr. Casaway said no, and then Mr. Casaway put his paperwork in his pocket and left with it.

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

I find that photocopies are inherently reliable in the same way that carbon copies of forms were found to be inherently reliable in the summary conviction appeal decisions filed by counsel that is the decision of the Alberta Court in *St. Jules*, 2013 ABQB 447, and *Metzger*, (K.C.) (2015), 479 Sask.R. 144 (QB), a Saskatchewan decision 2015. In both those decisions, the summary conviction appeal courts held that there was no further requirement for the Crown to prove that the copy be compared against the original where the copy is inherently reliable. In the decision of *St. Jules* at paragraph 41, the Alberta Court wrote:

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

In my view, the fact that the copy of the Certificate of a Qualified Technician was created by a photocopy in this case satisfies me that the copy that was given to Mr. Casaway was inherently reliable and a true copy, regardless of whether it was Constable Grimshaw or another person who made the copy. The fact that Constable Grimshaw is not able to recall specifically whether it was him or another person that made the copy, or whether he fingerprinted Mr. Casaway before his release or on a later date does not cause me to question the overall reliability of his evidence. I accept his testimony that he explained the results of the testing to Mr. Casaway and gave Mr. Casaway a copy of the Certificate of a Qualified Technician before his release.

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

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

There were several other issues addressed by counsel in oral and written submissions that dealt with what use I could make of other evidence before the court if the Certificate of Qualified Technician was found to be inadmissible. I thank counsel for their submissions and the corresponding caselaw that was provided. The submissions were thorough and appreciated and I reviewed all of the materials that were filed.

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

**(REASONS FOR JUDGMENT CONCLUDED)**

**CERTIFICATE OF TRANSCRIPT**

Veritext Legal Solutions, 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 16th day of April, 2024.

Veritext Legal Solutions, Canada

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