*Case Name:*

# R. v. Noskey

**Between**
**Her Majesty the Queen, and**
**Derek Wesley Noskey, Accused**

[2013] A.J. No. 1501

Action No. 120868831Q1

Alberta Court of Queen's Bench
Judicial District of Peace River
Peace River, Alberta

**K.G. Nielsen J.**

November 21, 2013.

(64 paras.)

*Criminal law -- Preliminary inquiry -- Committal for trial or discharge -- Review of committal order -- Application by Noskey for order for certiorari quashing preliminary inquiry judge's decision committing him to stand trial allowed -- One line by preliminary inquiry judge directing committal did not constitute reasons for decision -- It was impossible to determine how he reached decision -- Matter was remitted back to him.*

*Criminal law -- Extraordinary remedies -- Certiorari -- Application by Noskey for order for certiorari quashing preliminary inquiry judge's decision committing him to stand trial allowed -- One line by preliminary inquiry judge directing committal did not constitute reasons for decision -- It was impossible to determine how he reached decision -- Matter was remitted back to him.*

**Statutes, Regulations and Rules Cited:**

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

**Counsel:**

M.G. Mastel, for the Crown.

Y.R. Ziv (by telephone), for the Accused.

## Decision

**1** **K.G. NIELSEN J.**:--- All right. These are my reasons for a decision in the matter of Her Majesty the Queen v. Derek Wesley Noskey.

**2** In this case, Mr. Noskey applies for an order for certiorari quashing the order of Judge Goodson in the Provincial Court dated March 5th, 2013, which committed Mr. Noskey to stand trial on five charges on this Indictment. The duty of a judge on a preliminary inquiry is to determine if there is any admissible evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. And in that regard, I refer to the Supreme Court of Canada decision in The United States of America v. Shephard, [1977] 2 S.C.R. 1067, and R. v. Arcuri, [2001] 2 S.C.R. 828.

**3** In the case of a circumstantial evidence situation, the preliminary inquiry judge must enter into a limited weighing of the evidence to determine if the evidence is sufficient to warrant a committal of the accused. The Supreme Court of Canada commented as follows in Arcuri at paragraphs 1, 23 and 30. Firstly, paragraph 1: (as read)

> This appeal raises the question of whether a preliminary inquiry judge may "weigh the evidence" in assessing whether it is sufficient to warrant committing an accused to trial. For the following reasons, I reaffirm the well-settled rule that a preliminary inquiry judge must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the evidence in the limited sense of assessing whether it is capable of supporting the inferences the Crown asks the jury to draw. As this Court has consistently held, this task does not require the preliminary judge to draw inferences from the facts or to assess credibility. Rather, the preliminary inquiry judge must, while giving full recognition to the right of the jury to draw justifiable inferences of fact and assess credibility, consider whether the evidence taken as a whole could reasonably support a verdict of guilty.

**4** At paragraph 23, the Court stated: (as read)

> The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence -- that is, those as to which the Crown has not adduced direct evidence -- may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by

> definition, an inferential gap between the evidence and the matter to be established -- that is, an inferential gap beyond the question of whether the evidence should be believed.

**5** And then skipping down a little bit, still in that paragraph:

> The judge must, therefore, weigh the evidence in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt.

**6** And then at paragraph 30: (as read)

> In performing the task of limited weighing, the preliminary inquiry judge does not draw inferences from facts. Nor does she assess credibility. Rather, the judge's task is to determine, if the Crown's evidence is believed, it would be reasonable for a properly instructed jury to infer guilt. Thus, this task of "limited weighing" never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

**7** In R. v. Charemski, [1998] 1 S.C.R. 679, the Supreme Court of Canada commented as follows to the test at paragraph 23. There the Court said: (as read)

> The difference between the judge's function on a motion for a directed verdict and the jury's function at the end of the trial is simply this: the judge assesses whether, hypothetically, a guilty verdict is possible; the jury determines whether guilt has actually been proved beyond a reasonable doubt.

**8** Now, that case dealt with a directed verdict. The reasoning is equally applicable to the test to committal by a preliminary inquiry judge.

**9** The Supreme Court of Canada has mandated that judges must provide reasons for their decisions. Justice Browne summarized the directions of the Supreme Court of Canada with respect to reasons in her decision in R. v. Martinez, 2012 ABQB 317. At paragraph 13, Justice Browne stated as follows: (as read)

> Inadequacy of reasons does not constitute a free-standing right of appeal. However, where the absence of reasons prevents an appeal court from properly reviewing the trial judge's pathway to her conclusions and treatment of the principal issues in the case, then the failure to deliver meaningful reasons constitutes an error in law within the meaning of

section 686.

**10** R. v. Sheppard is referred to. She then goes on: (as read)

> Reasons need not necessarily reveal all the thought processes leading up to the final conclusions: R. v. Pan, 2001 SCC 42. They are to be considered in the context of the record, and it is reasonable to infer that the trial judge understood the import of the evidence, and the basic principles of criminal law at issue in the trial. The reasons need not be so detailed that they allow an appeal court to retry the entire case on appeal, nor that they prove that the trial judge was alive to and considered all of the evidence, or answered each and every argument of counsel: R. v. REM, [2008] 3 S.C.R. 3. Reasons will be adequate if the trial judge stated her conclusions briefly, and these conclusions are supported by the evidence: R. v. Burns, [1994] 1 S.C.R. 656.

**11** With respect to a preliminary inquiry, the Supreme Court of Canada commented on reasons in its decision in R. v. Deschamplain, [2004] 3 S.C.R. 601. The headnote to that case reads, in part, as follows: (as read)

> By failing to consider the whole of the evidence before discharging the accused, the preliminary inquiry judge committed a jurisdictional error on both counts. Although a preliminary inquiry judge is not required to give extensive reasons, there must be some indication that the mandatory requirement of section 548(1)(b) has been complied with, and the failure to give such an indication results in a loss of jurisdiction. A decision as to the sufficiency of the evidence is beyond review by certiorari only when it is made by a preliminary inquiry judge who was acting within his or her jurisdiction pursuant to the mandatory provisions of section 548.

**12** In this case before me, the transcript of the preliminary inquiry is a total of 32 pages long. It records the evidence of four witnesses and deals with two Informations that were before the court. Argument and submissions for the Crown on both Informations is at page 31, lines 11 to 26 and reads as follows: (as read)

> I'll start with the obvious. On the one Information alleging mischief, I believe it is Information 997, I don't believe there is any evidence on any of those counts and thus I don't believe committal is made out on those.
>
> Regarding the events of July 23rd, 2012, on that the Crown's case is circumstantial but there is circumstantial evidence in the sense that the accused was seen standing in the location where -- or close to the location where the shell casings were found. He says, "Grab my gun", they start running. Several shots are fired. Of course, it is a circumstantial case but I suggest that should be left to the trier of fact, that at this point there's enough to commit the accused to stand trial as he could be found

> guilty of being the one that took the shots.

**13** The submissions of the defence on both Informations is at page 31, lines 32 to 40, and page 32, line 1. The submissions were as follows: (as read)

> Sir, I don't think I need to take issue with anything my friend has said regarding Information 997, and I would also suggest that there isn't enough evidence to take that matter to trial.
>
> With respect to the other Information, Sir, clearly there's no firearm recovered. There's no firearm being placed in the hands of Mr. Noskey. In fact, nobody -- nobody even sees a shot fired, so I would suggest that the only counts that the Crown has any possibility of making out a conviction on would be the count 5 involving possession of the ammunition.
>
> And, I guess, Sir, those are my submissions.

**14** The reasons of the preliminary inquiry judge on both counts appear at page 32, line 9 -- sorry, lines 5 to 9:

> All right. The Information ending in the numbers 997, which alleges mischief, discharge firearm, four counts, the accused is discharged on those.
>
> On the other Information, the accused is committed to stand trial on all five counts.

**15** The one line by the preliminary inquiry judge directing committal on the five-count Information does not, in my view, constitute reasons for determining that the accused should be committed to stand trial. The preliminary inquiry judge was obliged to undertake a limited weighing of the evidence to determine if the test for committal had been met. While the judge may have done that limited weighing, it is not apparent on the transcript because there is a total lack of reasons on the committal. In my view, a reviewing court must be able to determine, from the reasons, how the judge below reached his or her conclusions. That is impossible in this case.

**16** As I stated, in the case of a preliminary inquiry, the judge must engage in a limited weighing of the evidence to determine if there should be a committal. There is no basis in this case upon which it can be determined that the judge engaged in that limited weighing of the evidence at all. Therefore, in my view, there was a failure on the part of the preliminary inquiry judge. This amounts to a lack of jurisdiction on the part of the judge and it is reviewable on a certiorari application such as this.

**17** Granting relief on such an application as these is discretionary. The issue then

becomes what relief, if any, should be granted in this case. In this regard, I refer to two decisions similar to this one, the first one is R. v. King, a decision of Madam Justice Strekaf of this court, 2011 ABQB 162. Paragraphs 35 and 36 in a similar type of application, she made these comments: (as read)

> I see no reason to exercise my discretion not to grant certiorari in the circumstances of this case. The legal grounds for quashing the committal have been established. Moreover, the error of jurisdiction did result in a denial of natural justice to the Applicants. The opinion evidence was significant and, having regard to the comments made by the preliminary inquiry judge at the hearing, may well have been excluded by her if she had not declined to perform the balancing exercise contemplated by Mohan.
>
> The relief sought by the Applicants is an order quashing the committal and remitting the matter back to the preliminary inquiry judge for her to consider the issue of committal after properly exercising her jurisdiction in relation to the admissibility of the expert evidence. The Crown has agreed that this is the appropriate remedy if certiorari is granted. That order is granted.

**18** The next decision is again back to the Supreme Court of Canada decision in R. v. Deschamplain at paragraph 39, this comment is made with respect to disposition by Justice Major, who was delivering the reasons on behalf of the majority: (as read)

> I would therefore allow the appeal, set aside the discharge order, and remit the matter to the preliminary inquiry judge to consider the whole of the evidence.

**19** In this case, I therefore grant the certiorari application because of the total lack of reasons in this matter and inability to determine the road map, as it were, as to how Judge Goodson got to his determination that the matter that Mr. Noskey should be committed for trial, and I remit the matter back to Judge Goodson for him to reconsider the matter on the whole of the evidence and parenthetically, upon that consideration, he should be obviously delivering reasons as to his decision.

**20** And that is my decision in this matter, gentlemen.

**21** MR. MASTEL: Thank you, My Lord. In terms of just how to accomplish this, I'm wondering if it would be useful to set a date then, now in the Provincial Court, where this will be returnable.

**22** THE COURT CLERK: Sir, if I could suggest any docket day and then, in the meantime, a date for Judge Goodson could be arranged --

**23** THE COURT: Yes.

**24** THE COURT CLERK: -- with the court downstairs.

**25** MR. MASTEL: Yes, we won't have the --

**26** THE COURT: I thought, if it was good enough for the Supreme Court of Canada to say, I remit it to the preliminary inquiry judge, I thought that might be good enough for me.

**27** No, I appreciate it cannot just go into limbo, it has got to go to a particular date.

**28** MR. MASTEL: And I believe this was arising out of Red Earth Creek, if memory is --

**29** THE COURT: The preliminary inquiry was conducted, I believe, at Red Earth Creek.

**30** MR. MASTEL: Sir, then that's Tuesdays, we'll make it the next one.

**31** THE COURT: I believe. Yes, sorry, the proceedings were at the Provincial Court of Alberta, Courthouse, Red Earth Creek, Alberta.

**32** MR. MASTEL: Sorry, Red Earth was just yesterday -- or just this past Tuesday, so I'm trying to calculate when the next time would be, but --

**33** THE COURT CLERK: Sir, the first and third Tuesday of the month is what the court calendar says.

**34** THE COURT: Sorry, the first Tuesday of the month?

**35** THE COURT CLERK: The first and third, Sir, so that would be the 5th of November, the 19th of November, the 3rd of December.

**36** MR. MASTEL: That would sound right.

**37** THE COURT: All right. Well then, we should --

**38** MR. ZIV: I'm -- I'm in Fox -- I'm in Red Earth Creek, I think it's another matter in that jurisdiction, and I'm just looking at the date and I think it was a week before Christmas.

**39** THE COURT CLERK: The 17th?

**40** MR. ZIV: I'm just looking at what days of the week they sit there.

**41** THE COURT: December 17th, Mr. Ziv?

**42** MR. ZIV: Yes, I'm there on another trial December 17th, Sir.

**43** THE COURT: Well, why do we not remit it back to the Provincial Court, then, December 17th, 2013. Would that be 9:30, madam clerk?

**44** THE COURT CLERK: I believe so, Sir.

**45** THE COURT: 9:30 in --

**46** MR. MASTEL: Sorry, no, Red Earth Creek would be 10:00.

**47** THE COURT: 10:00, all right. Thank you. At Red Earth Creek, then, and it can be dealt with there and then a time will have to be arranged, then, with Judge Goodson, who I understand is only sitting part-time now, so --

**48** MR. MASTEL: That's correct.

**49** THE COURT: All right. All right, well then that is what we will do, December 17th. That is convenient, at least, for Mr. Ziv that you are there then, that will work.

**50** That maybe takes us then to the Charter notice but it maybe becomes academic until -- given my decision -- until it -- if it ever comes back to this court, then. Would that be fair, gentlemen?

**51** MR. MASTEL: Yes, and I assume that the result of this will be the Indictment is more or less gone, so the Charter --

**52** THE COURT: Gone, quashed, yeah. Yeah.

**53** MR. MASTEL: -- the Charter notice would go with it, so --

**54** THE COURT: Yes. Is that fair, Mr. Ziv?

**55** MR. ZIV: I'd agree with -- I agree with that.

**56** THE COURT: Yeah, okay. All right, so the only thing that needs to be -- that anyone needs to be concerned with, then, is being back in front of Provincial Court on December 17th, then, in Red Earth Creek.

**57** MR. MASTEL: Yes. Thank you.

**58** THE COURT: Okay. Anything further, Mr. Ziv?

**59** MR. ZIV: No, Sir. Thank you.

**60** THE COURT: Okay.

**61** THE COURT CLERK: Thank you, Sir.

**62** THE COURT: All right. You can hang up with Mr. Ziv, then, madam clerk.

**63** THE COURT CLERK: Thank you, Sir.

**64** THE COURT: Thank you.