

## WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 539(1), (2), (3) or (4) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

**539 (1)** Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

- (a) may, if application therefor is made by the prosecutor, and
- (b) shall, if application therefor is made by any of the accused, make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,
- (c) he or she is discharged; or
- (d) if he or she is ordered to stand trial, the trial is ended.

**(2)** Where an accused is not represented by counsel at a preliminary inquiry, the justice holding the inquiry shall, prior to the commencement of the taking of evidence at the inquiry, inform the accused of his right to make application under subsection (1).

**(3)** Everyone who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction

**(4)** [Repealed, 2005, c. 32, s. 18(2).]

R.S., 1985, c. C-46, s. 539; R.S., 1985, c. 27 (1st Supp.), s.97; 2005, c. 32, s. 18.

CITATION: R. v. Gray, 2012 ONCA 7  
DATE: 20120105  
DOCKET: C54575

COURT OF APPEAL FOR ONTARIO

Sharpe, Blair and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Brandon Gray

Appellant

Victoria Rivers, for the appellant

Shawn Porter, for the respondent

Heard & released orally: December 22, 2011

On appeal from the order of Justice Michael J. Quigley of the Superior Court of Justice dated October 21, 2011.

ENDORSEMENT

[1] The appellant argues that the application judge erred by granting *certiorari* to quash a committal for trial for manslaughter and committing him for second degree murder.

[2] There are two issues:

1. Did the application judge err by concluding that the preliminary inquiry judge fell into jurisdictional error when he failed to commit the appellant for trial on the charge of second degree murder?
2. Did the application judge err by committing the appellant for trial on second degree murder rather than remitting the matter to the preliminary inquiry judge?

### **1. Jurisdictional error**

[3] After reviewing the evidence and the preliminary inquiry judge's reasons, the application judge concluded as follows at para. 30:

I find that Justice Hunter did commit jurisdictional error by favouring inferences to the benefit of the respondent without regard to inferences which might well be favourable to the Crown's position. I further find that Justice Hunter did not look at the totality of the evidence notwithstanding the fact that his reasons indicated that he had done so.

[4] In our view, the application judge applied the correct test. It is well established that a preliminary inquiry judge falls into jurisdictional error where he or she prefers an inference favourable to the accused over an inference favourable to the Crown or by failing to consider the whole of the evidence: see e.g. *R. v. Szant* (2004), 208 C.C.C. (3d) 224 (S.C.C.).

[5] It is also our view that it was clearly open to the application judge to conclude that the preliminary inquiry judge had committed both types of error. On our reading of the

preliminary inquiry judge's reasons, the exercise he engaged in was much more akin to weighing the evidence and trying the case than to assessing the sufficiency of the evidence for trial. That, in our view, amounts to jurisdictional error.

[6] [This paragraph has been edited for publication pending the conclusion of the trial, pursuant to the non publication order of the court.]

[7] [This paragraph has been edited for publication pending the conclusion of the trial, pursuant to the non publication order of the court.]

[8] [This paragraph has been edited for publication pending the conclusion of the trial, pursuant to the non publication order of the court.]

## **2. Committing for trial on second degree murder**

[9] The respondent concedes that the application judge erred by committing the appellant for trial on second degree murder: see *R. v. Thomson* (2005), 74 O.R. (3d) 721 (C.A.).

[10] While the Crown does not appear to have asked the application judge in either or written submissions to issue an order of *mandamus*, it is clear from the notice of application and from the reasons of the application judge that there was an application for *mandamus* in aid of *certiorari*.

[11] In our view, in these circumstances, the appropriate order is to allow the appeal in part and issue a *mandamus* order remitting the matter to the preliminary inquiry judge requiring him to commit the appellant for trial on the charge of second degree murder.

“Robert J. Sharpe J.A.”

“R.A. Blair J.A.”

“Paul Rouleau J.A.”