W A R N I N G

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therefor is made by any of the accused, make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,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 **(4)** [*Repealed*, 2005, c. 32, s. 18(2).]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., c. C-34, s. 467; R.S.C., 1985, c. 27 (1st Supp.), s. 97; 2005, c. 32, s. 18.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hawley, 2012 ONCA 528
DATE: 20120802
DOCKET: C54880

Doherty, Watt and Pepall JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Jerry Jeffrey Hawley

Respondent

Karen Papadopoulos, for the appellant

Robert Allan Barr, for the respondent

Heard and released orally: July 30, 2012

On appeal from the judgment of Justice Robert F. Scott of the Superior Court of Justice, dated December 15, 2011, dismissing an application for *certiorari*, with *mandamus* in aid, and upholding the order of Justice Charles D. Anderson of the Ontario Court of Justice, dated March 3, 2011, discharging the respondent on a charge of first degree murder but committing him for trial on a charge of manslaughter.

ENDORSEMENT

[1] The respondent was charged with first degree murder and committed for trial after a preliminary inquiry on the included offence of manslaughter. The

Crown moved in the Superior Court of Justice for an order setting aside the committal and for an order directing the preliminary inquiry judge to commit for trial on the charge of first degree murder. The Crown's application was dismissed. The Crown appeals from that dismissal to this court.

[2] (This paragraph has been edited for publication, pending the conclusion of the trial, in compliance with the publication ban ordered by Justice Charles D. Anderson.)

[3] (This paragraph has been edited for publication, pending the conclusion of the trial, in compliance with the publication ban ordered by Justice Charles D. Anderson.)

[4] (This paragraph has been edited for publication, pending the conclusion of the trial, in compliance with the publication ban ordered by Justice Charles D. Anderson.)

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[7] At the preliminary inquiry, the Crown also argued that the respondent should be committed on the charge of first degree murder on the basis that he committed murder as defined in s. 229(a)(ii) while unlawfully confining his brother, thereby committing first degree murder as defined in s. 231(5)(e). Apart from the argument based on the unlawful confinement of Jamie, the Crown did not suggest that the evidence supported a committal on the charge of first degree murder. Specifically, the Crown did not allege that the evidence provided a basis by finding that the murder was planned and deliberate.

[8] The defence at the preliminary inquiry agreed that the respondent should be committed for trial on the charge of manslaughter. The defence acknowledged that the respondent owed a duty of care to Jamie and that the evidence was capable of supporting a finding that he failed to provide the necessary care for Jamie and caused his death. The defence, however, resisted committal on the murder charge submitting that on the entirety of the evidence heard at the preliminary inquiry, the respondent could be said to have acted negligently, but not with any of the culpable states of mind required for murder.

[9] In declining to commit the respondent on the murder charge, the preliminary inquiry judge did recognize that the evidence supported the inference (this portion has been edited for publication, pending the conclusion of the trial, in compliance with the publication ban ordered by Justice Charles D. Anderson.) The preliminary inquiry judge concluded, however:

> This [meaning the evidence summarized above] provides clear evidence of criminal negligence. However evidence of negligence without more does not equate to evidence of a specific intent to kill or to cause bodily harm as set out in s. 229 of the Code.

The preliminary inquiry judge proceeded to discharge the respondent on the murder charge and commit him on the charge of manslaughter.

[10] In *R. v. Sazant*, [2004] 3 S.C.R., the court distinguished between an error in law, or an error as to the sufficiency of evidence offered at the preliminary inquiry, both non-jurisdictional errors not reviewable on a motion to quash and various jurisdictional errors all of which involved a preliminary inquiry judge going beyond the very limited function assigned under s. 548 of the *Criminal Code*. In *Sazant*, McLachlin C.J. provided examples of jurisdictional error at para. 25 of her reasons. These included drawing inferences from the evidence rather than determining what inferences could reasonably be drawn. The distinction is important because if the inferences urged by the Crown are within the field of inferences that could reasonably be drawn, the preliminary inquiry judge must commit for trial even if those are not the inferences that the preliminary inquiry judge would draw.

[11] The preliminary inquiry judge's indication that he could not commit for murder because acts of negligence do not "equate" with the *mens rea* for murder demonstrates that the preliminary inquiry judge went beyond a consideration of the possible inferences from the evidence to a finding as to the inference which

should be drawn. The question for the preliminary inquiry judge was not whether the acts of gross negligence by the respondent could be said to "equate" with the *mens rea* for murder, but rather whether the inference of the necessary *mens rea* was an available one given the nature and quality of the respondent's acts. The preliminary inquiry judge failed to ask himself the appropriate question and as a result failed to perform the function assigned to him under s. 548. In doing so he committed a jurisdictional error.

[12] The reviewing judge erred in law in finding that the preliminary inquiry judge did not exceed his jurisdiction. While we agree with the reviewing judge that the preliminary inquiry judge carefully considered the entirety of the evidence and the applicable legal principles, he did so in the context of addressing the wrong question, that is, whether evidence of gross negligence "equated" with the *mens rea* for murder. For the reasons set out above, the preliminary inquiry judge went beyond his statutory jurisdictional limits in deciding whether the acts of the respondent "equated" with the *mens rea* for murder.

[13] The jurisdictional error requires that we set aside both the order of the reviewing judge and the order of the preliminary inquiry judge. The question becomes whether the committal for trial should be on the charge of first degree or second degree murder.

[14] The problem for the Crown as it relates to the argument that the respondent should be committed on a charge of first degree murder is different than the problems encountered by the Crown on the argument relating to the charge of second degree murder. The Crown's problem in respect of a committal on first degree murder is procedural rather than jurisdictional. The Crown did not argue at the preliminary inquiry that it had a case for first degree murder based on planning and deliberation. It did not advance that argument before the reviewing judge. That argument appears for the first time in this court. The argument for committal on the charge of first degree murder made at the preliminary inquiry and before the Superior Court judge based on s. 231(5)(e) is not advanced in this court.

[15] The evidence of planning and deliberation is arguably tenuous at best. However, we decline to decide whether there is an evidentiary basis for a committal on the charge of first degree murder based on an allegation of planning and deliberation. We think it is inappropriate in the context of an appeal from a refusal to quash an order discharging an accused to consider an order for committal based on a theory of liability that was not advanced at the preliminary inquiry. It is hard to see how the preliminary inquiry judge could be said to have made a jurisdictional error by failing to consider a theory of liability not advanced at the preliminary inquiry.

[16] We decline, therefore, to pass on the merits of the Crown's argument that the evidence provided a basis for a finding that the murder was planned and deliberate. The Crown has its remedy should the Attorney General consider that the administration of justice requires that the respondent be tried on a charge of first degree murder.

[17] In the result, we quash both orders below and remit the matter to the preliminary inquiry judge with the direction that he commit for trial on the charge of second degree murder.

"Doherty J.A."
"David Watt J.A."
"S.E. Pepall J.A."