WARNING

THIS IS AN APPEAL UNDER THE

YOUTH CRIMINAL JUSTICE ACT

AND IS SUBJECT TO:

110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. S.K., 2014 ONCA 138
DATE: 20140224
DOCKET: C57125

Rosenberg, Gillese and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

S.K.

(A Young Person)

Appellant

Jonathan Dawe, for the appellant

Alison Wheeler, for the respondent

Heard: February 7, 2014

On appeal from the judgment of Justice Michelle Fuerst of the Superior Court of Justice, dated May 9, 2013, granting certiorari setting aside the order of Justice P.N. Bourque of the Ontario Court of Justice, dated October 15, 2012, discharging the appellant on the charge of first degree murder.

ENDORSEMENT

[1] The appellant appeals from the judgment of Fuerst J. allowing an application by the Crown for *certiorari* with *mandamus* in aid quashing the appellant's discharge on the charge of first degree murder and remitting the matter to the preliminary inquiry judge with a direction to commit on the charge of first degree murder.

[2] We agree with the application judge that there was jurisdictional error requiring that the discharge on first degree murder be set aside. She has set out those errors with clarity and we agree that the preliminary inquiry judge exceeded his jurisdiction by choosing between competing inferences. The main issue was knowledge of the likelihood of death under both s. 229(a)(ii) and (c) of the *Criminal Code*. In the circumstances of this case, the finding by the preliminary inquiry judge that there was some evidence to support that inference was determinative of that element of the offence. It was not for the preliminary inquiry judge to prefer the inference that the appellant panicked when there was sufficient evidence to support the inference of knowledge of the likelihood of death. In the result, the preliminary inquiry judge failed to consider a body of other evidence that also supported the knowledge element of the offences.

[3] The application judge also identified legal errors by the preliminary inquiry judge in relation to the elements of the offence as defined in s. 229(c). We agree with the appellant that it will be for the trial judge to determine the basis upon which murder should be put to the jury. Because of the manner in which the case was put before this court, we did not have full argument on this issue. It will be for the trial judge, based on the evidence at trial, to determine how this court's decision in *R. v. Shand,* 2011 ONCA 5 applies.

[4] Finally, we are satisfied that the trial judge did not err in granting *mandamus* and returning the matter to the preliminary inquiry judge with a

direction to commit on first degree murder. In our view, the availability of *mandamus* for this purpose has been settled by this court's decision in *R. v. Thomson* (2005), 74 O.R. (3d) 721. We agree with the appellant that there may well be cases where, despite a jurisdictional error, committal on the charged offence is not legally inevitable and the matter must be returned to the preliminary inquiry judge to consider anew the question of committal. This is not one of those cases. As we have said, even on the preliminary inquiry judge's own reasons, there was some evidence to support the committal for first degree murder. A consideration of the entire body of evidence makes the committal for the full offence inevitable.

[5] Accordingly, the appeal is dismissed.

"M. Rosenberg J.A."
"E.E. Gillese J.A."
"M.L. Benotto J.A."