On appeal from a decision of a Provincial Court Judge delivered on June 13, 2023.

Date: 20240410
Docket: CR 23-01-39656
(Winnipeg Centre)
Indexed as: R. v. Collins
Cited as: 2024 MBKB 50

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	
	)	
appellant,	)	Brendan Roziere
	)	for the appellant
- and -	)	
	)	
	)	Mark Wasyliw
TROY JUSTIN LOUIS COLLINS,	)	for the respondent
	)	
(accused) respondent.	)	
	)	JUDGMENT DELIVERED:
	)	April 10, 2024

LANCHBERY J.

INTRODUCTION

[1] The respondent was acquitted by the learned trial judge of two offences, namely:

(a) that TROY JUSTIN LOUIS COLLINS, on or about the 15th day of January in the year 2022, at the R.M. of St. Andrews, in the Province of Manitoba, did, within two hours after ceasing to operate a conveyance, have a blood alcohol concentration and a blood drug concentration that was equal to or exceeded the blood alcohol concentration and the blood drug concentration

that is prescribed by regulation, contrary to section 320.14(1)(d) of the ***Criminal Code***;

(b) that TROY JUSTIN LOUIS COLLINS, on or about the 15th day of January in the year 2022, at the R.M. of St. Andrews, in the Province of Manitoba, did operate a conveyance while their ability to operate it was impaired to any degree by alcohol, or a drug, or both, contrary to section 320.14(1)(a) of the ***Criminal Code***.

[2] On both charges the Crown proceeded summarily.

[3] The Crown appeals on three grounds:

- The learned trial judge erred in law by excluding the Certificate of Analysis;
- The learned trial judge erred in not granting an adjournment so the Crown could produce a copy;
- As a blended *voir dire* was held in respect to the respondent's section 8 ***Canadian Charter of Rights and Freedoms*** challenge, the learned trial judge erred in failing to conduct a full section 24(2) analysis.

Crown's position

[4] The Crown's position during the *voir dire* is they tendered the Certificate of Analysis (marked as Exhibit B) properly before the learned trial judge. It was up to the defence to seek an adjournment at this time and not leave it to argument.

[5] Constable Fast testified the certificate was added to the RCMP hard copy. He also testified, "I spoke to the accused by telephone and he was - - he advised me that he was

out of town at the time, that he was going to come to the detachment the next day. It was served by another officer the next day".

[6] The Crown's position is these actions were sufficient to prove the Notice of Intention to Serve was properly served and the learned trial judge erred by failing to admit the notice under section 320.32 of the ***Criminal Code***.

Respondent's position

[7] The respondent submitted the judge's factual findings are entitled to deference and the trial judge's ultimate ruling is subject to a review for correctness. (***R. v. Shepherd***, 2009 SCC 35, [2009] 2 S.C.R. 527)

[8] The issue of whether the Crown has given reasonable notice of intention to rely upon the Certificate of Analysis is a question of fact. The Crown must show a palpable and overriding error in the trial judge's reasons and it failed to do so. (***R. v. Fryza***, 2016 MBQB 55)

[9] The learned trial judge noted the Certificate of Analysis was signed by the person who performed the analysis of the blood. However, the learned trial judge further noted the Notice of Intention to Produce Certificate was not signed by the person who served the Notice.

[10] The learned trial judge ruled the Certificate of Analysis had not been served in accordance with the ***Criminal Code*** and was inadmissible. In ruling, the judge relied upon an unpublished decision of her fellow judge of the Manitoba Provincial Court in ***R. v. Coulter***. In ***Coulter***, the learned trial judge relied on section 320.32 of the ***Criminal Code*** which states in part:

> **Certificates**
> **320.32 (1)** A certificate of an analyst, qualified medical practitioner or qualified technician made under this Part is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person who signed the certificate.
>
> **Notice of intention to produce certificate**
> **(2)** No certificate shall be received in 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.

[11] In ***Coulter,*** the learned trial judge considered the Crown's argument whether an inference could be drawn since the defence challenged the Certificate and Notice of Intention to Produce Certificate and sought to exclude the certificate in his ***Charter*** breach argument service was perfected. The learned trial judge disagreed.

[12] Further, in ***Coulter***, the learned trial judge found absent an agreement to the contrary, the Crown failed to meet its onus on a balance of probabilities demonstrated the certificate and the Notice of Intention to Produce Certificate were served on the accused.

[13] The Crown's position in this case is the learned trial judge erred by failing to grant the Crown's adjournment request so it could remedy the reasonable notice requirement of the ***Criminal Code*** before continuing the trial, and further, the learned trial judge failed to provide counsel with a copy of the ***Coulter*** decision to properly address ***Coulter*** in its closing submissions.

[14] The Crown, in this appeal, submits ***Coulter*** is distinguishable as the question before the learned trial judge was only a certificate and not a Certificate of Analysis and Notice of Intention to Produce Certificate, and should be ignored.

ANALYSIS

[15] The Crown submitted the service requirements under section 320.32 could be inferred from the actions of the Crown and defence. I disagree. Section 320.32 (2) states, "No certificate shall be received in evidence ...". The ordinary meaning of section 320.32 (2) required the trial judge, in this case, to refuse to enter the certificate once the evidentiary foundation for service of the Notice to Intention to Produce was absent.

[16] In ***Coulter***, the learned trial judge noted that, "section 320.32 provides an evidentiary shortcut which allows the Crown to tender a Certificate of Analysis detailing the results of a breath sample process without the need to prove the signature or official character of the person who signed the certificate".

[17] This common-sense approach to evidentiary requirements prevents the waste of police resources testifying needlessly as to the results of the alcohol content in a breath sample obtained by a breathalyzer, or, in this case, the alcohol content found in a blood sample.

[18] The Crown suggested as this was a blood sample being analyzed as opposed to a breath sample, I should consider time delay between when the blood sample was obtained by police, shipped from Selkirk to Ottawa for analysis, then the sample being analyzed and reported to the Selkirk detachment. I disagree. This was a straightforward section 320 investigation. Whether a blood sample or a breath sample was analyzed, the service requirements remain the same. Every prosecution requires the certificate and Notice of Intention to Produce Certificate to be entered into evidence. These are technical

requirements Legislature created and must be complied with. There is a procedural shortcut (***Coulter***) available to the Crown, but this shortcut, in this case, was not met.

[19] The Crown could have sought an agreement from defence counsel about the admissibility of the certificate; could have called the officer who allegedly served the Notice of Intention to Produce Certificate; and could have obtained a letter from the officer who allegedly served the Notice of Intention to Produce Certificate confirming service as set out in section 4(b) of the ***Criminal Code.*** The Crown chose to avail itself of none of these avenues.

[20] The appellant's argument that the learned trial judge erred by failing to adjourn the trial to permit the Crown to obtain the evidence to confirm service also fails. Adjournment is a discretionary remedy.

[21] The standard of review for discretionary decisions was discussed in ***Sawatzky v. Sawatsky***, 2018 MBCA 102. Beard, JA found:

> [19] This Court has dealt with the standard of review applicable to discretionary decisions, including those that are interlocutory, on many occasions. The standard of review of discretionary decisions was explained in *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 22-28, and has been summarized in *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61, as follows (at para 13):
>
> > The applicable standard of review with respect to errors of law is correctness. For errors of mixed fact and law, or of fact alone, the standard is palpable and overriding error, unless an error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard of correctness applies to that extricable legal question: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 10, 37. Moreover, the granting or denying of a motion for summary judgment is in a judge's discretion, and that discretion should not be overturned unless the judge has misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367 at 1375; see also *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 at para. 117).

> [20] This is the standard of review that is to be applied to the discretionary decision of whether to grant an adjournment of a trial (see *R v Le (TD)*, 2011 MBCA 83 at para 35; *The Director of Child and Family Services v JG and KB*, 2017 MBCA 27 at para 7; and *The Director of Child and Family Services v GMH*, 2018 MBCA 35 at paras 12, 33-34).

[22] Considering whether the learned trial judge misdirected themselves, or whether the decision is clearly wrong, the ***Criminal Code*** set forth the necessity of service of the Notice of Intention to Produce the Certificate. The ***Criminal Code*** provides procedural shortcuts to minimize judicial and police resources in a prosecution under section 320.32. The Crown should have prepared its case accordingly to comply with section 320.32. As the Crown bears the burden of proving its case beyond a reasonable doubt, it is the Crown who bears the burden of having its witnesses ready. I find there is no injustice in this case. The Crown failed to present its case proving service of the Notice of Intention. The Crown could have taken the steps listed above and failed to do so.

[23] Turning to the question of whether the learned trial judge misdirected themself, I must consider the request for an adjournment is irrevocably tied to the argument service may be inferred.

[24] The Crown cites ***Fryza*** in support of its appeal. The case of ***Fryza*** was not presented to the learned trial judge. ***Fryza*** involved a defence ***Charter*** challenge to the admissibility of evidence in a similar case. Abra J. cited the following in reaching his decision:

> [39] It is quite conceivable that the Certificate of Analysis was not in the appeal book because the issue on appeal was whether Dewar J. ought to have acquitted the accused rather than ordering a new trial. A copy of the Certificate of Analysis may not have been considered necessary or relevant in view of the nature of the appeal.

[40] The significant point is that no appeal book, whether from the summary conviction appeal to the Court of Queen's Bench or the appeal to the Manitoba Court of Appeal, was filed in evidence before the learned Provincial Court judge. Furthermore, there was no *viva voce* evidence that the Certificate of Analysis was contained in any appeal book.

[41] In my view, it was pure speculation on the part of counsel for the Crown initially, and then the learned Provincial Court judge, that a copy of the Certificate of Analysis and the Notice of Intention to Produce was in an appeal book. There was no admissible evidence in that regard.

[42] If the Certificate of Analysis was before the summary conviction appeal court, or if the appeal book that was filed in the Manitoba Court of Appeal contained a copy of the Certificate of Analysis, it may have been admissible at the second trial. But there had to be proof on a balance of probabilities that the accused and/or his counsel had received a copy of the Certificate of Analysis, either at the appeal to the summary conviction appeal court or the appeal to the Manitoba Court of Appeal. There was no such evidence.

[43] Clearly, however, I do not have to make any finding in that regard. The Crown did not tender any evidence to prove that the Certificate of Analysis was before the summary conviction appeal court or the Manitoba Court of Appeal.

[44] Subsequent to submitting to the court that the accused and/or his counsel had a copy of the Certificate of Analysis because it was in an appeal book, counsel for the Crown abandoned that argument on the record. Nevertheless, the learned Provincial Court judge based his decision partly on a finding that a copy of the Certificate of Analysis had been served upon the accused because it was in an appeal book.

[45] As an alternative argument at the second trial, the Crown submitted that there had been constructive service of the Certificate of Analysis upon the accused and/or his counsel. The learned Provincial Court judge was asked to infer that the accused and/or counsel had received a copy of the Certificate of Analysis, either through pre-trial disclosure from the Crown and/or because it was filed as an exhibit at the first trial. The learned Provincial Court judge accepted those arguments. However, in my view, such inferences cannot be drawn.

[46] Firstly, with respect to Crown disclosure, there was no evidence before the learned Provincial Court judge as to what had been provided by the Crown to the defence in disclosure. There was no evidence that Crown disclosure had included a copy of the Certificate of Analysis.

[47] Secondly, the fact that an exhibit had been ruled admissible at the first trial does not mean that an accused and/or his counsel can be deemed to have been served with a copy of that exhibit for the second trial. There has to at least be evidence on the record from the first trial that a copy of that exhibit was given to the accused and/or his counsel. There was no such evidence.

[48] As part of its submission, the Crown relied upon *R. v. Wiebe* (9 January 2015), Winnipeg (Man. Prov. Ct.). In the reasons for judgment, the learned Provincial Court judge found (at p. 3, l. 25 to p. 4, l. 5):

> Proceeding on the basis of the principles set out above, I make the following observations. Although there was no direct evidence before the court that the certificate of analysis was part of the disclosure package provided to counsel for the accused in advance of the trial, I note the Crown's obligation to make full disclosure pursuant to the decision of the Supreme Court of Canada in *R. v. Stinchcombe* and the many cases which have followed it.

In that regard, I note that the certificate of analysis is typically the crux of the Crown's evidence with respect to the offence of driving over .08 contrary to section 253(1)(b) of the Code, and that the certificate of analysis appears to be the foundation of the prosecution in the instant case.

[49] I do not agree with that finding. With respect, in my view, it is incorrect. It cannot be assumed that any document, such as a Certificate of Analysis, has been included in Crown disclosure. It may have been inadvertently overlooked and not have been included. For such a finding to be made, there has to be clear and cogent evidence that a copy of the Certificate of Analysis was included in the disclosure.

[50] Even after a committal for trial in the Provincial Court, there have been many instances at pre-trials, or even at trials, in the Court of Queen's Bench that the defence has pointed out that relevant disclosure has not been provided to the defence. Generally such disclosure has simply been overlooked.

[51] In the *Wiebe* case, I am satisfied that the learned Provincial Court judge did come to the correct decision in finding that the Certificate of Analysis was admissible because of the unique circumstances in the case. Counsel for the accused gave prior written notice to the Crown that various *Charter* issues were being raised, including notice that the accused would be seeking, as a *Charter* remedy, the exclusion from evidence of the Certificate of Analysis. On that basis, it was appropriate to draw an inference that defence counsel and/or his client had received a copy of the Certificate of Analysis because it was the foundation of that written notice.

[52] But I reiterate, as a general proposition, an inference should not and cannot be drawn that a Certificate of Analysis is variably included in Crown disclosure.

[25] The Crown submitted the facts in ***Fryza*** were identical to this case. I disagree.

Abra J. noted the Certificate of Analysis was admissible because of "*unique circumstances*

in this case" (emphasis added). Justice Abra did not find an accused's ***Charter*** remedy would always result in the court inferring service of the Notice of Intention to Produce. The evidence in the case before Abra J. was notice had been provided by an exchange of letters between counsel prior to trial. That is not the case here.

[26] As noted in ***Wiebe***, the Certificate of Analysis is the key crux of the evidence and the foundation for the Crown's case. In ***Wiebe***, the unique circumstance was the Crown provided notice to the defence of its intention to produce the Certificate of Analysis. There is no evidence this is the case before me.

[27] This Notice of intention to Produce was first entered in the *voir dire* as Exhibit B. The Crown's argument was any objection by the defence should have occurred at the time the court marked this as Exhibit B. Marking a court exhibit by letter only becomes a numbered exhibit when all the requirements as to admissibility of the exhibit are met. This never occurred.

[28] Service is required and the methods the Crown had at its disposal are set forth in paragraph 19 herein. The Crown chose to ignore the simple requirement authorized by the ***Criminal Code***. This evidence could be tendered by the Crown, but only becomes evidence until it is admitted by the learned trial judge. When the Notice of Intention to Produce was first tendered, the Crown, at that point, had called no evidence that the Notice of Intention to Produce had in fact ever been served. The burden was on the Crown to prove service, and it failed.

[29] The Crown failed in presenting evidence to the court on service of the notice. I find the Crown's attempt to shift the onus to the defence is unacceptable. Further,

attempting to create an inference as ***R. v. Stinchcombe***, 1991 SCC 45, [1991] 3 S.C.R. 326, mandates disclosure by the Crown means the notice was served. This assumption was rejected by Abra J. in ***Fryza.*** I find this argument fails as in effect it would remove the service requirement under section 320.32 of the ***Criminal Code.*** Abra J. clearly rejected such an approach, as do I. Proof of service on the Notice of Intention to Produce can be through the testimony of an officer, a copy of letter between counsel, or an unsworn letter of an officer. I find no reason to extend the process to inferences.

[30] Addressing the final adjournment requirement, the Crown also argued it was up to defence counsel to make an application for adjournment for the purpose of cross-examining the officer. This is non-sensical. This is not a reverse onus situation.

[31] I reviewed the trial transcript and there is no direct request by the Crown for an adjournment. There was a suggestion case law suggests there could be an adjournment, but I find the request was never made of the learned trial judge. Absent a request for an adjournment, I infer the learned trial judge never made any finding. I find no palpable or overriding error in his failing to do so.

[32] The appellant's argument a full section 24(2) ***Charter*** analysis as to whether the blood sample results should be admitted is a red herring. The blended *voir dire* held involved whether the blood sample was taken in compliance with section 8 of the ***Charter***. The learned trial judge did not rule on the respondent's ***Charter*** challenge as section 320.32 of the ***Criminal Code*** directed the judge to exclude the evidence making the ***Charter*** challenge on the admission of the blood sample moot.

[33] Deference is owed to the factual finding of the learned trial judge and I find no reason to disturb those findings based on the record before me. Applying the correctness standard of review, the learned trial judge committed no palpable and overriding errors in reaching the decision. I dismiss this appeal.

_____ J.