

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Johnson*, 2022 NSPC 45

Date: 20221125

Docket: 8511409

Registry: Bridgewater

Between:

His Majesty the King

v.

Terry Richard Johnson

Restriction on Publication: 539. (1)

The evidence taken at the *Preliminary Inquiry* shall not be published in any document or broadcast or transmitted in any way before such time as the accused is either discharged or the trial has ended.

Judge:	The Honourable Judge Paul Scovil
Heard:	November 21, 22, 23, 25, 2022, in Bridgewater, Nova Scotia
Decision	November 25, 2022
Charge:	235(1) Criminal Code of Canada
Counsel:	Leigh-Ann Bryson and Bryson McDonald, for the Crown Darren MacLeod and Matthew Dill, for the Accused

A Ban on Publication of the contents of this file has been placed subject to the following conditions:

By court order made under subsection 539(1) of the **Criminal Code** the taking of evidence at a Preliminary Inquiry, the justice holding the inquiry:

- (a) Shall, if applicable therefore is made by any by the prosecutor, and

(b) Shall, if applicable therefore made by the accused, make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such times as, in respect of each of the accused,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.

By the Court:

[1] Terry Johnson appeared before the court on a Preliminary Hearing arising out of his being charged with second degree murder under section 235(1) of the **Criminal Code of Canada**.

[2] Part of the evidence from witnesses was that Mr. Johnson drove to his girlfriend's ex-husband's home and ran the ex-husband over with a pickup truck. The victim died on the scene.

[3] Mr. Johnson asks that in addition to the charge of second degree murder before this court for a Preliminary Hearing, that this court commit him to stand trial on two additional counts. Those being Dangerous Driving Causing Death under section 320.13(3) of the **Criminal Code of Canada** and section 220(b) of the **Criminal Code of Canada**, Criminal Negligence Causing Death.

[4] Mr. Johnson argues that these charges arise out of the same circumstances. In support of this Mr. Johnson cites *R. v. Brown* [1990] O.J., No. 493 from the Ontario Supreme Court. This, according to Mr. Johnson, gives this court jurisdiction to add charges against him to be part of his committal to stand trial.

[5] *Brown* involved a bouncer charged with assaulting two patrons. The Preliminary Hearing judge in hearing counts related to only one victim ordered that the accused be committed to stand trial relating to the second individual. This charge would be in addition to the individual he was alleged to have assaulted. The basis justifying this is that the two assaults arose from the same facts. The Ontario Court of Appeal in *Brown* held that the Preliminary Inquiry judge had jurisdiction to order committal of the assaults on both individuals, because they would be included offences. *Brown* is of little value here. *Brown* dealt with assaults, not a charge of murder. As will be seen later section 662(3) of the **Criminal Code of Canada** makes this an important distinction.

[6] In relation to this, the Crown is opposing this application. The Crown put before me the case of *R. v. Tschetter* 2009 ABPC 125. *Tschetter* dealt with included offences under Manslaughter where an accused in a large dump truck struck the rear of another vehicle killing a family of five. That decision was one by the trial judge. It did not consider committal at a Preliminary Hearing of offences not originally charged by the crown as we see here.

[7] In relation to this section 662(3) of the **Criminal Code of Canada** states that:

Section 662(3)

Subject to subsection (4), where the count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide but shall not on that count find the accused guilty of any other offence.

This effectively takes away any included offences that might be part of the underlining fabric of the facts in the cases.

[8] The **Criminal Code of Canada** makes it clear that where an individual is charged with murder the jury can only be left with the option of the included offence of Manslaughter or Infanticide, but no other.

[9] That was considered as well in *R. v. Tutiven* [2017] O.J. 5884, in the Ontario Superior Court of Justice. There Justice Forestall, after considering several cases, determined that pursuant to section 662(3) of the **Criminal Code of Canada**, the offence of dangerous driving cannot be left with the jury as an included offence to murder.

[10] Given the provisions of section 662(3) of the **Criminal Code of Canada**, Mr. Johnson is effectively asking this court to do an end round around both section 662(3) of the **Criminal Code of Canada** and the jurisprudence of *Tutiven* by putting to a jury included offences that would otherwise be prohibited by law. If this court were to accede to Mr. Johnson's request, a plethora of offences, including simple assault could be forwarded to trial despite such included offences being prohibited from being put to the jury once it reaches the trial judge.

[11] I cannot see where I would be able to put those charges forward as requested by Mr. Johnson. I am not prepared to do that.

[12] I therefore commit him to stand trial on the charge of second-degree murder.

[13] I order that he be brought back before the Supreme Court on Wednesday, December 14, 2022, at 9:15 am.

Paul Scovil, JPC