SUPREME COURT OF CANADA

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Case in Brief: *R. v. Awashish*

Judgment of October 26, 2018 | On appeal from the Court of Appeal of Quebec
Neutral citation: 2018 SCC 45

Rulings made in the middle of a criminal case can't be challenged until after the judgment, even if they are wrong, the Supreme Court has confirmed. The Court emphasized that the purpose of this general rule is to avoid trial interruptions and prevent delays.

Ms. Awashish was charged with impaired driving and driving "over 80." When a person is charged with a crime, s/he has a right to see copies of the documents related to the charges. This is called disclosure. The Crown (the prosecution) gave Ms. Awashish disclosure. Her lawyer asked for more documents. These related to the breathalyzer used to test her, including maintenance records and training records for the person using it. A provincial court judge ordered the Crown to give Ms. Awashish the documents.

In a criminal case, there will normally be a final decision, called a judgment, which results in a verdict of guilty or not guilty. But a judge will also make other smaller decisions along the way, such as how much court time a trial will take or what evidence should be admitted. These smaller decisions normally can't be challenged, except as part of an appeal of the trial judgment to a higher court (that is, after a guilty or not-guilty verdict). There are only very limited exceptions to this rule.

In this case, though, the Crown asked a superior court judge to review the provincial court judge's decision to order the disclosure before the trial judgment. It did so using a legal procedure called *certiorari*. *Certiorari* (pronounced different ways, including ser-tee-oh-RARR-ee) is a court's power to cancel another court's decision because of an obvious mistake. It is not the same as an appeal, and is rarely granted in criminal cases in Canada.

Certiorari was only even a possibility because Ms. Awashish's case was being heard before the Court of Quebec, which is a provincial court, not the Superior Court. Provincial and territorial courts are sometimes called "inferior courts" because they get their powers from legislatures. They can't hear all the same kinds of cases that superior courts can, and can have their decisions changed by superior courts. Superior courts, on the other hand, get their powers from the Constitution. Their decisions can't be changed by other courts, except when there is an appeal. Superior courts include most trial courts, and all provincial and territorial appeal courts. Trial-level superior courts can be called different names in different provinces; for example, B.C. has a "Supreme Court" and Alberta, Manitoba, Saskatchewan, and New Brunswick have "Courts of Queen's Bench."

The Superior Court judge ruled for the Crown and granted *certiorari* (that is, canceled the provincial court judge's order). She agreed with the Crown that Ms. Awashish didn't show why the request for additional documents should be allowed. In response, Ms. Awashish asked the Crown to tell her if it had the documents she wanted. But the Crown wouldn't confirm or deny if the records existed, because it said that they weren't relevant to her case. The provincial court judge (the same one who made the original order) once again ordered the Crown to provide the information. The Crown again asked the Superior Court for review. A different judge granted a second *certiorari* application, saying the information didn't have to be shared unless Ms. Awashish could show it was relevant.

The Court of Appeal ruled for Ms. Awashish. It said that *certiorari* is only available in limited situations, such as if a party's basic rights would be permanently harmed. It said *certiorari* shouldn't have been granted because the provincial court judge had the power to make the decision (even if she made the wrong one).

The Supreme Court unanimously ruled for Ms. Awashish. It said parties could only use *certiorari* in criminal cases when a provincial or territorial court judge went beyond his or her powers (a "jurisdictional error"). It agreed with the Court of Appeal that the provincial court judge applied the wrong rules to Ms. Awashish's request. But this was a legal error, which could be corrected on appeal, not a jurisdictional error that needed to be fixed with *certiorari*. So, even though the decision was wrong, *certiorari* couldn't be used to fix it. The Court also noted that letting parties appeal decisions before trials are finished would create delays. That's why these types of appeals, known as "interlocutory appeals," are not allowed in the *Criminal Code*. While *certiorari* is different from an appeal, courts limit it for the same reason, because lawyers could use it to get around the rule against

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interlocutory appeals. The Court noted that it had previously been clear that courts need to do a better job of finishing criminal trials in a reasonable time. Allowing *certiorari* in situations like Ms. Awashish's would go against that.

The decision confirmed the general rule that trials should not be interrupted to deal with side issues. The Court noted that *certiorari* would still be available in some circumstances, such as when a legal error affected other people who wouldn't have the right to appeal a judgment. The Court said that if Ms. Awashish asked for disclosure again, the documents' relevance should be looked at in light of the Court's decision in *R. v. Gubbins*, which was released on the same day.

Breakdown of the Decision: ***Unanimous:*** Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, and Martin JJ. in agreement)

More information (case # 37207): Decision | Case information | Webcast of hearing

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