

SUPREME COURT OF YUKON

Citation: *R. v. Schmidt*, 2014 YKSC 39

Date: 20140417
S.C. No.: 10-01520
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

MICHAEL PETER SCHMIDT

Before the Honourable Mr. Justice S.D. Hillier

Appearances:

David A. McWhinnie and Christiana Lavidas
Gordon Coffin

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] HILLIER J. (Oral): I need to start with a few introductory remarks.

[2] This decision has been prepared in recognition of the significant stress which such a traumatic incident imposes, not just on the persons in this courtroom but on your entire community. Indeed, it serves as an all too troubling message about how casually we tend to measure the risks and consequences of human behaviours.

[3] Nothing in these proceedings will of course undue the damage, particularly to Jessica Frotten, nor is this trial going to bring any real measure of closure for family and

friends. Everyone, naturally, has to move on in some way but you do not want to, you cannot ever forget. This Court recognizes all of this turmoil and the emotions which have attended the long history of this case. It has not been easy.

[4] My clear preference would have been to prepare crisper reasons for my decision but that would require still further adjournment. You are entitled to know the Court's decision now, that is what I must do, and so here are my reasons.

[5] This matter concerns a residual two-count indictment alleging impaired driving causing harm against the accused, Michael Schmidt. The case was directed for re-trial by the decision of the Court of Appeal dated November 9, 2012, in respect of a single vehicle accident on December 14, 2009, in which two passengers were injured.

[6] The Crown relies upon the cumulative evidence of various witnesses to support its position that Michael Schmidt drove while impaired causing bodily harm contrary to s. 255(2) of the *Criminal Code*.

[7] Defence asserts that the Crown has not met its burden of proof, particularly having regard to the absence of any signs of impairment and the condition of the road.

[8] The central focus, then, is to assess the reliability of the evidence as to what led up to and influenced the way in which this accident occurred.

BACKGROUND

[9] In the aftermath of the Court of Appeal direction of a new trial, the parties presented a preliminary matter for determination as to the use of any evidence on blood alcohol content ("BAC") in the re-trial. In a decision rendered October 29, 2013, I ruled that the Crown was precluded from leading evidence of back extrapolations on BAC.

[10] The Court of Appeal had directed a new trial because the reasons of the trial

judge did not specifically reconcile the conflicts in evidence as related to road conditions, specifically frost heaves. Having in part mis-expressed the Court's reasoning in that preliminary decision that I rendered, it is important to clarify that frost heaves were addressed by more than one witness and the Court of Appeal critiqued the conclusion reached. It then deferred to the role and responsibility of the fact finder to reconcile this conflict. The same conflict between witnesses on this same issue has recurred in this trial and needs to be reconciled. But the re-trial examined much more than this issue.

[11] On the re-trial, considerable focus was placed on the following points as may have affected the driving of the accused:

- a. How much alcohol did he consume, particularly in the six or seven hours from when he got up and the time of the accident?
- b. What were the road conditions encountered by the accused on the Alaska Highway north of Whitehorse and particularly just leading up to the scene of the accident?
- c. What indicia of impairment could be derived from the observations of the accused and his conduct, particularly in respect of his behaviour just prior to and following the accident?

[12] These are by no means water-tight compartments. The evidence was presented comprehensively and the Court must consider whether, on all of the evidence, the Crown has met its burden on these two remaining counts. I will review the evidence in these three aspects to organize the Court's assessment of what facts and inferences are properly supportable in all the circumstances.

[13] Before dealing with points of dispute, however, certain points were undisputed and it may be fairly summarized that:

- a. Defence confirms identity and jurisdiction, including date and place of the alleged offences.
- b. Evidence of two witnesses unavailable for re-trial, including one of the injured passengers, would be reviewed from transcript without audio replay of their earlier testimony.
- c. More generally, there is no conflict as to the chronology and underlying background. For clarity, I will refer to the accused as "Schmidt" and the passengers as "Sanderson" and "Frotten."
 - i. The night of December 13 and into the early hours of December 14, 2009, Schmidt celebrated the visit to Whitehorse of his close friend Sanderson. From his police statement, Schmidt drank six beers between 11 p.m. and 3 a.m., when he went to bed for about seven hours.
 - ii. Shortly after 10 a.m., Sanderson served Schmidt an Irish coffee, of which he drank about a quarter cup before realizing it had alcohol and did not finish it.
 - iii. Schmidt contacted his friend Frotten and came over to her house with Sanderson. Various plans were made and later modified leading to stops prior to the brief trip on the Alaska Highway where the accident occurred.

[14] I will come back to the key stops which involved alcohol in a moment because

versions differ on that point.

- iv. What remains uncontroverted is that Schmidt, Sanderson, and Frotten met for lunch at the Airport Chalet, picked up some beer at Yukon Brewery where Frotten worked, and got gas for Schmidt's Honda Civic at the Super A at 3:47 p.m.
- v. The rollover collision occurred at distance marker 1466 on the Alaska Highway about a mile and a half before the Takhini Bridge. Schmidt's passengers were thrown from the vehicle. He unbuckled his seatbelt, checked their condition, and then flagged down a school bus driver, Mackenzie, to call for help. The call was made about 4:15, when Mackenzie was able to get a signal and contact his dispatcher by radio.
- vi. Both Sanderson and Frotten were injured as a result of the accident. Frotten, in particular, sustained a paraplegic spinal chord injury and continues a significant rehabilitation, now three and a half years later.

CONTROVERTED EVIDENCE

[15] I turn, then, to the controverted evidence in respect of alcohol consumption, road conditions, and observations of behaviour, all as may inform the determination of impairment:

I Alcohol Consumption

[16] Only the two passengers were present at all venues where the accused may have consumed alcohol on that day:

- a. Sanderson says, p. 39, that he only saw Schmidt "... have a couple of beer, with a huge dinner at the Airline Inn." He could not recall if Schmidt had any alcohol at Frotten's house, any samples at the Yukon Brewery, or whether he drank any beer in the car en route to Haines Junction. His evidence proves little.
- b. Frotten spoke of four times when Schmidt may have been drinking:
 - i. She thought at first that he may have shared some of Sanderson's drink which she mixed in a bottle at her house. She later acknowledged from earlier testimony that she could not say for sure and did not recall seeing that.
 - ii. She also thought that the three of them had finished two pitchers of beer at the Airport Chalet but confirmed on cross-examination that it may have been just one pitcher and possibly they left about a quarter of it unconsumed.
 - iii. She said that Sanderson and Schmidt had samples on a tour of the Yukon Brewery while she was in the back area. They bought a 15-pack of cold beer that was in the back seat and placed a couple of dozen damaged cans in the trunk of Schmidt's car.
 - iv. Finally, she thought initially that she opened a can in the vehicle for Schmidt but later stated that she may have shared her beer with Schmidt as he drove.

[17] I must pause here to comment that I found Frotten's testimony forthright and fair, but that some recollections were unreliable for a number of reasons:

- a. First, she had consumed beer and was definitely feeling the effects.
- b. Second, she sustained a serious concussion that inflicted memory loss from just before the accident until 10 days later when she recalls being in hospital in Edmonton.
- c. Third and perhaps most candidly, Frotten notes with the passage of time that she tries not to think back about this and also that her regrets have coloured her memory to some extent.

[18] This is totally, totally understandable. I never sensed that she was in any way or at any time seeking to exaggerate or distort her testimony. Of course she regrets her decision, but she states clearly that she was not concerned about their drinking at the time.

[19] Heather Steinhagen ("Steinhagen") served the table at the Airport Chalet. I found her account clear and totally reliable. She brought one 60-oz jug of Yukon Gold beer that all three shared. She also brought a glass of water for Schmidt. She served hamburgers and chips to each of the boys, that they ate; and a club sandwich to Frotten, half of which she wrapped up to be taken away. She recalls all of the water was finished and about three-quarters of the beer.

[20] From her eight years of experience and training as a lounge server, Steinhagen noted:

- a.
 - i. It did not appear that the three had been drinking before they came in some time between 1:30 or 2 p.m. and stayed for about an hour.
 - ii. They did not seem drunk at all when they left, before 3 p.m.
- b. Schmidt paid the bill in cash, including a shortfall that arose because the

GST had not been tallied. Steinhagen noted no indicia that he had been drinking other than her knowledge that she had served the pitcher to that table.

- c. Finally, since she disliked and had previously fired Sanderson, she would not have hesitated to refuse service if there had been obnoxious behaviour or they had had too much to drink.

[21] Darcy Laliberty ("Laliberty") was a sales representative at Yukon Brewery and he knew Schmidt as a regular, sometimes daily customer. He saw Schmidt that day around 3:30 p.m. in a very happy jovial mood. Parenthetically, I attribute no significance to this comment about his mood as being in any way related to alcohol, given the uncontroverted evidence that his best friend Sanderson was visiting, he won \$50 on a lotto ticket, and had just kissed Frotten for the first time in what he hoped would become a relationship. Darcy Laliberty was in the same room for three or four minutes and saw Sanderson have a sample before crushing the plastic cup but he did not see Schmidt have anything. He was not concerned at the time that any of the three was intoxicated.

[22] Todd Onsortge ("Onsortge") was an EMS attendant who has no direct knowledge of consumption but said he could smell alcohol on the driver's breath. He added that speech was clear, understandable and not slurred, and questions were answered appropriately. Finally, he observed that Schmidt walked normally to the hospital bay and his mood was very flat, consistent with emotional shock. From my notes, he specifically stated that there was no discussion of the amount of alcohol at the hospital. He heard a comment when he arrived initially that there had been drinking all day but he does not attribute that statement to Schmidt. At best it may describe Sanderson.

[23] The accused, Schmidt, provided a cautioned statement to Cst. Turner that was part of the Crown's case in which he advised that:

- i. He had a portion of a cup of Irish coffee before 11 a.m.
- ii. The three of them had one pitcher of beer at the Airline Chalet. He had at least two glasses but did not feel intoxicated, thought he was safe, maybe pushing it a little but did not feel impaired.
- iii. He did not think he had any beer at Yukon Brewery, but Frotten picked up a loose box of beer as an employee.
- iv. He did not drink at all in the vehicle.

[24] Cst. Ryan Hack ("Hack") formed reasonable and probable grounds to support a demand for a breath sample based on the odour of alcohol in the police vehicle, the admission that Schmidt shared a pitcher of beer with his two friends, and the other circumstances which I reviewed in the *voir dire* ruling and will not repeat here. He also noted from his discussions that Schmidt drank two "sleeves" or glasses of the pitcher of beer at the Airport Chalet.

[25] The Certificates of Analysis were admitted upon the *voir dire* ruling, for which separate reasons were provided. Readings of 70 mg% over three hours later would fairly infer a higher level at the time of the collision but not the magnitude of difference. Hack stated from his experience that the testing and monitoring were conducted properly. But as to indicia of actual impairment from his involvement with Schmidt, he fairly notes that the accused spoke clearly, was concerned for his friends, and was very respectful. Nothing in Hack's evidence beyond the odour of alcohol, if combined with driving too fast and sliding off a winter highway, would suggest that impairment was a

factor in the accident.

Brian Image

[26] I need to spend extra time reviewing the expert testimony of Brian Image ("Image") which was informative of the framework of alcohol impairment. He identified a level of impairment short of intoxication between 30 and 100 mg%. Outward signs in this initial zone may be minimal but could include odour, flushed face, and perhaps dilated pupils/bloodshot eyes.

[27] At about 100 mg%, the average person has decreased comprehension, judgment, and attention, all of which pose greater risks for driving a vehicle.

[28] It is the zone of intoxication which exhibits slurred speech, poor balance or gait, and then mental confusion and emotional stability at concentration levels between 150 and 200 mg%. The higher levels leading ultimately to the zone of death have even less relevance here.

[29] Image testified that the rates of absorption and elimination both tend to be fairly standard or predictable, particularly once the person stops consuming. Food intake does not affect these rates or timeframes but can affect the peak or degree of impact.

[30] His evidence also reviewed the effects of alcohol in terms of impaired visual acuity, depth perception, peripheral vision, and reaction to glare. He pointed to the complex demands of driving in regard to perception, information processing, reaction time, and hand-eye coordination. The risks of misperception increase in emergency situations and with outside distractions.

[31] Image fairly acknowledged that the impacts of alcohol vary with the individual. Variables include metabolism and prior exposure/use of alcohol which affect the level of

tolerance. He agreed that 90 mg%, the equivalent of what is often described as .09, may not be evidence of impairment, and also that the maximum absorption may not be achieved for up to 68 minutes in some cases. Finally, he agreed that driving skills vary widely, some accidents arise other than from impairment, and that drinking does affect the ability of poor drivers.

[32] Are there any other points which could assist as to how much the accused was drinking? I concluded not really, except to note that in addition to the glass of water that Steinhagen served him at the restaurant, there was a video and a receipt evidence that Schmidt bought a bottle of water at the Super A time stamped and verified as 15:47. This speaks against any strong inference that Schmidt was focused on a day of drinking alcohol.

Summary

[33] From all of this, as to alcohol, I have sufficient reliable information and am able to make the following findings of fact:

- i. Schmidt drank a half cup or less of Irish coffee some time before 11 a.m., having consumed about six beers the night before, and slept from around 3 to 10 a.m. or so.
- ii. Nothing in the evidence supports that any of that alcohol would still be in his system five or more hours later, much less adding to any impairment, and I will not draw any such inference.
- iii. Any suggestion by Frotten that Schmidt may have had some of Sanderson's drink that she prepared at her house is unreliable in this trial and in any event would have been about 11:30 a.m.

- iv. Schmidt consumed not more than two glasses, a maximum of 20 oz, of regular beer at the Airport Chalet and left some time before 3 p.m.
- v. Schmidt probably did not consume beer at Yukon Brewery but if so, it would not be more than a single 2 oz sample since, unlike Sanderson, no one testified having seen him drinking there. Also, there was no brewery tour at that time, and they were only there briefly.
- vi. Schmidt may have shared some of Frotten's beer in the car but did not have his own can. Only one empty can was found in the vehicle that had been opened in the usual way for drinking and Sanderson definitely drank one in the vehicle. Frotten testified that she threw her empty can out just before the accident.

[34] As a tally of Schmidt's consumption, it amounts to less than 30 oz of beer, much of which is consumed over an hour and a half before the collision. I have no evidence of the usual effect of that amount of alcohol on a young 6'1" male, weighing about 195 lbs. Nor do I have any evidence of the effect or any enhanced risk of impairment from the prescription drug Lamisil (Exhibit 9, p.12) that Schmidt was taking for a finger infection.

[35] I decline to infer from the amount consumed alone that Schmidt was impaired while driving. However, the blood alcohol content reading and the expert evidence of Image do remain to be considered in the context of Schmidt's dealing with road conditions and his general conduct as may relate to driving impairment.

II Road Conditions

[36] The evidence on this topic is mixed and difficult to reconcile.

[37] Charlie Mackenzie ("Mackenzie"), an experienced school bus driver, described the roadway leading up to the scene of the accident as a long straight stretch of about two miles with frost heaves. The highway in the area generally was clear that day with a number of frost heaves. Specifically he noted those at:

- a. Takhini Crossing, about 10 to 12 minutes south -- or east, really, of the accident scene;
- b. Drury Ranch, about five to six minutes south, or east, of the accident scene; and
- c. the accident scene itself.

[38] Of these, Takhini was the most wicked and vehicles had to slow down there. The heaves at Drury Ranch were not as sharp and the bumps were more sideways. As for the motor vehicle accident scene, he describes the heaves as fairly long and swooping. He could not remember if any of these heaves had been marked, and I had no reliable evidence on that specific point.

[39] Eleanor Emke ("Emke") described the highway, well known to her, as icy that day with a couple of big frost heaves. She did not identify where these were but remembered that Schmidt had mentioned going over two big ones and then, like the hand of God, he went off the road and rolled several times in the ditch.

[40] Frotten described going over some bumps prior to the accident and hitting her head on the roof causing them to laugh. She was not wearing at least the shoulder harness of the seatbelt. She saw the speedometer at 140 kph at one point and asked Schmidt, who often drives fast, to slow down. She could not remember if he did.

[41] Onsortge noted from his EMS driving that the highway has a chronic issue with

several dips that they try to fix every year. He typically travelled within 25 kph of the posted limit of 90 kph but it is important to slow down at these frost heaves.

[42] Laliberty, a Whitehorse resident for 13 years, noted that the highway north of Whitehorse tends to be icy and is riddled with frost heaves periodically through the trip to Haines Junction. That was also how junior Cst. Brean Desaulniers described the road as he travelled to the scene on the afternoon of December 14, 2009. He confirmed his earlier evidence that, "Yes, there were frost heaves as I was arriving," although he emphasized in this trial that he had slowed substantially as he arrived so that he did not drive past the scene.

[43] Sgt. Jason Flynn noted some frost heaves at the site where he measured the skidding of the vehicle off the road. He saw these frost heaves as some downgrades but nothing big. He did note that there were some very large dips elsewhere on this highway that he had caught air on travelling at emergency speeds and that are quite tricky. He also agreed that if a vehicle was travelling fast enough, small humps could cause a problem. He noted that vehicles exceed the speed limit on the highway at all times of the year.

[44] Schmidt is reported to have said more than once that he was speeding and hit some bumps. He says in his statement at p. 6:

... and it was -- it was -- seemed slippery and then those -- those bumps on the road, I noticed them so I started slowing down. And it was just on a straight stretch and I didn't see the bump or anything but it just put the car sideways and we hit the ditch in, like, one second and I was upside down in the car. We rolled a few times.

[45] Exhibit 7, Photo 4, shows some bumps or unevenness on the road surface just approaching where the vehicle left the road. I have no evidence as to how those bumps

compare with the road generally and how they might affect a driver's control of the vehicle. The officer who took the photo, Cst. Christine Larsen, did not have any comment on how typical the road surface was at that point shown in her photo. She confirmed that drivers do speed on this highway and are ticketed summer and winter.

Summary

[46] From all the evidence, I am able to conclude that:

- a. Frost heaves are a chronic, well known feature of the Alaska Highway north of Whitehorse with differing contours that are not regularly signed.
- b. The highway was at least somewhat icy at the time of the accident with frost heaves at various points, including the stretch at the scene of the accident.
- c. The heaving at the scene was not dramatic but neither was it insignificant so as to dismiss it as a contributing cause of the accident.
- d. So too Schmidt was speeding at various times. Although I have no reason to disbelieve his own evidence that he had been slowing down, I simply do not have sufficient information as to what his highest and reduced speeds may have been.
- e. Obviously the vehicle was still travelling fast enough that it flipped and was airborne for some distance in the ditch but I have nothing in the nature of any accident reconstruction by which to make any specific inferences, much less conclusions.

Observations of Behaviour

[47] There are two periods that need to be assessed and these engage different

witnesses.

[48] Those who saw Schmidt before the accident stated that he showed no signs of impairment, including Frotten, Laliberty, and notably Steinhagen who served the jug of beer and dealt with him as he paid the bill. I accept from her experience that if she had any concerns about sobriety, she would have noted and shared that with the Court during her testimony, which I found highly credible.

[49] Laliberty, a former bartender, had a concern about Frotten's choice to go to Haines Junction that day but fairly stated that he had no concerns about Schmidt, a regular customer, in terms of his ability to drive on that day. He described Schmidt to be in a good mood, as I have noted, but that is proof of nothing in the circumstances.

[50] The video of getting and paying for gas is a bit distorted since it merges time lapse still shots. Nonetheless, there is nothing to suggest that Schmidt was in the least impaired as he filled his gas tank or paid for items, including water at the Super A till. I decline to reach any conclusions as to the image of the passenger in long sleeves since the question of whether Frotten was picked up at her house does not really alter my finding that Schmidt was speeding at some points leading up to the accident.

[51] In terms of conduct after the accident, two civilian witnesses, Mackenzie and Emke, obviously found Schmidt to be alert and communicative, describing no indicators of motor or speech impairment. He was emotional and crying in Emke's presence but given the condition of his friends, this is neither surprising nor is it in any way evidence of impairment. It does neutralize any attribution of red eyes as was fairly noted by Hack to have been a discounting feature.

[52] In general, Schmidt's conduct after the accident was immediately responsive to a

crisis and he remained focused on the welfare of his two friends. His judgment showed no signs of impairment in terms of placing a coat for Frotten, getting Mackenzie to call for help, waving down Emke to drive him to hospital, and in cooperating with the police. His admission to driving too fast shows a level of candour consistent with his expressed concern only for his friends.

DISCUSSION

[53] As to the law or test of impaired driving, decisions still regularly quote from *R. v. Stellato* (1993), 12 O.R. (3d) 90, aff'd [1994] 2 S.C.R. 478 as to an appropriate test for impairment no longer speaking to a "marked departure" from normal behaviour.

Paragraph 14 of that decision expressed:

In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

[54] The Court continues with a reference that cases express and emphasize as very important. Those decisions include the *R. v. A.L.E.* 2009 SKCA 65 decision, p. 65, and *R. v. Andrews* 1996 ABCA 23, upon which defence has relied heavily.

[55] The quote continues:

The impairment must of course pertain to the accused's ability to operate a motor vehicle. If a person's functional ability is impaired in some way by the alcohol it doesn't necessarily follow that his ability to operate a motor vehicle is impaired.

[56] Five principles noted in *Andrews* as having been quoted in the *A.L.E.* decision at

para. 40 are important but I am only going to read the fifth as it relates to the onus of proof.

(5) proof can take many forms. Where it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent, the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the *ability to drive* is actually impaired.

[57] *Andrews* further notes at para. 23 various methods of proof for impairment.

[58] One of these is expert evidence coupled with the amount consumed, as to which I have reviewed a rather modified presentation in light of the exclusion of the back calculations of BAC and the uncertainty as to times and amounts of consumption.

[59] A second component, the observation of conduct, which is more typical, as to which I have also covered in the evidence led in this case and that there is an absence of correlation between any difficulties that may have been observed and the physical demands for driving.

[60] What is left, however, is whether the mental demands of judgment, risk evaluations, response to road conditions, adherence to the rules of the road including speed, whether all these factors demonstrate impairment beyond a reasonable doubt.

[61] On this, let me be clear: the accused was speeding. He slowed at times, whether in response to frost heaves or otherwise. His speed was in all probability quite inappropriate to the conditions even though he and others do exceed posted speed limits. But that itself is insufficient proof of impairment.

[62] So too the loss of control of the vehicle was something for which Mr. Schmidt must accept responsibility. It may well have derived from a flawed assessment of his

risks and the risks to his passengers, but so too it may have arisen from attention to one heave and failure to see the next heave. I have determined that those frost heaves were there. This amounts to more than speculation; it is a genuine concern that the Court has from a review of the whole of the case. But it does not enable the Court to come to a firm conclusion about impairment as was available to the Court on the facts in *R. v. Bernier*, 2012 BCCA 466, that was cited by the Crown.

DECISION

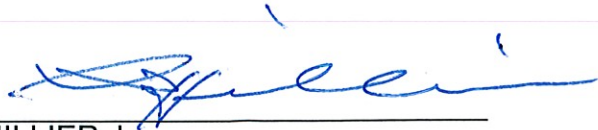
[63] In summary then, the Crown has led a fulsome case of its investigation of this matter and the Court has addressed the evidence as presented in the context of the law on impaired driving causing bodily harm.

[64] The accused certainly was at fault in this matter. He drank and he drove, and his friends faced a near fatal crash. As to the degree of fault, it is important to measure what happened as to whether it breached a criminal standard for impairment.

[65] The reality is that reacting to frost heaves is hard to simulate. Slower speed, reflexes uninfluenced by any alcohol, and a high level of attentiveness may all have helped. Any one of those would probably have avoided the dangerous driving that was exhibited in this case. But the Court here is dealing with criminal responsibility on a charge of impaired driving causing harm. Any doubt as to the outcome or consequences from a state of events cannot be speculative or measured by probabilities.

[66] The benefit of a Court's reasonable doubt, where applicable, is accorded to everyone. Accordingly, I find Michael Schmidt not guilty on both remaining counts on this indictment.

[67] I want to thank counsel greatly for your assistance to the Court.

A handwritten signature in blue ink, appearing to read "Hillier", written over a horizontal line.

HILLIER J.