

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Awer, 2017 SCC 2, [2017] 1 S.C.R. 83 | **Appeal heard:** January 17, 2017  **Judgment rendered:** January 17, 2017  **Docket:** 37021 |

Between:

**Nihal Awer**

Appellant

and

Her Majesty The Queen

Respondent

**Coram:** Moldaver, Karakatsanis, Wagner, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 8) | Moldaver J. (Karakatsanis, Wagner, Brown and Rowe JJ. concurring) |

R. *v.* Awer, 2017 SCC 2, [2017] 1 S.C.R. 83

Nihal Awer Appellant

v.

Her Majesty The Queen Respondent

**Indexed as: R. *v.*** Awer

2017 SCC 2

File No.: 37021.

2017: January 17.

Present: Moldaver, Karakatsanis, Wagner, Brown and Rowe JJ.

on appeal from the court of appeal of alberta

*Criminal law — Sexual assault — Evidence — Expert evidence — Forensic DNA analysis — Trial judge unwarrantedly subjecting evidence of Crown and defence DNA experts to materially different levels of scrutiny — Conviction quashed and new trial ordered.*

**Cases Cited**

**Distinguished:** *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272.

APPEAL from a judgment of the Alberta Court of Appeal (Berger, Watson and Schutz JJ.A.), 2016 ABCA 128, 37 Alta. L.R. (6th) 62, 29 C.R. (7th) 118, [2016] 9 W.W.R. 458, [2016] A.J. No. 457 (QL), 2016 CarswellAlta 827 (WL Can.), upholding the accused’s conviction for sexual assault entered by Topolniski J. Appeal allowed.

Nathan J. Whitling and Amy Lind, for the appellant.

Troy Couillard, for the respondent.

The judgment of the Court was delivered orally by

1. Moldaver J. — This appeal comes to us as of right from the Court of Appeal of Alberta. A majority of the court concluded that there was no basis for overturning the appellant’s conviction for sexual assault. Justice Berger, dissenting, would have set aside the appellant’s conviction and ordered a new trial.
2. Because we have concluded that a new trial must be ordered, we need not finally decide whether the impugned evidence of the Crown’s DNA expert as to the source of the complainant’s DNA, found on the appellant’s penis, was or was not admissible. If an attempt is made to tender that evidence at the new trial, a *voir dire* may be required to determine whether it is sufficiently reliable to warrant its reception. It could conceivably amount to circumstantial evidence, derived from the expert’s experience, from which an inference as to the origin of the complainant’s DNA could reasonably be drawn. Alternatively, it might prove to be purely speculative, with little or no scientific foundation. Whatever the case, I note that it differs qualitatively from the impugned evidence in *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, where false logic, devoid of any probative force, was used to infer the state of mind of persons transporting large quantities of illicit drugs across the U.S.-Canada border.
3. In the present case, assuming the impugned evidence of the Crown’s DNA expert was admissible, it was challenged by the defence DNA expert as being speculative, and without any scientific foundation. On its face, there was no way of telling whether it was speculative, scientific or somewhere in between — and defence counsel did not explore this in cross-examination.
4. Unfortunately, even though neither Crown nor defence counsel referred to the impugned evidence in their closing addresses, the learned trial judge accepted it at face value, without subjecting it to any scrutiny, and used it as an important piece of evidence in finding the appellant guilty.
5. At the same time, the trial judge subjected the testimony of the defence DNA expert, who testified that the impugned evidence was speculative and without scientific foundation, to intense scrutiny.
6. In our respectful view, the materially different levels of scrutiny to which the evidence of the two experts was subjected — none for the Crown expert and intense for the defence expert — was unwarranted, and it tended to shift the burden of proof onto the appellant.
7. In these circumstances, we feel obliged to quash the conviction and order a new trial. In so concluding, we note that the Crown did not request that we apply the curative proviso. In any event, given the importance that the trial judge placed on the impugned evidence in finding the appellant guilty, we cannot say that the verdict would necessarily have been the same had she not done so.
8. In the result, we would allow the appeal, quash the conviction and order a new trial.

*Judgment accordingly.*

Solicitors for the appellant: Beresh Aloneissi O’Neill Hurley O’Keefe Millsap, Edmonton.

Solicitor for the respondent: Alberta Department of Justice, Edmonton.