

Court of Queen's Bench of Alberta

Citation: R v Dauphinais, 2021 ABQB 21

Date: 20210114
Docket: 180584948Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Kenneth Dauphinais

Accused

Identification Ban – See the *Criminal Code*, section 486.5.

By Court Order, information that may identify the witnesses must not be published, broadcast, or transmitted in any way. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information, or submissions at the hearing of the application.

NOTE: This judgment is intended to comply with the identification ban.

**Reasons for Decision for *Voir Dire*
of the
Honourable Madam Justice R.E. Nation**

[1] The police targeted the accused in an undercover operation, often described as a Mr Big operation, between January and March of 2018. The admissibility of statements made by the accused during this operation are the issue in this *voir dire*.

1. The Law

[2] The leading case in Canada dealing with the admissibility of statements made during this type of undercover operation is *R v Hart*, 2014 SCC 52 [*Hart*]. That case decided that statements obtained via this technique are presumptively inadmissible. That presumption can be overcome if the Crown proves on the balance of probabilities that the probative value of the confession outweighs its prejudicial effect.

[3] Probative value is evaluated as a function of the reliability of the statement. In assessing the reliability of the confession, courts must look at the circumstances in which the statement was made. Factors to consider are: the length of the operation; the number of interactions between the police and the accused; the nature of the relationship between the undercover officers and the accused; the nature and extent of inducements offered; the presence of any threats; the conduct of the interrogation itself; and the personality of the accused, including his age, sophistication, and mental health: *Hart* at para 102. The question at this stage is whether and to what extent the reliability of the confession has been called into doubt by the circumstances in which it was made.

[4] After looking at the circumstances surrounding the confession, courts must look at the confession itself for any markers of reliability. *Hart* outlined some of these markers to be: the level of detail, whether the statement leads to the discovery of additional evidence; whether the confession identifies any elements of the crime that would not be known to the public; or, whether the statement accurately describes mundane details of the crime the accused would likely not know had he not committed it: at para 105. Confirmatory evidence is not necessary, but where it exists, it can be a powerful guarantee of reliability. The greater the concern raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession, or the surrounding circumstances.

[5] Weighing the prejudicial effect of the confession looks at the prejudice to the accused that may arise. Moral prejudice may increase with operations that involve the accused in crimes of violence. Reasoning prejudice arises if the court's focus will be distracted from the case before it. Reasoning prejudice can also be a problem depending on the length of the operation, the amount of time that must be spent detailing it, and any controversy as to whether a particular event or conversation occurred.

[6] In the end, a judge must weigh the probative value and the prejudicial effect of the statements at issue, and decide whether the Crown has met its burden.

[7] Even if the Crown has met its burden, trial judges are tasked with carefully scrutinizing the conduct of the police to determine if an abuse of process has occurred. No matter how reliable the confession, courts cannot condone state conduct such as physical violence that coerces the target to confess. The mere presence of inducements is not problematic, but the line is crossed when police conduct approximates coercion. The state cannot overcome the will of the accused and coerce a confession. If the accused can establish on the balance of probabilities that an abuse of process has occurred, the court can fashion an appropriate remedy including the exclusion of the confession or a stay of proceedings.

2. The Details of the Operation

[8] In a Mr Big operation, a strategy is put in place using undercover officers to befriend the accused who is the target, to encourage him to become involved in a fictitious organization. This organization is portrayed to carry on a number of business ventures, some of which are illegal or shady. The contact involves business duties for which the target is paid, and also socializing, designed around the target's interest (here, hockey games and meals out). Scenarios are played out which show loyalty and honesty is valued, and illegal activity is tolerated.

[9] The fictitious organization, (in this judgement referred to as "UO") portrayed warehousing as its legitimate business, but had several other business ventures. The accused was involved in the collection and transport of credit card pin devices portrayed as collecting credit card information, which was then used fraudulently by the UO. Two scenarios involved the purchase of illegal guns, in one of which fake passports were used by the UO to purchase the guns.

[10] In general, all scenarios were designed to build trust between the undercover officers and the accused and involve him in the UO so that he would feel loyal to the UO and perceive that it had the power to help him out.

[11] One scenario involved a member of the group seemingly just released from jail. The group picked him up, bought him clothes and provided him with an apartment. There was a social celebration to mark his release. This was to portray the loyalty of the group to its members.

[12] There was a staged incidence of violence designed to show the effect of betraying the organization. The accused was involved in the "surveillance" done by the UO to ascertain that a female member was selling information to another group. She was taken to the outskirts of Winnipeg and an assault occurred (simulated so that the accused believed her nose was broken). The accused stood lookout during the event. This was designed to give the impression that the UO was not against violence to women, but disloyalty would not be tolerated within the UO.

[13] An event was staged where a member, Y, lied to the UO about having performed work tasks that he was assigned. The accused was sent to search Y's car for the pin pads that Y stated he had delivered. The accused found the pin pads and Y was confronted. There was strong language used to reinforce that loyalty and honesty was essential. Y was fired and kicked out of the organization. Y had to return the keys to his car and his cell phone before being escorted from the UO's location. All this was in the presence of the accused. Later, a scenario was staged where Y was present in a bar, when the accused and other members of the UO arrived. Y was told to leave the bar and it was stressed that no physical violence would be used by the UO against Y, but he was no longer to associate with or even be around the members of the association. Y was clearly ostracized.

[14] Ultimately a "stim" was used. This is the event designed to put the target in a situation where he gives details of the offence under investigation if he knows anything. Here, a call came to undercover officer, X, from an identified detective in the Calgary Police Service, while the accused and X were in a car, which indicated that the Calgary Police Service was looking for the accused to arrest and charge him with the 2002 murder of Terri Ann Dauphinais ("Terri Ann"), his former spouse. At that point the UO offered support, but required the accused give any information he had to the head of the UO, the so called Mr Big or Crime Boss in these

undercover operations (the “HUO”), in order that the UO could save the accused from arrest and any culpability. The members of the UO had previously portrayed backgrounds of either having criminal charges which the HUO could make go away, or histories where they had failed to disclose to the HUO, and thus could not utilize the UO’s assistance and served time in prison.

[15] The accused ultimately gave some statements that led to his arrest.

3. Probative Value

3.1 Background Circumstances

3.1.1 Overall Magnitude of the Operation

[16] This operation lasted from January 16 to May 21, 2018, a period of 125 days. It involved 39 scenarios. It would be on the shorter to medium length as Mr Big operations go. It was mainly based in Winnipeg, but involved trips to Saskatoon, Montreal, and Ottawa, and drives in Ontario, Manitoba, Saskatchewan, and Quebec.

3.1.2 Relationship Between the Undercover Officers and the Accused

[17] The accused dealt principally with X, the two socialized and travelled together and were involved in the business of the UO. The accused and X had a close and easy relationship.

[18] The accused was willing to make himself available for the UO. He owned and lived in a house in Winnipeg with his two teenage sons and a girlfriend. His relationship with his girlfriend was described by him as rocky and he reported that they had broken up during the operation.

[19] Most undercover officers described the accused as relaxed, easy to hang out with, and he had a sense of humour. They had common interests, and this made the relationship easy to build.

3.1.3 The Nature and Extent of the Inducements Offered

[20] The costs of the operation involved payments to the accused of \$4,400, as well as \$1,882 spent on food and drink. He was provided with flights and hotels valuing \$1,500 as well as mileage when his car was used and an iPod.

[21] The accused had a mixed financial profile. He owned his own home and a motorcycle. He expressed concern that his girlfriend might try to make a claim to half of the value of the home. At one point in the operation he was hoping to sell the motorcycle for \$12,000 as he was short on cash. He was not working outside of this operation. At the start of the operation the accused had been on Workers’ Compensation Board (“WCB”) benefits as a result of a work accident, although he expressed that there were some issues with the continuance of those benefits. The accused at times talked of jobs he was considering or for which he was actively applying.

[22] A job in Saskatoon was an inducement offered to the accused, tailored to his express need for work and his desire to move to Saskatoon. During a meetup on May 8, the accused advised that he had been offered a job driving for a hydro company in Northern Manitoba earning \$30 an hour. The evidence as to acceptance or when this job would start was not clear from the evidence; the accused told one member of the UO that he still needed to get medical clearance. Two days later on May 10, the UO offered the accused a job in Saskatoon, the details of which were to be worked out with HUO in Montreal. The impression was that the job would start near the end of June. The intention was to keep the accused in Winnipeg rather than moving to

Thompson, Manitoba for the job, as the undercover operation was scheduled to terminate by the end of May and a move to Thompson would make it more difficult to complete.

3.1.4 The Presence of Threats or Violence

[23] As previously described, violence was used against a female who worked in a retail location which used the UO's pin pads to obtain the credit card information to be used for fraudulent purposes. It was portrayed that she was selling them to another organization, so she was "beaten down." It was clearly and graphically portrayed that she was assaulted, fired, and then replaced.

[24] There was also a debt collection scenario where the group was looking for and finally found someone who owed money to the UO. A number of members of the UO and the accused confronted him in a parking lot. He was submissive and gave them keys to his motel room. The accused went to the room with another UO member and took and later counted approximately \$5,000 in money and poker chips. Violence was not used in the scenario, but the scenario was to show that as a group, the UO was capable of violence.

[25] The UO was portrayed as purchasing guns. In one scenario, X did grab a gun and put ammunition in it, and put it in his waistband to portray that he was willing to use a firearm if necessary in the scenario. Other than that, there was no evidence of anyone carrying guns and no guns were pointed or discharged in any of the scenarios.

[26] There was no evidence that any threats of violence were made or suggested toward the accused.

[27] X had a back story that he had a bad temper in the past and found it easier to control now he had met another employee of the UO as well as the accused. X did tell a story that in the past he had lost his temper and injured someone to the point that they were now confined to a wheelchair. X was the person used by the UO when loud, aggressive positions had to be taken or shown.

3.1.5 The Personality of the Accused

[28] The accused was described by the undercover officers as social, intelligent, having a sense of humor, and willing to discuss his life experiences. He drank alcohol sparingly and used marihuana at times. He was socially at ease. The accused did not have an extensive social network, although he did have a close friend or friends in Saskatoon. He did not appear to have a lot of outside interests, although he had a motorcycle and was interested in a proposed motorcycle trip.

[29] The accused was described by X as easy to hang out with. When in other cities for "jobs," the accused would often go out and shop or amuse himself when the parties had to wait to complete the UO's business. He was responsible and showed up for tasks on time.

[30] The accused appeared to be a concerned father to his boys, and concerned that his children would be financially self-sufficient. He lived with his two teenage sons, and often brought them up in conversation.

[31] The accused was non-confrontational. In fact, in one scenario designed to have two people insult the accused and members of the UO stand up for him (to show loyalty), it was described that the scenario was hard to complete as the accused was not taking offence, and trying to diffuse the situation himself.

3.1.6 The Nature of the Interrogation

[32] At the interrogation stage and after the stim, every undercover officer who dealt with the accused testified that the demeanor of the accused changed significantly. In addition to the stim, several steps were taken to increase the pressure on the accused. This included: two police officers going to his house in Winnipeg and telling his sons that the accused was wanted for arrest for the murder of their deceased mother; other members of the UO portraying that his impending arrest was bringing unwanted police attention on the UO; and relaying information that there was a “manhunt” for the accused, including asserting that the police were “swarming” the hotel room which the accused had just left.

[33] During this time, the accused was described a stressed out, no longer his jovial self, and clearly concerned for himself and any negative repercussions to the UO as a result of the accused’s association with it. The interrogation was partly videotaped and partly audio recorded. The interrogation took place over a period of four days. It was fashioned under the guise that the organization had connections and they could help discredit any new information the police had received. Information was fed to the accused to suggest that the wife of his best friend had informed the police she had seen the accused pick up a weapon the evening of Terri Ann’s death. The accused was put in several meetings with X and the HUO, with the aim to have him give details of the murder and his involvement. Despite considerable pressure, he did not speak coherently about the use of a weapon or give much information. When this did not produce the inculpatory statements the police hoped for, they told him that his best friend, G, had given the police the accused’s cellphone number – in essence that G had “ratted” on the accused (quote from X: “G fucking ratted you out”). These all had the effect of isolating and pressuring the accused.

[34] There were no threats, no violence, or specific inducements made to the accused in the course of the questioning. The overarching theme of the interrogation was that the organization could “fix” things with the police by paying off witnesses, or manipulating evidence. Also, the UO was portrayed as being capable of giving the accused a false identity and getting him across the Canada /US border undetected. What the accused needed to do was search back in his memory and try to think what new information the police must have, and provide details of his memory of the events of the evening/early morning of April 28 and 29, 2002.

[35] During a period of four days from May 17 to May 20, the accused was moved from one hotel to another and one city to another, and was effectively isolated from anyone who was not a member of the UO. The accused expressed concern that his telephone had been previously bugged. At the start of the interrogation period, he was told to take the battery out and at another time to put it in the microwave, in order that it could not be tapped, and also so his movements could not be tracked by the police. At the time of the “stim” call, the member of the Calgary Police Service in charge of the file directed two Winnipeg Police Service members to go to the accused’s house in Winnipeg, where they knew his two teenage sons (aged sixteen and eighteen) were living, and inform the boys that the Calgary Police Service were looking to locate their father in order to arrest and charge him with the murder of Terri Ann (their mother). This was emphasized a number of times through the interrogation period, in order to emphasize the degree to which the police were searching for the accused.

[36] The stim call was made in the afternoon of May 17. The accused and X aborted their drive to Winnipeg and returned to Montreal by car to avoid police detection. X’s conversation

with the accused was recorded covertly during that time. That is the first part of the interrogation period. After “hiding” in the covert location in Montreal and later in a hotel room, there was a meeting with the HUU at 7:30 pm and then continued taped discussions with X until just after midnight. On May 18, the accused was left alone to “lay low” in Montreal until 9:43 pm when X met with him to socialize and try to obtain information from him. On May 19, the accused was left alone in his hotel until 2:50 pm, when X met with him and later the HUU was also involved in that interrogation, which lasted about 3.5 hours. It was decided the accused should be flown to Winnipeg, but only after other members of the UO ascertained that it was “safe” to avoid arrest there. The accused and X flew to Winnipeg on May 20. There was a further interrogation period starting after 8 pm in the evening and continuing to 12:08 am on May 21. In the morning of May 21, the accused was picked up by members of the UO and driven to the airport, supposedly to go to Vancouver to “hide”; however, the plane had a scheduled stop in Calgary where he was arrested by the Calgary Police Service.

[37] During the four-day period, the accused was permitted to send messages to his sons, and there was an exchange of clothes and other necessities facilitated by one of the members of the UO, including obtaining medication the accused needed. The accused did occasionally go out and walk and drive during this period. However, he was constantly expressing concern that his phone was bugged, and was sparing of any calls. He also expressed concern that he was being followed.

[38] The accused reported to X that he had back pain, was not sleeping well, and his blood pressure was “through the roof.” He also made several statements during the course of the four days about suicide being an option for him, rather than face arrest. The accused stated that he would rather take a shot in the head than go to prison. He stated that he was nervous and wanted to jump off a bridge, and that he would rather die than go to jail. The accused outlined his options at one point as: (1) self-harm; (2) go to Calgary and give himself up; or (3) talk to the HUU. X, who was with him during these statements, steered him away from the suicide option and encouraged him to take assistance from the HUU. He also stressed that their friendship was strong and X did not want to lose the accused to jail or otherwise. X testified at the *voir dire* that he did not believe there was a concern about self-harm. X was alive to that concern, but felt he was monitoring the risk. However, notably X did not bring this up to the file manager who was deciding the scenarios. The accused was left alone in his hotel room for long periods of time over the four days of “hiding.”

3.1.7. Conclusions About the Circumstances in Which the Statement was Given

[39] The concern is that the circumstances in which a Mr Big confession is made may undermine the supposition that people do not normally confess to crimes they have not committed. Because the organization works outside of police restraints, a detailed examination of the operation is required. The development of the connection to this accused, and the development of the UO is not out of the ordinary for a Mr Big organization. Nor did the operation take advantage of the accused’s vulnerabilities in terms of addictions, social deficiencies, or financial situation. However, the nature of the interrogation raises many concerns.

[40] When the use of a stim that suggested that the accused risked being immediately arrested did not result in the desired statement from the accused, actions were taken to ramp up the psychological pressure on the accused. These included: (1) suggesting there was a “manhunt” for

him; (2) involving his teenage boys in the operation by sending uniformed police officers to tell them they were looking for their father to arrest him (a deliberate falsehood); and (3) keeping the accused essentially secluded and “hidden” for four days, with numerous “interrogations” during that period. Whenever the accused stated that he had no or limited memory of events and referenced an industrial accident with a head injury as the cause of his confusion, he was persistently challenged. His loyalty to the organization and his friendship to X were brought up as reasons he should be more forthcoming with the information they were demanding.

[41] When the original idea of a new witness was not working, the undercover officers tried to arrange a meeting of the accused with his good friend, G, who he knew around the time Terri Ann was killed. When G would not cooperate, the tactic was to feed the accused information that suggested that G had given the accused’s telephone number to the police (in essence, a betrayal). This was all while the undercover officers knew the accused was increasingly stressed, had shaved his head and beard to change his appearance, was complaining of high blood pressure and backache and stress and on more than one occasion mentioned suicide as a possibility if he had to face arrest. The price at stake was his liberty. Either he was to give information to the standard required by the organization so they could “help” him or face arrest and detention.

[42] The police showed no concept of restraint in the pressure they were willing to put on the accused. They used completely false information of arrest, and a manhunt, to put the accused in a mental framework where he was kept “hidden” from the police for four days while they questioned him and spent time with him, all the time looking at angles to get him to give them information. When he did not do so, the police chose to ramp up the pressure. This high-pressure tactic lasted for four days, a period of time that is concerning.

3.2 Markers of Reliability

[43] The accused never gave much detail, nor did he describe what happened on the evening of Terri Ann’s death, other than a few fragments of memory. He continually indicated that he could not remember; explaining he had “blacked out,” and that his subsequent industrial accident had affected his memory.

[44] Examining the reliability of the statements made by the accused, there are no markers of reliability. No information was gained that identified the holdback evidence that the detectives were looking for. Furthermore, there was very little detail given by the accused. He never described the crime start to finish; in fact, he was never asked if he had killed Terri Ann. The tactics involved were all premised on him being the aggressor. His statements were very contradictory. For example, he continually resisted the suggestion there was a weapon, then he talked of a weapon that he divided up into pieces and burnt, and then stated he was 100 percent sure there was no weapon. He continually indicated that he had no memory of much of the evening, and stated that his work injury (of which the undercover officers knew) affected his recall. The most inculpatory statements made by him in approximately 900 pages of transcription of the interviews done over four days are set out below.

[45] On May 17, the accused stated to the HUU that he had zero recollection of any murder, but “I think that it’s all my fault.” When asked why, he said because he was head of the house. The accused also stated to the HUU that he wore the same clothes to work the next day and after being released from police questioning, he burnt them and all his papers. This was done in broad daylight, at the home of a relative where he was living with his father. He stated “I panicked and burnt everything.”

[46] To X on May 20, in response to a question as to why the accused thought there were no fingerprints, he said that he went downstairs and got gloves, and that he was mad when he was downstairs. He stated “[t]hen I think I just fuckin’ grabbed her and knocked her out of the way. She went down funny and that was ‘holy fuck’ like panic made. So-and extra panic mode because there was three fuckin’ little...just headed out to the car and left. And that was it. Shaking all the way.”

[47] The statements give no explanation of the details the accused knew from his police interview – that Terri Ann was strangled and that she had been beaten. All through the interviews the accused continually resisted any suggestion that there was a flashlight as a weapon. He gave no statements that acknowledged or explained the power failure in the house, or the removed window downstairs.

[48] The accused’s statements were contradictory at times. In one instance, he was 100 percent certain there was no weapon. However, at another time, he stated that any weapon was in multiple places, destroyed, and gone. He at one point described putting the kids down to bed, and at another point said he did not even remember putting the kids to bed. He remained adamant that whatever any recent police informers were saying, they were making things up. He came up with no ideas or suggestions of what that new information could be, despite being pushed on it for hours.

3.3 Conclusions on Probative Value

[49] The probative value of the statements is weak as they give almost no detail and there is no holdback information identified. The totality of the interrogations led to confusing and contradictory answers against a background of the accused constantly reaffirming that he has no or limited recollection of events.

[50] The police tactics used in the interrogation stage of this operation raise a real concern that the continual and ongoing pressure put on the accused over four days may have resulted in some type of statement to appease the UO. Providing more information about his actions on the night of Terri Ann’s death was presented as the only way the accused could maintain his liberty by avoiding arrest, and also the only way to stay in the UO.

4. The Prejudicial Effect of the Statement

[51] The prejudicial effects here are the dangers of moral and reasoning prejudice, that the accused was involved with a criminal organization committing “crimes” that he believed were real. These are significant dangers in a jury trial. As this will not be a jury trial, some of these concerns are alleviated. It is true that a judge may be less influenced by any moral or reasoning prejudice than a jury. However, the fact of a judge-alone trial does not result in a presumption that there would be little or no prejudicial effect. Trial fairness is an important consideration at this stage of the analysis.

[52] If the statements are admitted, the trial judge or jurors must analyze them for their truth and the weight to be placed on them in the context of all the evidence at the trial. Once the statement is admitted in this *voir dire*, the details of how the statement was obtained may be less of an emphasis, or somewhat redacted for a jury due to concerns of moral or reasoning prejudice. Thus, the only time during which the manner in which the statement was obtained and the

pressure put on the accused is carefully examined is here, in the *voir dire*, in the assessment of its probative value and prejudicial effect.

5. Weighing the Probative Value Versus the Prejudicial Effect

[53] This involves the application of the law, to the analysis of the undercover operation and its outcome, to decide if the Crown has met its burden to show that the probative value of the evidence overcomes its prejudicial effect. Here it is useful to go back to the *Hart* analysis. In *Hart*, Moldaver J, writing for the majority, laid out that the concern about Mr Big operations is the reliability of the confessions they produce. The concern is that as the nature and extent of the inducements increase, the potential for a false confession increases. Thus, Moldaver J highlighted the importance in introducing a test of assessing the reliability of the statement, as well as the prejudicial effect on the accused. His solution was a two-pronged approach: first, he recognized a new common law rule of evidence; and second, he introduced a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct.

[54] Here, I am dealing with an evidentiary rule. The inadmissibility of the statement is overcome where the Crown can establish, on the balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value turns on an assessment of its reliability. Its prejudicial effect flows from the bad character evidence that may be admitted. Is it reliable enough to be put before a judge or jury in a trial setting?

[55] Here the statements of the accused have a low probative value. They do little to add to what was known to the police prior to the undercover operation, and confirm very few details of the case. Further, they were obtained in an extremely high-pressure environment after four days of questioning with constant inferences and suggestions that the accused's explanations were not good enough. In short, there were almost no markers of reliability in a statement that was given in circumstances of escalating pressure.

[56] When I look at the lack at the general nature of the statement, the paucity of what was said, the lack of confirming evidence, and the nature of the interrogation, I do not find that the Crown has met the burden here on the balance of probabilities. The Crown's burden is to show that the probative value is such that it overcomes any prejudice, so that what would otherwise be inadmissible evidence becomes admissible at trial. The Crown has failed to do so.

[57] The result is that the statements made by the accused during the Mr Big operation are not admissible at the trial.

6. Does the Operation Amount to an Abuse of Process?

[58] Very few reported cases which have examined a Mr Big operation include a detailed discussion of abuse of process. In many cases it is not argued. In this case it was.

6.1 The Law

[59] The start of this analysis has to be what was said about abuse of process in Mr Big operations in *Hart*. Justice Moldaver addressed the role of the doctrine of abuse of process. He outlined that police misconduct will not be forgiven so long as a demonstrably reliable confession is secured. The onus is on the accused to show that an abuse of process has occurred:

Hart at paras 111–113. The abuse of process doctrine is intended to “guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system”: *Hart* at para 113.

[60] Justice Moldaver specifically noted at paragraph 114 of *Hart* that the doctrine of abuse of process should be “reinvigorated” in the Mr Big context, but declined to set out a bright-line rule for when the doctrine applies. He stated at paragraphs 115 to 117:

It is of course impossible to set out a precise formula for determining when a Mr Big operation will become abusive. These operations are too varied for a bright-line rule to apply. But there is one guideline that can be suggested. Mr Big operations are designed to induce confessions. The mere presence of inducements is not problematic (*Oickle*, at para. 57). But police conduct, including inducements and threats, becomes problematic in this context when it approximates coercion. In conducting these operations, the police cannot be permitted to overcome the will of the accused and coerce a confession. This would almost certainly amount to an abuse of process.

Physical violence or threats of violence provide examples of coercive police tactics. A confession derived from physical violence or threats of violence against an accused will not be admissible – no matter how reliable – because this, quite simply, is something the community will not tolerate (see, e.g., *R. v. Singh*, 2013 ONCA 750, 118 O.R. (3d) 253).

Violence and threats of violence are two forms of unacceptable coercion. But Mr Big operations can become coercive in other ways as well. Operations that prey on an accused’s vulnerabilities – like mental health problems, substance addictions, or youthfulness – are also highly problematic (see *Mack*, at p. 963). Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system. As this Court has said on many occasions, misconduct that offends the community’s sense of fair play and decency will amount to an abuse of process and warrant the exclusion of the statement.

[61] Despite outlining examples of when Mr Big operations amount to abuse of process, Moldaver J also specifically noted that he was not foreclosing the possibility that Mr Big operations can become abusive in other ways and left it up to the trial judges’ discretion to determine when there has been an abuse of process: *Hart* at para 118. He specifically pointed to the factors set out in *R v Mack*, [1988] 2 SCR 903 at 996 to provide guidance.

[62] Case law has made it clear that a typical Mr Big operation is not in and of itself an abuse of process: *R v Yakimchuk*, 2017 ABCA 101 at para 87; *R v Klaus*, 2017 ABQB 721 at para 54; *R v Allgood*, 2015 SKCA 88 at para 67. In *R v Unger* (1993) 85 Man R (2d) 284 (CA), Scott CJ states: “[c]ourts should not be setting public policy on the parameters of undercover operations. The Crown’s position, with which we agree, is that the public would endorse rather than be shocked by the efforts of the undercover agents in this case.” In paragraphs 272 to 273 of *R v Bennett*, 2020 ABQB 728, B Nixon J states that “[t]he threshold for the second prong is quite high,” citing *R v MM*, 2015 ABQB 692, a case where the Court found that there was no abuse of process despite the relatively young age of the accused.

[63] Nonetheless, abuse of process in the Mr Big context remains important in ensuring that police discretion does not run untrammelled in a way where state resources are deployed in an unfair fashion against vulnerable people to coerce confessions. There is a balance to be struck between the concepts of justice and fairness and the necessity of police tactics to investigate crime.

[64] There are four post-*Hart* cases where abuse of process has been considered: *R v Derbyshire*, 2014 NSSC 371 [*Derbyshire*], affirmed 2016 NSCA 67; *Laflamme v R*, 2015 QCCA 1517 [*Laflamme*]; *R v Nuttall*, 2016 BCSC 1404 [*Nuttall*], affirmed 2018 BCCA 479; and *R v SM*, 2015 ONCJ 537 [*SM*].

[65] In *Derbyshire*, the police set up a scenario to determine what involvement Brittany Derbyshire had in a homicide. While not a Mr Big operation, Wood J decided there was an abuse of process arising from the threats and intimidation that Ms. Derbyshire faced. In *Laflamme*, Dufresne JA indicated that the actions of the Mr Big in this scenario were unacceptable as it was implied that if the Mr Big found the interview to be unsatisfactory, his friend would be at serious risk of harm. It was found in paragraphs 82 to 88 that the pressure created through violence and threats could not be tolerated, and the coercive tactics tarnished the police investigation and threw the administration of justice into disrepute.

[66] *Nuttall* and *SM* found abuse of process where the operations preyed on a target's specific vulnerabilities. In *Nuttall*, the exploitation of the accused's spirituality, social isolation, and desperation for friendship all contributed to the finding that the police conduct was egregious and amounted to an abuse of process. *Nuttall* made it clear that it was the entire context of the undercover operation that had to be examined "to determine whether this is one of those rare cases in which a stay of proceedings is warranted to ensure the justice system is not brought into disrepute by the continued prosecution of the defendants": at para 784. It was the subjective impact of the police actions on the accused that were taken into account. In *Nuttall*, the trial judge recognized that "sophisticated criminal minds must be met with creative police work: at para 789. In *SM*, police used the father of 15-year-old SM as an agent of the state. SM's vulnerabilities included his youthfulness, emotional and financial inducements, and manipulative trickery by his father. This misconduct was found to offend the community's sense of fair play and decency, and it was determined that there was an abuse of process.

[67] The difficulty in establishing an abuse of process claim should not be confused with heightening the balance of probabilities standard required to make out such a claim. If it is demonstrated on a balance of probabilities that a Mr Big operation violates fundamental principles of justice which underlie the community's sense of fair play and decency, there is an abuse of process.

6.2 Analysis of the Law Applied to the Facts

6.2.1. The Type of Mr Big Operation

[68] All Mr Big operations start in the same way, with the cultivation of a friendship and business arrangement in a fictitious organization. In many, the impetus to provide a confession is to gain entry into the organization and obtain a job (see e.g. *Hart*). Others use a completely different model. They introduce the concept that the police are looking for the person to do with the crime under investigation, or are planning to arrest the person. In order to avoid arrest or police attention, the accused needs the help of the organization to either manipulate evidence or

get out to the country; however, all details of the accused's involvement must be given for the organization to provide this assistance (see e.g. *R v Buckley*, 2018 NSSC 1; *R v Magoon*, 2015 ABQB 351; *R v Streiling*, 2015 BCSC 597). Some of these scenarios, including in this case, involve people who have already given statements to the police, but never charged with the crime under investigation to that point. Careful attention has been given in developing these scenarios to illustrate to the accused that the organization has the power to save its members from the criminal justice system.

[69] Courts must distinguish between these two types of operation. In the first type, any disclosure of the details of the crime is carried out in the context of full disclosure of the past in order to get into an organization. The concerns are that the accused may be so desperate for the money, status, or socialization that he may falsely confess to get full membership in the organization. The second type of operation, of which this is one, is different. The accused wants to stay in the organization, but a problem with his past has come up. This "problem" often comes in the form of a "stim," which is designed to put pressure on the accused. This second type of Mr Big operation usually involves putting pressure on the accused in hopes he will confess.

6.2.2. Threat of Loss of Liberty

[70] The initial stim used in this operation was a call from a non-undercover detective in Calgary to X, saying that the Calgary Police Service was looking for the accused to arrest him and charge him with the murder of Terri Ann. In this way, there is initially the threat of real police action.

[71] In this operation, it was represented to the accused that the police had a new informant who had provided information that she had seen the accused collect a weapon the night of Terri Ann's death 16 years previously. When the accused continued to insist that this was impossible and that the informant must be lying, the undercover police used other techniques to create more pressure on the accused. The accused was told there was a 'manhunt' out to find him and arrest him, and in fact the police were "swarming" the hotel room he had left in Montreal when he was moved to Winnipeg (but kept in a hotel as it was not safe for him to be at his home). He was advised to remain hidden in motel rooms arranged by the organization. In addition, it was represented to the accused that other members of the organization were taking "heat" from the police due to their interest in the accused. This was designed to put more pressure on the accused as this was not good for the organization. Finally, after three days, the accused was told (falsely) that his longest standing and best friend had turned over information to the police (ratting him out). The situation was intentionally created to be stressful for the accused. The stage was set so that the only way for the accused to avoid arrest was to tell the members of the UO about the death of his wife, so the HUU would do whatever was necessary to get rid of the manhunt. This state of affairs progressed over four days, with multiple "interviews" in different formats, all recorded in some fashion, designed to get some information from the accused that could actually lead to his arrest.

[72] A threat to one's liberty, much like a threat to one's person, can significantly affect a person's ability to tell the truth. Recognition of the seriousness of a threat to liberty is evident in section 7 of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, which protects life, liberty, and security of the person. There is an obvious difference between this case and *Derbyshire* in that the undercover officers in *Derbyshire* posed as gangsters and were the ones that threatened

her. Here, the undercover officers posed as friends of the accused and the threat was the threat of arrest by other police. However, in both cases, the application of the threat was fully under police control. Further, the targets of the respective operations felt that they were not free to leave until they gave undercover officers the statements they wanted to hear. The accused was held for four days while falsehoods were serially used to try to pressure him. The threat was of real police power, the ability of the state to arrest and detain for a serious crime. An effective loss of liberty for four days, and the threat of future loss of liberty by arrest, can be sufficiently compelling to coerce a confession and amount to an abuse of process. As mentioned earlier, the period of four days raises concern that the Mr Big operation is approaching the level of coercion.

[73] To be clear, not every threat to liberty in a Mr Big operation is an abuse of process. Like physical violence in Mr Big operations, it can be a legitimate tool for undercover officers to use in order to determine the truth. In cases of physical violence, the violence must reach the level of coercion to reach the threshold for abuse of process: see *Hart* at para 59; *Derbyshire* at paras 102–03; *R v Randle*, 2016 BCCA 125 at para 67; *R v Balbar*, 2014 BCSC 2285 at paras 382–83. In the same way, a threat to one’s liberty will amount to abuse of process if it meets the threshold of coercing a confession.

6.2.3 Pressure Amounting to Coercion

[74] During the interviews with the HUU, who was not successful in getting incriminating information from the accused, the accused was met with pressure and disbelief. When the accused told the HUU that he has had problems with his memory due to an industrial accident where he smashed his head (the undercover officers knew the accused was on WCB for a work accident when they started the operation), the HUU made comments such as: “don’t disrespect me” and “I think you are holding out.” Later, X told the accused that the problem was that the HUU did not think that the accused trusted him, again to pressure the accused to give more details. This disloyalty, of course, had been portrayed to be akin to sin in the UO. Interactions such as this occur between the HUU and the accused:

HUU: Kenny, I want to fix something, but I have nothing to fix.

Accused: I don’t think there is anything to fix. That is the thing.

[75] One of the arguments from the prosecution was that the accused never denied that he had killed Terri Ann. When one reads the transcripts and views this Mr Big operation, however, that open-ended question was never something he was asked. The accused had provided a statement to the police at the time of Terri Ann’s death, sixteen years prior, in which he stated he had been at the house the evening before Terri Ann died. He described babysitting the children while Terri Ann went grocery shopping, and eventually leaving. He accounted for his actions afterwards. The way the story was given and the “additional “evidence was presented, it was assumed at all times that the accused had killed Terri Ann, and the task was to get details to try to figure out what information the recent informant had provided that could result in the recent police action. In this way, the police identified the accused as the one who had killed Terri Ann, and applied pressure until they got the result they wanted. The police refused to accept that their theory of the case may be incorrect. The stage was set so that the only way for the accused to avoid arrest was to tell the members of the UO about the death of his wife, so the HUU would do whatever was necessary to get rid of the “manhunt.”

[76] When one method of applying pressure failed, the police continually upped the pressure until the accused finally caved on the fourth day. At 8:45 pm on May 20, X told the accused that his friend ratted him out. Reading pages 32 to 91 of the transcript of that interview, X continually speaks ill of the friend, G, suggesting that G was not really a friend, but actually a police informant or agent for the last sixteen years. X continually emphasizes how disloyal the friend was. In addition, he introduces that “multiple” people are now saying they saw the accused with a weapon, which the accused continued to resist. The accused suggested he should just go to the police and explain that these people are lying. X discouraged that course of action, and continued to pressure the accused. The accused made conflicting statements about a weapon that make no sense – for instance, stating that it was “in multiple pieces” and “gone,” but then denying any memory of a weapon. At this time, the accused again referenced his memory issues. X then raised the ante again, indicating that X may be implicated if the police find the accused, that the accused is putting X at risk (presumably due to police attention on the UO). It is only after all of this that the accused makes very general statements that link him to the offence. It is clear that after four days of increasing psychological pressure, being kept “hidden” from the police (but effectively isolated) and continually disbelieved, the accused is being coerced with new pressure, to give information that links him to the offence.

[77] This is why the distinction between the two types of Mr Big operations is important. The file manager in this case testified that a Mr Big operation is an investigation where the target is identified, and scenarios are designed and presented in hopes of creating an environment where the accused is comfortable to give details of the offence being investigated, if they know anything. This definition of the operation was parroted by X. However, that was never the design of this Mr Big operation. The sole design of this operation and its execution was to put pressure on the accused. It aimed to raise his fears and concern that he was about to be arrested and pressure him to disclose details of the offence, ostensibly so the UO could help him. The aim was never to make the accused “comfortable” to give details of the offence. This is often the case in the second type of Mr Big operations. The danger associated with them is that the police, as in this case, may exert an extreme amount of pressure on the accused that approaches the level of coercion. In addition, it should not be overlooked that undercover officers are using the power of the state, the legitimate power that the police have to charge and arrest someone, as the method to take away someone’s liberty and keep them scared and willing to talk to the UO to obtain its help.

6.2.4. Exploitation of the Parent-Child Relationship

[78] Another factor in looking at the police conduct in this case is their exploitation of the accused’s parent-child relationship.

[79] The conduct of the police in *SM* in recruiting an absentee father to get information from his child was found to offend the community’s sense of fair play and decency and amounted to an abuse of process. One of the obvious factors in *SM* that led to the inadmissibility of the evidence was the young age of the accused. However, the Court also discussed the parent-child relationship, stating that “it is clear that the police were exploiting the parent/child relationship between M.F. and S.M. A child should normally be able to look to their parent to take care of them and to be able to trust them.” The use of an absentee father as an agent of the state to trick a child was found to fall in the category of manipulative trickery.

[80] Paragraph 75 of *Magoon* commented on the real concern about the particular inducement that was used; an offer to the accused parents to help them regain custody of their children from social service, something the undercover officers knew was extremely unlikely to happen, but emotionally crucial to the targets.

[81] Here, the file manager sent two uniformed members of the Winnipeg Police Service to tell the accused's teenage children that their father was wanted, and would be arrested and charged with the murder of their mother, and to inquire of the accused's whereabouts. This was done in conjunction with the stim. The intention was to make the "manhunt" more realistic to impress upon the accused how seriously the police were searching for him. However, it was done when the police knew the teenage children (one of whom was still a minor) would be alone, without a parent or adult living with them for the next days, while the police conducted their interrogations. The involvement of children in this way shows a shocking lack of care of how teenagers could be vulnerable in this home situation and the effect that police message may have on these teens.

[82] On May 20, X went to the accused's residence to get medication the accused needed, Ramipril, and exchange dirty clothes for clean ones. The interaction was taped. It was very short, and there was no attempt to check on the welfare of the teens. In addition, the accused had written a note to the children that he sent with his laundry, which X had opened and read surreptitiously. The note was quite innocuous, but directed the children to "torch this paper please." This both elevates the concern felt by the children and illustrates the state of mind of the accused.

[83] I recognize that the police conduct in this case is not as egregious as the police conduct in *SM*. Further, I am aware that there was no abuse of process found in *Magoon*. These factual circumstances, on this ground alone, are insufficient to establish a claim for abuse of process. However, the police use of the accused's children to help "validate" their claim of imminent arrest, their reference to this in discussion with the accused, and their knowledge the children would report it to their father amounts to yet another attempt by police to "ramp up" the pressure on the accused. The exploitation of the parent-child bond in this case is a factor in reviewing the facts in determining if there has been an abuse of process.

6.2.5 Psychological Pressure on the Accused

[84] The accused did not testify in the *voir dire*, so all that can be taken from his state of mind is in his actions and the descriptions by the undercover officers. That evidence was clear – the accused had a complete change of demeanour after the stim and was stressed and upset. He was not providing information, so more pressure was applied and tactics were switched to try to obtain a confession. He was constantly told that he had to provide more detail, and his denials were not believed.

[85] There is evidence that this pressure took a toll on the accused. The evidence of every undercover officer who dealt with the accused in the days after the stim was that the accused's personality had changed completely. He was no longer his easygoing, jovial self. He was stressed, depressed, and quiet. In addition, he reported a number of times that he was concerned the police were following him. He was moved from Montreal to Winnipeg, but kept "hidden" in a hotel.

[86] Although the accused was never kept locked in his hotel rooms and was ostensibly free to leave, he was clearly concerned about being detected and arrested. On one occasion, when he went for a drive, he was sure someone was following him. He asked one of the UO members to bring a razor to his hotel and he shaved off his long beard and the hair off his head to change his appearance. He saved all the hair clippings and walked a block away to dispose of them in a dumpster so that they could not be traced to his hotel room. When he noticed a police car parked outside his hotel room, he pinned the curtains together so they would not flutter. He expressed concern that his phone was bugged, and clearly did not want to use it to contact anyone. He was provided with a burner phone, but was clearly concerned about contacting his sons in case that phone was tapped. Amidst all of this, the undercover officers did nothing to dispel the accused's increasing paranoia; to them, this was useful to pressure the accused. In fact, they reinforced the perception of the imminent arrest which only the UO could stop.

[87] The accused was apologetic that this situation had now brought police attention to the UO. While strategizing about his options, the accused expressed on a number of occasions that suicide was an alternative if he was going to go to jail. He talked of putting a bullet through his head, jumping off a bridge, or being in a box below ground. Reading these comments in context, they cannot be classified as serious, immediate suicide threats. However, they are an indication of the state of mind of the accused. Although X said he was aware of this and as a police officer was monitoring it, the accused was purposely left alone and "hiding" for significant periods of time. On May 20, the accused, talking of his situation to X, said: "like I was saying I fuckin' walking around with little flashes of paranoia and freaking out and thinking, you know, I guess if they roll up and grab me here, you know, you guys will find out eventually..." (they being the police).

[88] Mere stress or upset is insufficient to ground a claim of abuse of process. As confirmed in *Nuttall*, there must be a manipulation and exploitation of vulnerabilities. In this case, the police disregarded, or at least minimized, the effect that the high-pressure tactics were having on the accused. Although, the psychological effect the investigation had on the accused is insufficient to ground a claim of abuse of process on its own, it further contributes to the complete factual matrix in examining whether an abuse of process occurred in this case.

6.3 Conclusion on Abuse of Process

[89] The accused has the onus to show an abuse of process on the balance of probabilities. Abuse of process is intended to guard against police conduct that society finds unacceptable and threatens the integrity of the justice system. It goes to the fairness of the trial. It is not a finding that is made without thorough analysis of the totality of the circumstances, and the subjective situation of the accused. The state must have engaged in conduct that is offensive to societal norms, as there are limits to the type of conduct that will be tolerated in an undercover situation.

[90] Clearly, the police need to be empowered to use guile, deceit, and other tactics to obtain a confession from an accused in an undercover operation. Thus, for instance, the fact that uniformed officers lied to the accused or his children about the immediacy of arrest is not in itself an abuse of process, although I find it offensive to involve minor children in this manner. The whole illusion of the UO, and to befriend and deceive the accused is an allowable tactic. The use of inducements, such as the job opportunity, and providing scenarios that involve violence or illegal activities are not in themselves at a level that creates concern.

[91] However, all the tactics used have to be considered together, and it is sometimes the confluence of the factors and their effect on the accused that leads to an abuse of process. If the accused is put in a situation where he is coerced to provide information, there is a line that may be crossed where the conduct of the police is unacceptable. The abuse of process concern here is not that economic pressures were used, or that inducements of a job, money, or friendship were overwhelming; rather, it is that in pursuit of information as the interrogation stage unfolded, the police seemingly lost sight of the fact that they were ramping up pressure on someone who was getting increasingly stressed, upset, and displaying some paranoia in his conduct. They continued fabricating information to pressure the accused over a period of four days during which he was essentially detained: physically isolated in a hotel room and psychologically by the lies he was being told. For four days, the accused was left to believe that the full power of the state was being employed to track him down and arrest him for a murder that occurred sixteen years before.

[92] The period of four days is problematic here. From the police point of view, they needed time to try and arrange a meeting between G and the accused, which never came to pass. In addition, they were involved with two Mr Big operations in relation to this murder at the same time, which may have meant delays. However, it is the subjective impact of the police actions on the accused that are the focus here.

[93] Here, it is not the usual *Hart* factors that lead to concern. It is that relentless pressure was placed on the accused, who although not locked in his hotel room, was put in a psychological state which meant he was captive for four days while the police turned up pressure on him. The interrogations were not oppressive in themselves, but it was made clear that the accused was facing a loss of his liberty unless he provided particular answers to the members of the UO. He is shown continually racking his brain for the information they wanted. His attempts to answer questions about the weapon were denials, and upon pressure, were suggestions that made no rational sense (for example, saying there was a weapon that was split between provinces). These answers were not accepted and increasing pressure was put on him psychologically for a period of four days, all while his behavior demonstrated an increasing level of paranoia.

[94] In conducting these operations, the police cannot be permitted to overcome the will of the accused and coerce a confession. It is an abuse of process to hold someone close to “captive” for four days when all of the officers realize the personality of the accused has completely changed, and he is acting with increasing paranoia. During those four days, to ramp up the pressure by piling on falsehood after falsehood to pressure the accused into making a statement crosses the line of acceptable police conduct and becomes coercive. The undercover officers used the power of the state, the threat of immediate arrest and detention, when there was almost no more information or evidence to arrest the accused at that time than there was sixteen years before when he was questioned by the police. To continue this for four days is excessive.

[95] I find that in the circumstances, the defence has shown on the balance of probabilities that there has been an abuse of process when one considers the combination of the threat of loss of liberty, the pressure amounting to coercion, the involvement of the accused’s children, and the psychological effect of the four days of confinement on the accused. The statements made at the end of the four days, on May 20, were coerced.

[96] The appropriate remedy for this abuse of process is that the statements given by the accused during the May 20, 2018 meeting with X should not be admitted into the trial, as by that

time of the operation, any statements by the accused were coerced as a result of a cumulation of tactics by the police that amounted to an abuse of process.

[97] As the statements are not admissible under the first prong of the *Hart* test, that remedy does not change the result in this case. However, the analysis of abuse of process is an important function the courts maintain to review the use of police discretion in undercover operations.

7. Conclusion

[98] The statements of the accused obtained during the Mr Big undercover operation are not admissible in the trial of this matter.

Heard on the 18th to the 20th and the 23rd to the 26th day of November, 2020.

Dated at the City of Calgary, Alberta this 14 day of January, 2021.

R.E. Nation
J.C.Q.B.A.

Appearances:

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