

CANADA / JUDGMENT

R. v. Athwal

2021 BCCA 84

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 84 R. v. Athwal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Athwal,

2021 BCCA 84

Date: 20210301

Docket: CA44975

Between:

Regina

Respondent

And

Tanpreet Kaur Athwal also known as Sonia Kaur Gill

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify any of the undercover officers in this case. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated November 25, 2017 (R. v. Athwal, New Westminster Docket X075945-B).

Counsel for the Appellant (via videoconference):

K. Westell

Counsel for the Respondent (via videoconference):

S. Elliott

M. Shah

Place and Date of Hearing:

Vancouver, British Columbia

December 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 1, 2021

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Grauer

Summary:

A jury found the appellant guilty of first degree murder in the 2007 stabbing death of Amanpreet Bahia. The stabbing occurred in Ms. Bahia's home while she was alone with two young children. The appellant appeals the murder verdict on three grounds. She contends that: (1) the trial judge erred in her admissibility analysis of hearsay statements tendered at the appellant's trial; (2) statements made by the appellant to an undercover police officer were erroneously admitted without a "Hart" voir dire; and (3) the judge should have declared a mistrial when a sheriff misconducted herself at the trial.

Held: Appeal from conviction dismissed. The appellant has not established that the trial judge misdirected herself on admitting the hearsay statements or that her exercise of discretion was clearly wrong and resulted in a miscarriage of justice. Nor did the decision to forego a voir dire in respect of the appellant's statements to the undercover officer constitute an error in law. The appellant waived the necessity of a voir dire. Finally, the trial judge's refusal to grant a mistrial is entitled to considerable deference on appeal. The appellant has not shown a principled basis for interfering with that exercise of discretion.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] In November 2017, a jury found Tanpreet Kaur Athwal guilty of first degree murder in the stabbing death of Amanpreet Bahia. Ms. Bahia was killed in her home in Surrey in 2007. She was alone with her two youngest children at the time of the murder.
- [2] The Crown prosecuted Ms. Athwal for aiding the murder, relying on s. 21(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46. The jury was told that to find Ms. Athwal guilty of the offence, it had to be satisfied beyond a reasonable doubt that the Crown proved she: (1) knew someone intended to kill Ms. Bahia before the murder occurred; (2) intended to and actually aided that person in the killing; and (3) knew the killing was planned and deliberate.
- [3] The Crown alleged that the appellant planned the murder with Baljinder Bahia, the victim's husband. She then arranged for and financed the killing. The individual who inflicted the stab wounds was Eduard Baranec. The purpose of the murder was to enable an intimate relationship (including marriage) between the appellant and Mr. Bahia.
- [4] Following a "Mr. Big" operation that targeted Mr. Baranec, in which he disclosed the killing and implicated Ms. Athwal and Mr. Bahia, all three alleged perpetrators were arrested and charged with first degree murder. The appellant was tried separately from Mr. Bahia and Mr. Baranec.
- [5] On appeal, the appellant seeks to have the murder verdict set aside.
- [6] First, she says the trial judge wrongly admitted as evidence statements made by Mr. Baranec during the Mr. Big operation without properly assessing their probative value and prejudicial effect. Second, the judge erred in admitting statements that the appellant made to an undercover officer without first holding a "Hart" voir dire. Third, the appellant contends that a sheriff who was interacting with the jury at her trial misconducted herself and seriously undermined the appearance of trial fairness. As a result, the judge should have declared a mistrial.
- [7] I would dismiss the appeal from conviction. In my view, the appellant has not established error in the admissibility determinations. Nor has she shown a basis for appellate interference with the denial of her application for a mistrial.

General Background

- [8] Baljinder Bahia and Eduard Baranec were tried together for first degree murder. A jury found them both guilty. They appealed their convictions. This Court upheld the convictions: *R. v. Baranec*, 2020 BCCA 156 (the "Baranec appeal"). Leave to appeal to the Supreme Court of Canada has been refused: [2020] S.C.C.A. No. 287.

- [9] The appellant was tried alone for the murder. In 2013, she obtained an order for severance from her two co-accused: *R. v. Athwal*, 2013 BCSC 1219 ("Athwal-1").
- [10] The appellant did not testify at her trial, nor call any other evidence. Ms. Athwal did not dispute the fact of a murder. Rather, her defence was that the Crown did not prove she was involved.
- [11] The reasons for judgment in the Baranec appeal provide a general overview of the circumstances surrounding the murder. That overview is equally germane to this appeal:
- [2] Amanpreet was married to Bahia. On the morning of February 7, 2007, she was brutally murdered in her home in Surrey, British Columbia. The cause of death was multiple stab wounds to the front of her neck and to her back.
- [3] Bahia's parents, who were living with their son and Amanpreet at the time, had left the house that morning to attend a medical appointment. The killing was committed when Amanpreet was alone in the residence with her two youngest children, aged one and three.
- [4] Bahia was a "person of interest" from the outset. Athwal was in India when the murder was committed. While the police suspected Bahia may have been having an extra-marital affair with Athwal at the time of the murder, Athwal was not initially regarded as a "person of interest".
- [5] The investigation foundered for lack of evidence until December 5, 2010, when Baranec, who had been targeted with a Mr. Big operation arising out of the unrelated disappearance and presumed murder of 15-year-old Katelyn Noble in Saskatchewan (the "Noble investigation"), told Constable B, the primary undercover officer, that in addition to killing Ms. Noble he had committed three other murders. This statement was made in Saskatchewan after Baranec was persuaded to accompany undercover officers to that province to re-enact the killing of Ms. Noble and lead them to her burial site.
- [6] Baranec claimed that one of three other murders he committed occurred in 2008. He said he stabbed an East Indian woman to death in her home in Surrey. He said it was arranged by Athwal who paid him \$15,000. Baranec said he never met Bahia but, based on what Athwal told him, Baranec understood that Bahia planned the killing, knew when it would take place, and that it was arranged because Athwal and Bahia wanted to get married. He supplied Cst. B with numerous details respecting the murder, including information about the layout of the Bahia residence, how he committed the murder and what the deceased was wearing at the time. Baranec said that even though he committed the murder himself, he told Athwal he retained an unidentified third party from Toronto to do the killing. Baranec also told Cst. B that he read about the murder in the newspapers.
- [7] Following Baranec's December 5, 2010 statement, the Mr. Big operation continued but shifted focus away from the Noble investigation toward a renewed investigation of the murder of Amanpreet.

- [8] Cst. B convinced Baranec that he needed to speak with Athwal and Bahia to confirm that neither of them had said anything about Amanpreet's murder to anyone else, and that there were no "loose ends" that could bring unwanted attention to Baranec and, through him, to the activities of Mr. Big's criminal organization.
- [9] On January 10, 2011, at the direction of Cst. B, Baranec met with Athwal. Cst. B joined the conversation, assuming the role of the hitman from Toronto Baranec had told Athwal he hired to do the killing. The communications were intercepted. Athwal assured Baranec and Cst. B that only the three of them and Bahia knew what had happened. Cst. B insisted Athwal call Bahia to arrange for a further meeting between the four of them so Cst. B could satisfy himself that Bahia had not said anything to anyone else about the murder. In that meeting, which was also intercepted, Bahia was asked by Cst. B if he had said anything to anyone about his wife getting "whacked". Bahia said he had not.

Background Specific to Ms. Athwal's Trial

- [12] At the appellant's trial, three matters arose unique to her prosecution that form the subject matter of the appeal.

Admissibility of Mr. Baranec's Statements to Undercover Officers

- [13] First, the Crown attempted to call Mr. Bahia and Mr. Baranec as witnesses against the appellant. However, they refused to testify. The trial judge cited both men for contempt.
- [14] The Crown then applied under the principled exception to the rule against hearsay to admit statements made by Mr. Baranec during the Mr. Big operation. (It did not make the same application in respect of Mr. Bahia's evidence). The hearsay application was specific to statements from December 5, 2010, and January 10, 2011, in which Mr. Baranec spoke to the primary undercover officer about the appellant's role in the murder. That admissibility ruling is indexed as R. v. Athwal, 2017 BCSC 2651 ("Athwal-2").
- [15] In her ruling, the judge summarized the material aspects of the statements the Crown sought to tender:
- [84] The Crown is tendering Baranec's statement[s] for the truth of his claim that Athwal hired Baranec to kill the deceased. The material aspects of the statements are Baranec's assertions relating to his and Athwal's involvement in the deceased's murder.
- [85] In particular, the Crown asserts Baranec's statements implicate himself and Athwal in the following manner:
- a) Athwal and Bahia together planned the murder of Bahia's wife, the deceased.
 - b) Athwal hired Baranec to kill the deceased.
 - c) Baranec killed the deceased.

- d) Athwal paid Baranec money in cash as payment for the murder.
 - e) Athwal gave Baranec a phone that she purchased from a 7-Eleven store to communicate with him both before and after the murder.
 - f) Athwal left the country and travelled to India prior to the murder.
- [16] The appellant opposed admissibility. She conceded that the Crown met the necessity requirement for tendering hearsay evidence because of Mr. Baranec's refusal to testify. However, she argued that the statements did not satisfy the criterion of threshold reliability. The judge described the defence argument as follows:
- [9] The defence asserts that Baranec's statements should not be admitted. The possibility that he is lying about Ms. Athwal's involvement cannot be ruled out. The defence says that Baranec's conduct throughout the Noble and Bahia's investigations demonstrate that he is an inveterate liar and an entrenched criminal. Because he is an unsavoury witness, overcoming the presumption of inadmissibility of his statements will be extremely challenging.

(Athwal-2.)

- [17] Applying *R. v. Bradshaw*, 2017 SCC 35, the trial judge admitted Mr. Baranec's statements. She was satisfied the Crown established both necessity and threshold reliability. That aspect of the judge's decision is not under appeal.
- [18] In its submissions on the *Bradshaw* voir dire, the defence also asked the judge to keep Mr. Baranec's statements from the jury on grounds that their prejudicial effect outweighed their probative value. A trial judge retains a residual discretion to exclude evidence on this basis, even where it meets the test for necessity and threshold reliability. The trial judge declined to do so:

[165] At paragraph 24 of *Bradshaw*, the court states:

By only admitting necessary and sufficiently reliable hearsay, the trial judge acts as an evidentiary gatekeeper. She protects trial fairness and the integrity of the truth-seeking process . . . In criminal proceedings, the threshold reliability analysis has a constitutional dimension because the difficulties of testing hearsay evidence can threaten the accused's right to a fair trial . . . Even when the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, she has discretion to exclude this evidence if its prejudicial effect outweighs its probative value . . .

- [166] Mr. Justice Williams extensively weighed the probative value against the prejudicial effect and determined that the probative value of Mr. Baranec's confessions outweighed its prejudicial effect. There is no basis for me to find otherwise. In respect to Athwal's right to a fair trial, I agree with the Crown that these matters were addressed by severing Athwal's trial from her then co-accused.

(Athwal-2; emphasis added.)

- [19] The judge's reference to the weighing of probative value and prejudicial effect by Justice Williams relates to a voir dire ruling from the joint trial of Mr. Bahia and Mr. Baranec, indexed as R. v. Bahia, 2016 BCSC 60 ("Bahia"). Williams J. presided over that trial. As part of the proceeding, he conducted a Hart voir dire on the admissibility of Mr. Baranec's statements to the Mr. Big undercover officers. (As I understand it, Mr. Bahia did not raise Hart in relation to statements that he provided.)
- [20] In his analysis of the probative value and prejudicial effect of Mr. Baranec's statements, Williams J. concluded:
- [147] that the general circumstances surrounding Mr. Baranec's relationship with the undercover operators and particularly the circumstances surrounding the making of the confession which he provided to Cst. B are substantially indicative of the confession being truthful. As for the second aspect of the probative value analysis, that is, an examination of the confession for markers of reliability, I find that his confession was replete with details, the vast majority of which conformed with investigative findings. I take that view, even recognizing that there were some discrepancies, which I would characterize as, in the larger picture, relatively minor. Furthermore, I conclude it to be highly unlikely that he knew all of those details other than by reason of having been involved in the offence.
- [148] I find the probative value of the statement to be well made out.
- [149] I turn now to an examination of the prejudicial effect of permitting the evidence to be adduced at trial.
- [153] Dealing first with the moral prejudice, Mr. Baranec contends that the facts of this matter create enormous issues of potential prejudice, far more than most cases.
- [154] As Mr. Baranec argues, the off-indictment offences to which he made admissions of responsibility constitute the type of conduct and attitude that have a substantial similarity to the offence at bar and which are, frankly, reprehensible. There is a genuine risk that such evidence, if fully disclosed to the jury, will quite likely create an enormous, probably insurmountable, prejudice to Mr. Baranec's fair trial rights.
- [156] Taken in its totality, the evidence was most certainly capable of creating an impression about the persons involved, both the defendant and the undercover officers, which was not positive. It could easily cause an observer to form adverse opinions about them. The scenarios included coarse and profane language and comments that displayed socially repugnant attitudes. As well of course there is the core consideration, namely that crime was afoot.
- [157] In my view, that is not, by any means, the manner in which the trial can be expected to progress.

[159] I would expect that evidence can be led before a jury in a way that the non-prejudicial content can be very substantially edited. Certainly, the vast majority of the prejudicial material will not be before the jury.

[163] In short, it is my view that situations such as this will inevitably entail some measure of prejudicial evidence. The Court accepts that, but must ensure that the effect is minimal and does not overwhelm Mr. Baranec's right to a fair trial.

[164] It is for the Court to supervise the manner in which the evidence comes forward in a way that the prejudicial effect for Mr. Baranec is minimized. As well, of course, it will be necessary to address the concern by way of a clear and timely jury instruction.

[165] In the result, while I accept that there will be some prejudicial effect from the leading of this evidence, I am satisfied that it can be minimized. Accordingly, I do not find this concern to constitute a bar to the evidence being led by the prosecution.

(Bahia; emphasis added.)

[21] In the Baranec appeal, this Court found no error with Justice Williams' assessment of probative value and prejudicial effect:

[162] the judge's approach to the first prong of the Hart admissibility inquiry reflects no reversible error in principle. The admissibility ruling is well founded in the evidence and entitled to deference on appellate review. I see no basis upon which this Court could properly intervene with the manner in which the judge weighed the probative value of the evidence against its prejudicial effect.

[Per Fitch J.A., writing for the Court.]

[22] When she charged the jury in relation to Mr. Baranec's statements, the trial judge directed the jurors to approach his evidence with caution:

Statements from this kind of witness must be approached with the greatest care and caution because experience tells us that he has a strong motivation to lie, the ability to conceal true motives, and a desire to both maximize and minimize his own involvement.

It is dangerous to base a conviction on unconfirmed evidence of this sort. You should consider whether Mr. Baranec's statements are confirmed by other evidence in deciding whether the Crown has proved Tanpreet Kaur Athwal's guilt beyond a reasonable doubt.

In the present case, you should consider that there was a great incentive for Mr. Baranec to want to join the [fictitious] organization, that the evidence with respect to the Ontario claims is indicative of a preparedness to lie about his criminal activities, and there was considerable detail about the murder of Ms. Bahia available in the public domain, in the news reports.

Given the particular nature of the confession by Mr. Baranec and the context in which it was made, you must take carefully into account what I have said about it.

Appellant's Statements to Undercover Officer

- [23] In addition to tendering statements made by Mr. Baranec during the Mr. Big operation, the Crown tendered statements made by the appellant during that same operation.
- [24] The appellant made some of these statements directly to Mr. Baranec while he and the appellant were outside the presence of the primary undercover officer. (Among other things, the appellant confirmed with Mr. Baranec that she paid for the killing using cash received from rental properties.) Other of the appellant's statements occurred while in the presence of the officer. (For one, the appellant disclosed that the purpose of the murder was to allow for a relationship with Mr. Bahia.)
- [25] The appellant did not object to the admissibility of her statements at her trial proper. However, she did raise the issue of admissibility prior to the trial judge taking conduct of the case. That objection was resolved pre-trial by Williams J., who case-managed the appellant's prosecution after granting severance in 2013.
- [26] The relevant ruling is indexed as *R. v. Athwal*, 2016 BCSC 2743 ("Athwal-3"). At issue was whether the statements made to the undercover officer were presumptively inadmissible because of *R. v. Hart*, 2014 SCC 52, and therefore not available to the Crown at the appellant's trial unless they first underwent a two-pronged admissibility analysis. In a *Hart* voir dire, the Crown bears the burden of showing on a balance of probabilities that the probative value of the impugned statements outweighs their prejudicial effect: *Hart* at para. 89. If the Crown meets that test, the defence has the opportunity to establish on a balance of probabilities that the statements are nonetheless inadmissible because of an abuse of process: *Hart* at para. 89. See also the Baranec appeal at paras. 84, 109 and 181.
- [27] The Crown made submissions on the applicability of the *Hart* framework, taking the position that Ms. Athwal's interaction with the undercover officer did "not bear the hallmarks that were present in the Mr. Big operation in *Hart* that caused the Supreme Court of Canada so much concern." Ms. Athwal was only briefly involved in the operation (a single meeting with an undercover officer). Neither Mr. Baranec nor the undercover officer told Ms. Athwal about the fictitious criminal organization, Mr. Baranec's involvement with that organization, or anything done by him on the organization's behalf. She did not participate in any criminal activities as part of the operation. She had no ongoing relationship with the undercover officer. Nor did she receive any form of benefit or inducement from the officer in exchange for information.
- [28] After the Crown's submissions, the appellant's then counsel asked Williams J. to take the morning recess. In part, counsel wanted to review the Crown's written submissions on the applicability of *Hart*. Upon completion of the recess, the defence conceded that the presumption of inadmissibility was not engaged in Ms. Athwal's circumstances:

MR. FOWLER: Thank you. My Lord, I've obviously listened to my friend's submissions in respect of whether *Hart* applies and I have nothing to add.

THE COURT: All right. So this is--this is in the nature of an application by Ms. Athwal for a voir dire--a Hart voir dire.

MR. FOWLER: This is why my friend and I were--and this is why it sort of proceeded this way.

THE COURT: Yeah. Yeah. It seems to me--

MR. FOWLER: It seems to--sorry.

THE COURT: --that if--that if I'm persuaded that Hart has no application--

MR. FOWLER: Right.

THE COURT: --there would be no voir dire and that would be the end of the matter.

MR. FOWLER: Right. It just seems from Hart that there's a--there's an implication at least that this kind of evidence is presumptively inadmissible, unless the Crown can satisfy Your Lordship that either Hart does not apply, which it is my submission they have, or you have a full Hart voir dire and it convinces the court that there is no abuse.

THE COURT: I take from--from your submission you accept that Hart does not apply.

MR. FOWLER: Right.

THE COURT: All right. Thank you very much, Mr. Fowler. That is most helpful.

[Emphasis added.]

[29] Williams J. agreed that Hart did not apply, gave brief oral reasons to that effect, and declined an evidentiary voir dire:

[1] THE COURT: This oral ruling is with respect to the application as to whether or not there should be a Hart voir dire in this matter.

[2] I have heard submissions of Crown counsel. I have considered the authorities to which I have been referred and the authorities with which I am reasonably familiar. I take into account the position articulated by counsel for Ms. Athwal.

[3] In the circumstances, it is the ruling of this Court that there will be no voir dire. Hart has no application with respect to the statements made by Ms. Athwal.

(Athwal-3; emphasis added.)

[30] I note that by the time of this ruling, Williams J. had already heard and issued judgment on the Hart voir dire in the Bahia and Baranec trial. As such, he was intimately familiar with the details of the Mr. Big operation, including the extent of Ms. Athwal's involvement, as well as the legal principles governing the Hart analysis.

[31] The appellant's statements to the undercover officer were admitted as evidence at her trial. I see no indication from the record before us that the appellant sought to re-open or revisit Williams J.'s ruling before the trial judge. Indeed, in its opening statement to the jury, the

Crown referred to the appellant's dialogue with the undercover officer when summarizing the evidence that the prosecution anticipated calling as part of its case. From that, I infer that neither the Crown nor trial judge had been told by the defence that the admissibility of the evidence remained an issue following the pre-trial determination by Williams J.

Mistrial Application

- [32] During her trial, and well into the Crown's case, the appellant applied for a mistrial. The application focused on conduct by one of the sheriffs who was assisting with the jury. At the morning recess on November 14, 2017, the sheriff emerged from the jury room and approached Crown counsel. In the courtroom, and within earshot of the appellant and her trial counsel, the sheriff told the Crown that some members of the jury did not understand a document that had been marked as an exhibit at the trial. The document consisted of admissions made in respect of various phone records, with the records attached. The sheriff also told the Crown that a juror had asked whether a witness would testify to explain the records.
- [33] The Crown answered the sheriff's questions, informing her that the admissions were self-explanatory and that no witness would be testifying about them. The Crown also said that the columns in the phone records captured the dates and times of incoming and outgoing calls.
- [34] Before the sheriff had an opportunity to relay this information to the jury, the defence informed the trial judge about the conversation. The Crown confirmed its accuracy and agreed with the defence that because of what had occurred, an inquiry was necessary.
- [35] The sheriff confirmed for the trial judge that she had spoken with a jury member. The conversation occurred with all jurors present in the jury room, but not all jurors were involved. In response to the question asked about the exhibit, the sheriff told the juror that she did not know the answer. She then initiated her conversation with Crown counsel. She did not return to the jury room and did not communicate further with the juror. The sheriff confirmed that she did not receive any other questions from a juror regarding evidence at the trial.
- [36] After the judge's inquiry, the sheriff was re-assigned and had no further interaction with the jury. The defence applied for a mistrial. The judge agreed that the sheriff had misconducted herself. However, she held that remedies short of a mistrial were sufficient to address any resultant prejudice and she dismissed the application. That ruling is indexed as *R. v. Athwal*, 2017 BCSC 2634 ("Athwal-4").
- [37] In her ruling, the trial judge instructed herself on the legal principles governing mistrial applications. A miscarriage of justice can occur "where anything happens in the course of a trial, including the appearance of unfairness, which is so serious that it shakes public confidence in the administration of justice" (at para. 11, citing *R. v. Cameron* (1991), 2 O.R. (3d) 633 (Ont. C.A.) at para. 20; leave to appeal ref'd [1991] S.C.C.A. No. 211). The judge noted

that a mistrial is a remedy of last resort and only available in the clearest of cases: R. v. Muller, 2013 BCCA 528 at para. 66 (dissenting, but not on this principle).

[38] The judge then held:

[43] It is clear that the Sheriff misconducted herself when she took a concern about Exhibit 15, the Telephone Records, expressed by a juror (in the presence of other jurors) in the jury room to Crown counsel for clarification and asked whether a witness would be attending to address the juror's concern. The misconduct is serious and significant. The Sheriff's conduct was of such a nature it could impair trial fairness and the integrity of the justice system. The conduct is inexplicable, even to the Sheriff.

[46] I must find a remedy to address the Sheriff's misconduct. The issue is whether the conduct requires a declaration of a mistrial or whether other effective measures can be taken to ameliorate the effect of the Sheriff's misconduct.

[54] Because the jury is not implicated in the Sheriff's misconduct, and does not know about it, I am confident that the jury can continue to consider the case fairly without prejudice or sympathy or that their impartiality is impugned by the Sheriff's conduct. In that regard, any potential prejudice that Ms. Athwal has suffered or any actual prejudice from the Sheriff's conduct can be removed by providing certain mid-trial and final instructions.

[55] I accept that the Sheriff's misconduct, in and of itself, reflects poorly on the administration of justice. It is of grave concern to me that the Sheriff considered that she had a role to play in assisting the Crown by bringing the juror's concern directly to the Crown. I cannot think of an explanation for it, nor could the Sheriff. It does reflect a notion that the Sheriff is on the same side as the Crown. That the Sheriff discussed the juror's concern with the Crown in front of defence counsel, Ms. Athwal and the public in the gallery does not reduce the seriousness of the conduct.

[56] At the same time, I do not consider that there is any foundation for me to conclude that the Sheriff engaged in any other misconduct. I reject that as a basis for declaring a mistrial.

[57] I took what steps I could to immediately address the Sheriff's continued participation in the jury trial. She will not be assigned as a Sheriff in this trial.

[60] Because of the nature of the evidence that gave rise to this matter - an admission and because the jury has been spared from the Sheriff's misconduct and there is no basis to find the jury can no longer be impartial, I consider that remedies short of a mistrial can properly address any prejudice against the accused arising from the Sheriff's misconduct.

(Athwal-4; emphasis added.)

Issues on Appeal

[39] The appellant advances three grounds of appeal. She says:

- a) the trial judge erred in her approach to the admissibility of Mr. Baranec's statements by failing to independently weigh their probative value and prejudicial effect;
- b) the appellant's statements to the undercover officer in the Mr. Big operation should not have been admitted without a Hart voir dire; and,
- c) the sheriff's misconduct seriously undermined the appearance of a fair trial and should have resulted in a mistrial.

[40] If this Court finds that the trial judge did not err in her admissibility determinations, the appellant raises no issues with the adequacy of the jury instructions, including any warnings provided about the weighing and use of Mr. Baranec's and the appellant's statements.

Discussion

Did the trial judge wrongly admit Mr. Baranec's statements?

[41] The appellant takes issue with only one aspect of the trial judge's admissibility determination concerning Mr. Baranec's statements, namely, her weighing of probative value and prejudicial effect. That aspect of the ruling attracts a deferential standard of review. As explained by Fitch J.A. in the Baranec appeal:

[130] [t]he advantages trial judges have in making determinations of this kind are well recognized in the jurisprudence and should be respected through the application of a deferential standard of review: Hart at para. 110; see also R. v. Araya, 2015 SCC 11 at para. 31; R. v. Shearing, 2002 SCC 58 at para. 73; R. v. Stewart, 2018 BCCA 76 at para. 14, leave to appeal ref'd [2018] S.C.C.A. No. 185; R. v. Skeete, 2017 ONCA 926 at para. 88, leave to appeal ref'd (2019), [2018] S.C.C.A. No. 508; R. v. Shafia, 2016 ONCA 812 at para. 255, leave to appeal ref'd [2017] S.C.C.A. No. 17. Absent an error in principle in the articulation of the test, a material misapprehension of the evidence, a palpable and overriding error of fact, or a decision that is clearly unreasonable, an appellate court should not interfere with a trial judge's assessment as to where the balance between probative value and prejudicial effect falls.

[Emphasis added.]

[42] The appellant says that in admitting Mr. Baranec's statements, the trial judge committed an error in principle sufficient to displace the deferential standard of review. In particular, she failed to conduct an independent assessment of probative value and prejudicial effect. Instead, the appellant says the judge simply adopted, without reflection, Williams J.'s assessment from the Hart voir dire that he conducted in the Bahia and Baranec trial.

[43] The problem with the judge's approach, says the appellant, is that Williams J.'s assessment was not specific to the appellant. The appellant says the trial judge should have engaged in her own assessment of probative value and prejudicial effect within the context of the appellant's trial, which may have invited different considerations, and the failure to do so irreparably taints the admissibility ruling.

- [44] In making this argument, the appellant relies heavily on Mr. Baranec's status as a "Vetrovec witness" and the fact that he "falsely confessed to at least two murders, implicating others in the process". The appellant acknowledges that the probative value of Mr. Baranec's evidence was "substantial" because it directly implicated the appellant in the murder; however, she says the prejudicial effect of the statements was "enormous" and the trial judge should have more closely scrutinized that factor before admitting the statements into evidence (appellant's factum at paras. 103-107).
- [45] The Crown says the trial judge did independently assess probative value and prejudicial effect specific to the appellant's trial. She understood that Williams J.'s determinations from the Hart voir dire were not binding on her. Her Bradshaw analysis independently and fully addressed the reliability of Mr. Baranec's statements and their prejudicial effect. In light of that, it is not surprising that her reasons on the residual discretion to exclude are not comprehensive. Finally, the Crown says that from the face of the judge's reasons, it is readily apparent that before admitting the evidence, she turned her mind to the impact of admission on the appellant's fair trial interests.
- [46] I agree with the Crown that the judge independently assessed the probative value and prejudicial effect of Mr. Baranec's statements, alive to the fact that overbearing prejudicial effect may justify exclusion even where the contested evidence meets the Bradshaw criteria of necessity and threshold reliability (see para. 165 of Athwal-2).
- [47] In my view, there is no indication that the judge considered herself bound by Williams J.'s ruling on the Hart voir dire and, because of that ruling, somehow precluded from excluding Mr. Baranec's statements on residual discretion grounds (see para. 108 of Athwal-2).
- [48] Indeed, it would have been an error to consider herself so bound. Ms. Athwal's culpability for murder arose from the same factual context as her two co-accused. However, the determination of her guilt required an individualized assessment of the evidence tendered against her, as opposed to the co-perpetrators, and in the course of that assessment, she was entitled to the full panoply of substantive and procedural safeguards afforded to any other accused. Interlocutory rulings from the Bahia and Baranec trial could not tie the hands of the appellant's trial judge. For a discussion of informing principles, see: *R. v. Duhamel*, [1984] 2 S.C.R. 555; *R. v. Mahalingan*, 2008 SCC 63; *R. v. Chow*, 2011 BCCA 338 at paras. 44-45; and *R. v. Tran*, 2014 BCCA 343.
- [49] Having said that, it was not unreasonable for the trial judge to review and consider Williams J.'s findings on the Hart voir dire when reaching her own decision on admissibility. Justice Williams examined the same statements and the same surrounding circumstances. In his ruling on the Hart voir dire, he thoroughly canvassed the minutiae of the Mr. Big operation. Among other things, he concluded that:
- a) the inducements directed at Mr. Baranec did not overwhelm his will (Bahia at para. 101);

- b) Mr. Baranec did not fabricate what he told the undercover officer about the murder of Ms. Bahia (para. 102);
 - c) Mr. Baranec was not personally threatened during the operation (para. 103);
 - d) his relationship with the undercover officer was not oppressive and he was not pressured into making statements (para. 107);
 - e) he was not a vulnerable (and therefore "susceptible") person (para. 111);
 - f) he was not afraid of or intimidated by the undercover officer (para. 122);
 - g) his description of the murder of Ms. Bahia was "strikingly similar to what the investigation disclosed" (para. 135); and,
 - h) the risk of moral and reasoning prejudice arising from the introduction of bad character evidence, and the possibility of a jury being distracted by the events of the undercover operation, could be adequately addressed through a minimized presentation of the evidence.
- [50] These findings were logically informative of the trial judge's own assessment of probative value and prejudicial effect, even though she was examining the issue separately and in the context of the appellant's trial. The trial judge, aware of the previous findings, said there was "no basis for [her] to find otherwise" (Athwal-2 at para. 166). In other words, she agreed with those findings, having herself conducted a Bradshaw analysis in respect of the same evidence.
- [51] Finally, I also agree with the Crown that before admitting Mr. Baranec's statements, the trial judge turned her mind to the appellant's fair trial rights and the effect of admission (see para. 166 of Athwal-2). Again, on this issue, it was reasonably open to her to consider other relevant findings with informative value.
- [52] In that regard, the judge turned her mind to the severance ruling from July 2013, which was specific to the appellant. In granting severance, Williams J. identified potential prejudice to the appellant if Mr. Baranec's statements were to be admitted in a trial involving her, but could not then be used against her. He was of the view that in those circumstances, the statements were "so specifically incriminatory" of the appellant that jury instructions, no matter how "clearly articulated", likely could not prevent improper use of the evidence (Athwal-1 at para. 18). Moreover, the amount of "inadmissible" evidence arising out of the statements provided by both Mr. Baranec and Mr. Bahia would overwhelm the amount of "admissible" evidence against the appellant (at para. 19). Distinguishing between the various statements and their proper, as opposed to improper use, would render the jury instructions more complex (at para. 20). Ultimately, Williams J. was of the view that the combined effect of those factors would place "too great a load on the jurors and the system" (at para. 22). See also the Baranec appeal at para. 115.

- [53] The trial judge was satisfied that the prejudice identified by Williams J. had been ameliorated by the fact of severance. In other words, severance had substantially reduced the prejudicial effect of introducing the evidence surrounding Mr. Baranec's statements in a trial involving the appellant alone. Mr. Baranec's statements--if they met the Bradshaw test for necessity and threshold reliability--would be admissible against her. There would no longer be a concern about improper reasoning or use arising out of the presence of inadmissible evidence. The Crown was furthermore not seeking to introduce Mr. Bahia's statements, thereby removing this evidence from the mix. Without the concern about an overwhelming amount of inadmissible evidence and its potential to taint the jury's reasoning process vis-à-vis the appellant, the charge would necessarily be less complex.
- [54] In his submissions on the residual discretion to exclude, appellant's trial counsel asked that the "themes and arguments" raised in support of the appellant's primary position on non-admissibility under the Bradshaw analysis be equally taken into account. In other words, he recognized there was overlap between the two. Counsel argued that Mr. Baranec's statements were of "very questionable reliability" and that their "prejudicial effect" was great because their admission would "unleash an avalanche of information into [the] courtroom before [the] jury, very little of which [would be] of much use to them". He also submitted that presenting Mr. Baranec's evidence would take "an exceptionally large amount of time". Finally, appellant's counsel argued that there were "holes in the narrative" surrounding Mr. Baranec's evidence, and, as a result, the jury might assign a "level of value" to his statements that, objectively, was not justified.
- [55] In my view, the essence of the appellant's concerns, as framed at trial, was adequately addressed through the combination of: (1) the judge's Bradshaw ruling; (2) her consideration of and agreement with the findings underlying Williams J.'s assessment of probative value and prejudicial effect; and (3) her consideration of the severance ruling and its mitigation of prejudice.
- [56] I note that in her Bradshaw ruling, the judge specifically turned her mind to the "hearsay dangers" of Mr. Baranec's statements within the context of the appellant's trial. This included the dangers emphasized by the appellant on appeal, namely, Mr. Baranec's status as a Vetrovec witness; the inherent dangers and frailties of incriminatory evidence gathered during a Mr. Big operation; and the fact that Mr. Baranec had falsely confessed to two murders in Ontario, indicative of a propensity to lie.
- [57] Finally, the appellant suggested to the trial judge that calling the evidence surrounding Mr. Baranec's statements would unduly prolong the trial; however, it appears from the record that the evidence required less than three full days of trial time. The Crown called only three witnesses for that purpose.

- [58] Immediately following the testimony of the primary undercover officer, the trial judge provided a mid-trial instruction specific to Mr. Baranec's statements, telling the jurors that they should be "extremely cautious in accepting [his] evidence" and that it "[would be] dangerous to rely on that evidence alone".
- [59] In his closing submissions, defence counsel vigorously challenged the reliability of Mr. Baranec's statements. In her final instructions, the judge again told the jury that it would be "dangerous" to convict on the basis of Mr. Baranec's statements without finding that his evidence was independently confirmed. She told the jury that in assessing the truthfulness of the statements, it was obliged to take the circumstances of the Mr. Big operation into account and to recognize that when Mr. Baranec made his statements, "he very much wanted to establish his bona fides and become a member of the group." She said that in those circumstances, there is a "real concern that a person in such a position might falsely claim the credit for offences committed, with a view to making himself seem more worthy of membership in the group."
- [60] I am satisfied from the record, as a whole, that the trial judge was alive to the prejudicial effect of admitting Mr. Baranec's hearsay statements. However, in light of their substantial probative value (not disputed on appeal) and the mitigation already achieved through the severance ruling, she concluded that strong warnings to the jury would suffice to ameliorate the prejudice. She then proceeded to deliver those warnings in robust terms and the appellant alleges no error in the judge's instructions.
- [61] I would not accede to this ground of appeal.

Should there have been a Hart voir dire?

- [62] The appellant's second challenge to her conviction raises a question of law: Baranec appeal at para. 130; R. v. Bernard, 2019 QCCA 1227 at para. 8, leave to appeal ref'd [2019] S.C.C.A. No. 341; R. v. Kelly, 2017 ONCA 621, leave to appeal ref'd, [2017] S.C.C.A. No. 474; and R. v. Niemi, 2017 ONCA 720 at para. 32.
- [63] The appellant says her statements to an undercover officer during the Mr. Big operation were inadmissible without undergoing a full Hart voir dire. She argues that her original trial counsel did not "expressly concede the admissibility of the statements or waive the appellant's right to a voir dire." Moreover, even though the appellant was not the target of the Mr. Big operation, the hallmark risks associated with that investigative technique nonetheless existed, raising the "spectre of false confessions, prejudicial reasoning, and police misconduct" (appellant's factum at paras. 89, 71).
- [64] As such, consistent with the analytical approach taken in Bernard and Kelly, the appellant contends that her statements to the undercover officer were presumptively inadmissible. In both cases, the courts extended Hart's two-pronged admissibility framework to evidence obtained during investigative scenarios that did not involve complete or classic Mr. Big operations.

- [65] In Bernard, for example, the appeal court found the trial judge erred in not applying Hart to statements obtained from a non-target of a Mr. Big operation who met with the target and an undercover officer for a one-hour conversation and implicated himself in a murder. The conversation involved a "derivative scenario in which the state took advantage of the relationship between the [target and the appellant] and put the appellant under the full weight of a criminal organization of its own making" (at para. 47). The undercover officer expressed concerns to Mr. Bernard about the crime under investigation. He made him feel that he was about to be incriminated for that crime. He led Mr. Bernard to believe that if he admitted the crime, he could be shielded from police by the fictitious criminal organization, which would obtain a confession from someone else using details provided by Mr. Bernard (at para. 54).
- [66] In her factum, the appellant accepts that "several of the most concerning aspects of a 'Mr. Big' Operation were absent" from her interaction with the undercover officer (at para. 79). However, she says Bernard makes it clear that a derivative Mr. Big scenario involving a non-target will nonetheless raise Hart concerns. The appellant contends that the failure to conduct a full Hart voir dire deprived her of the opportunity "to argue for the exclusion of the most damning evidence against her with the Crown bearing the burden of proof" (appellant's factum at para. 87).
- [67] The Crown's primary response to this ground of appeal is that Williams J. did not err in declining to apply Hart because the appellant waived her right to that voir dire. Alternatively, the Crown says the judge correctly found that the presumption of non-admissibility applicable to Mr. Big statements and (potentially) like scenarios had no application to the appellant's case. The circumstances surrounding her statements to the undercover officer did not raise the three-fold Hart concerns about reliability, prejudice or police misconduct:

No inducements were offered. No dishonest conduct was contemplated beyond the subject-matter of the charge. No vulnerabilities were exploited. The appellant's involvement in the undercover operation was not the type of organized plan with intent to induce something illegal or wrong that raises the Hart dangers.

(Respondent's factum at para. 75.)

- [68] I do not consider it necessary to address the question of whether the appellant's statements mandated a Hart voir dire as a matter of law. That is because I am satisfied the appellant unequivocally waived the necessity of a Hart voir dire. On that basis, there is no principled reason to interfere with Williams J.'s ruling. Then, consistent with and confirmatory of the waiver, the appellant did not later object to the admission of the evidence at her trial proper, or seek to re-open or revisit the pre-trial ruling. (As such, the trial judge is also without fault on this issue.) The appellant did not dispute that she made the statements. At no point did she claim that the statements to the undercover officer were the product of an abuse of process. I agree with the Crown that in these circumstances, considered as a whole, the

appellant cannot withdraw from the position she took at trial and seek a new hearing by invoking a presumption of non-admissibility that she plainly forewent at first instance.

- [69] In *R. v. Quinton*, 2021 ONCA 44, the Court of Appeal for Ontario recently addressed the issue of waiver within the context of a confession. The court released its decision in that case after the hearing of this appeal. The appellant argued in *Quinton* that the trial judge erred in not conducting a Hart voir dire. On appeal, the Crown conceded that Hart applied to the confession (at para. 38); however, it asserted that the failure to conduct a Hart voir dire did not constitute reversible error because Mr. Quinton waived his entitlement to a voir dire.
- [70] The appeal court noted that judges are "obliged to conduct a voir dire into the admissibility of a confession, even in the absence of objection, unless the right to a voir dire has been expressly waived" (*Quinton* at para. 45, citing *R. v. Park*, [1981] 2 S.C.R. 64 at 70). Indeed, the "gatekeeping function of trial judges is such that they have a duty to vigilantly assess and exclude inadmissible evidence regardless of the positions taken (or not taken) by counsel": *R. v. A.L.*, 2020 BCCA 18 at para. 150, leave to appeal ref'd, [2020] S.C.C.A. No. 83.
- [71] Where a waiver has been "offered" by the defence, the judge "has [the] discretion to accept the waiver, to hold a voir dire, or to make inquiries of counsel as to factual admissions underlying the waiver" (*Quinton* at para. 46, citing *Park* at 70). The purpose of those inquiries would be to ensure that counsel has made an informed decision to waive (at para. 46, citing *Park* at 73). In the face of no objection to the impugned evidence, a trial judge should only proceed with a voir dire of their own motion where there is "clear evidence" in the record that a testing of the evidence is objectively necessary: *R. v. S.G.T.*, 2010 SCC 20 at para. 25.
- [72] In *Quinton*, the appellant confessed the details of a murder to undercover officers. That confession was "the culmination of an eight-month operation during which the Niagara Regional Police befriended the appellant and recruited him into a fictitious criminal organization" (at para. 2).
- [73] The appeal court held that in those circumstances, there should have been a Hart voir dire. It ordered a new trial. After reviewing the trial record, the court found that the appellant's lawyer did not waive the necessity of a voir dire; instead, "he erroneously conceded that a voir dire was not required because the rule requiring a voir dire did not apply" (at para. 48; emphasis added). The concession was in error because the investigative technique used to obtain the confession in *Quinton* fell squarely within the scope of Hart. Police recruited Mr. Quinton into a fictitious criminal organization of its own making in order to elicit a confession from him (at para. 42).
- [74] The court also found that "defence counsel did not understand the law that applie[d], and the trial judge accepted the "waiver" without satisfying himself that counsel understood the matter and made an informed decision" (*Quinton* at para. 48). Finally, there was "clear evidence on the record that should have alerted the trial judge to the need for a voir dire to determine compliance with the rule in Hart, notwithstanding defence counsel's mistaken

concession that the rule did not apply" (at para. 48). As such, even if one could say that the concession amounted to a waiver, it was not valid (at para. 48).

- [75] The case before this Court is qualitatively different.
- [76] First, unlike Quinton, the appellant was not the target of the Mr. Big operation and had only a brief encounter with an undercover officer. As such, a serious question did arise as to whether the Hart framework had any application. (In his closing submissions before the jury, appellant's trial counsel described Ms. Athwal as having been involved in "only one of [the] 49 scenarios, on one particular day".) The defence did not dispute that in her dealings with the undercover officer, Ms. Athwal received no information about the fictitious criminal organization or a crime boss. She was not told of Mr. Baranec's involvement with the organization or work that he performed on its behalf. She did not have an ongoing relationship with the undercover officer. This was not a situation, like Bernard, in which the statement provider would feel "the full weight of [the fictitious] criminal organization" (at para. 47).
- [77] Second, the necessity of a voir dire was thoroughly canvassed before trial, with the Crown making extensive submissions on the applicability of Hart. That was not the situation in Quinton, where the issue received only fleeting attention before the start of trial (see para. 50 of that decision).
- [78] In this case, the Crown's submissions focused on whether the appellant's interaction with the undercover officer raised "any of the concerns that the Supreme Court of Canada had [in Hart]" (emphasis added). Those "concerns" were identified to be the reliability of the statements, prejudicial reasoning arising out of the presence of bad character evidence and abuse of process.
- [79] The appellant's concession that Hart did not apply to her statements came after the Crown's submissions. Appellant's then counsel told the judge that he had considered the submissions in formulating the defence position and agreed with them.
- [80] In Quinton, the defence concession that Hart did not apply was problematic because rather than turn his mind to reliability, prejudice and police misconduct, defence counsel conceded the non-applicability of Hart based on the nature of the criminal activity conducted as part of the operation and the non-hierarchical structure of the fictitious criminal organization (at para. 63). Nor did counsel turn his mind to any abuse of process concerns (at para. 68). By his own admission, he was unfamiliar with the law governing Mr. Big confessions (at para. 70). Ultimately, the appeal court found that the defence concession was not one a "fully informed defence counsel would have made" (at para. 69). Counsel "did not understand the legal issues and did not appreciate the implications of the waiver of the voir dire" (at para. 71).
- [81] That is not the case here and a third reason why Quinton is distinguishable.

- [82] I am satisfied the appellant did make an informed determination that a Hart voir dire was not required, knowing that it meant she could not avail herself of the presumption. Williams J. confirmed with her then counsel that he accepted the Hart framework did not apply and, in the absence of a voir dire, that would be the "end of the matter". This is not a situation of acquiescence to a perceived inevitability without inquiry by counsel, or a concession predicated on a misunderstanding of the relevant legal principles. Rather, counsel told the judge--after hearing the Crown's substantive submissions and reviewing its written argument--that the Crown had met its burden to show that Hart was not engaged on the facts. In other words, counsel accepted, based on the Crown's articulation of the governing principles and the relevant case law, that factually and jurisprudentially, the Hart presumption was not available in the circumstances of this case. It was a considered decision.
- [83] In her factum, the appellant asserts there was no waiver because her original trial counsel did not specifically tell the judge that the appellant was "waiving" her right to a voir dire. Respectfully, in the circumstances of this case, I see that as a form-over-substance argument. "No particular words or formula need be uttered by defence counsel to express [a] waiver . All that is necessary is that the trial judge be satisfied that counsel understands the matter and has made an informed decision to waive the voir dire": Park at 73.
- [84] The only reasonable inference to draw from the discussion before Williams J. is that the appellant's then counsel was satisfied the Crown had established Hart did not apply, and that he had reached the same conclusion after his independent consideration. In my view, the waiver was clear and unequivocal, with full knowledge of the interests a Hart voir dire is intended to protect, as well as the implications of dispensing with that safeguard: R. v. Hebert, [1990] 2 S.C.R. 151 at 169-70.
- [85] On appeal, the appellant does not allege ineffective assistance by her original counsel. As noted in S.G.T.:
- [86] In an adversarial system of criminal trials, trial judges must, barring exceptional circumstances, defer to the tactical decisions of counsel: see generally R. v. Lomage (1991), 2 O.R. (3d) 621 (C.A.), at pp. 629-30. There is a "strong presumption" that defence counsel are competent in advancing the interests of their clients .
- [Emphasis added.]
- [86] In any event, I am also satisfied there was not "clear evidence" in the record that "objectively should have alerted [Williams J.] to the need for [an evidentiary] voir dire notwithstanding [the position taken by defence counsel]": R. v. Hodgson, [1998] 2 S.C.R. 449 at para. 41; Quinton at para. 47.
- [87] I have reviewed the transcripts of the conversations between the appellant, Mr. Baranec and the undercover officer. The appellant contends that on the face of that material, it is apparent the appellant was "placed in the grasp of the fictional criminal organization." She

believed Mr. Baranec and the undercover officer "were involved in a large network who could track her every move." The appellant says the transcripts show that Mr. Baranec told her what to say, raising the realistic possibility that she provided a false narrative, purposefully tailored to align with what she thought Mr. Baranec was demanding of her. She hugged the undercover officer, a person who she understood to have done the killing. The appellant says this is akin to bad character evidence. The undercover officer falsely presented himself as the killer and made the appellant feel as if he "held some power over her". The appellant contends there was an atmosphere of "psychological confinement" surrounding her interaction with the two men and that her choice of whether to continue participating in the conversation was "constantly undermined" (appellant's factum at paras. 80-86).

- [88] I do not agree that the nature of the appellant's interaction with Mr. Baranec and the undercover officer, as captured in the transcripts, raised flags that, objectively, should have led Williams J. to second-guess or disregard the appellant's waiver and conduct a full or even partial evidentiary voir dire. (Again, it is worth noting here that although only the transcripts were before Williams J. for determining the applicability of Hart, he had already presided over a full evidentiary voir dire arising out of the same undercover operation and was intimately familiar with the details.)
- [89] The appellant was not the target of the Mr. Big operation. Neither Mr. Baranec nor the undercover officer pressured the appellant to provide details for acceptance into a fictitious criminal organization or other form of illegal scheme. She received no inducements for her information. Neither Mr. Baranec nor the undercover officer threatened the appellant with violence. She did not witness any violence in her interaction with them.
- [90] The appellant was not told that Mr. Baranec and the undercover officer were part of a group that typically resorted to violence. To the contrary, before she spoke with the undercover officer, Mr. Baranec warned the appellant that the officer was a "blunt" speaker and he assured her that nothing would happen to her. The transcripts reflect a curt and aggressive demeanour by the officer while interacting with Ms. Athwal; however, there is no indication that he was physically aggressive. When addressing the appellant's statements in his closing submissions before the jury, defence counsel told the jurors to be cautious about what they inferred from the things said by Ms. Athwal because they consisted of "stilted answers to bullying and leading questions". Respectfully, that is not the kind of scenario, standing alone, that would objectively necessitate a Hart voir dire.
- [91] In Quinton, the appeal court overrode a defence concession that Hart did not apply, in part, because the evidence surrounding the undercover operation raised serious abuse of process concerns:
- [91] the appellant was extremely vulnerable and came to depend on [the undercover operator]: he had very little money and lacked a social network; he had documented mental health issues, including addi[c]tion to alcohol; by the time of his confession, he had significant

physical health issues; and he was off his medication for three days in the lead-up to his confession. The appellant's vulnerabilities were exploited, consciously or not, by the operation: the police officers provided him with money; they made him feel valued; they provided him food and alcohol; they were invaluable to the appellant while he was recovering from his stroke; and they actively prevented the appellant from obtaining medication right before the confession.

[92] The evidence surrounding the appellant's statements at the time Williams J. made his ruling did not raise any of these same concerns. Indeed, in the Baranec appeal, this Court rejected a claim that the Mr. Big operation was abusive (at para. 194). The appellant does not suggest on appeal that she is a person with vulnerabilities that rendered her more susceptible to influence by the undercover operator.

[93] I would not accede to the second ground of appeal.

Was the trial judge obliged to declare a mistrial?

[94] Granting or denying a mistrial is a discretionary decision that attracts deference on review. In Muller, it was explained this way:

[4] A trial judge's exercise of discretion on a mistrial application is entitled to significant deference from this Court. As stated in *Emkeit v. R.*, [1974] S.C.R. 133 at 139, [1972] 2 W.W.R. 597, "the administration of justice in our courts would be gravely hampered if it were not recognized that a trial judge has a wide discretion as to the manner in which a trial is to be conducted". Further, in *R. v. Larose* (1996), 70 B.C.A.C. 70 at para. 7, Wood J.A. (as he then was) commented: "This court will not interfere with the exercise of a trial judge's discretion to declare or not to declare a mistrial unless it is clear that the judge proceeded on a wrong principle or that the exercise of the discretion resulted in a miscarriage of justice". See also *R. v. Bengert* (1980), 53 C.C.C. (2d) 481 at 549-550, 15 C.R. (3d) 114 (B.C.C.A.).

[Emphasis added.]

[95] At the hearing of the appeal, appellant's counsel spent most of his time addressing this third ground of appeal. The appellant acknowledges that a mistrial is a remedy of "last resort" (Muller at para. 66). However, she says the sheriff's conduct was:

so blatantly irregular on the part of someone who is entrusted with the impartiality and secrecy of the jury that [it] could not be excused. By taking the jury's concern with trial evidence directly to Crown counsel, [the sheriff] behaved as if her role were to assist the Crown in obtaining a conviction. As the trial judge found, the [sheriff's] behaviour reflected "a notion that the Sheriff is on the same side as the Crown." Such a notion must be denounced with the utmost severity.

While the inquiry established that no actual prejudice had been demonstrated, as the jury was not implicated in the misconduct, it did little with respect to the unquestionable appearance of unfairness. Where an inquiry into an incident does not adequately remove the taint of suspicion of prejudice to the fair trial of the accused, and therefore the taint of prejudice to the administration of justice, a miscarriage of justice [ensues] and a mistrial should be declared.

(Appellant's factum at paras. 62 and 65).

- [96] The Crown says the trial judge properly instructed herself on the law governing a mistrial application. There has been no error in principle. Moreover, the appellant has not shown that the judge's decision was clearly wrong, resulting in a miscarriage of justice. The sheriff's conduct did not result in actual prejudice to the trial process. The Crown was in no way advantaged by the incident. Finally, the sheriff's conduct, while inappropriate, would not lead a "reasonable, well-informed member of the public [to] perceive the trial as unfair" (respondent's factum at para. 64).
- [97] There is no question that both "the fact of a fair trial and the appearance of a fair trial are essential to the administration of justice": *R. v. Afghanzada* (2000), 149 C.C.C. (3d) 349 (Ont. C.A.) at 355. However, it is my view that what happened in this case did not compromise that principle in a manner sufficient to displace the deference afforded to the judge's choice of remedy.
- [98] The trial judge effectively remedied any appearance of unfairness when she removed the sheriff from the trial. This removal was affirmed in open court. The court did not condone the irregularity. To the contrary, the trial judge denounced the conduct, re-affirming and prioritizing the importance of impartiality, real and perceived. The judge's action also removed any possibility of further irregularity by the sheriff. This step, coupled with the finding of no actual prejudice to trial fairness (not seriously disputed on appeal), was sufficient to alleviate any concern that the occurrence irreparably tainted the administration of justice. The cases relied upon by the appellant in support of appellate intervention involved considerably different facts and more egregious conduct.
- [99] In *Cameron*, for instance, the jury in a murder prosecution dined at a local restaurant during its deliberations. In addition to the jurors and their two sworn "court constables", whose role it was to "make certain that no unauthorized persons be allowed to have contact with the jury" (at para. 24), eight other persons joined the dinner, including a uniformed police officer who was a first cousin of the murder victim. After dinner, the jurors continued their deliberations and then went to a hotel. Two unsworn court constables assisted with that process. Later that night, an unsworn court constable invited one of the jurors to accompany him to the hotel bar for drinks. They consumed alcohol and conversed before the juror returned to his room.

[100] An inquiry by the trial judge in that case established that no actual prejudice arose from the impugned events. However, the appeal court held that "incidents so blatantly irregular on the part of those placed in charge of a sequestered jury and on the part of those charged with the responsibility for the administration of justice cannot be excused" (Cameron at para. 25). In the result, the court ordered a new trial.

[101] In *R. v. Masuda* (1953), 106 C.C.C. 122 (B.C.C.A.), two police officers were assigned to guard the jury in a murder prosecution. Both were Crown witnesses who had testified at trial or were about to. On the second day of trial, the jurors had dinner at a local hotel before returning to the courtroom for the resumption of evidence. A police sergeant who was a "Crown witness of some importance" joined them at dinner (at 123). He engaged in conversation with one or more of the jurors. When the trial resumed, the situation was brought to the judge's attention. After an inquiry, the judge dismissed a motion to discharge the jury. This Court ordered a new trial:

Stripped to its bare essentials, there can be no escape from the fact that three Crown witnesses dined with the jury during a murder trial. [T]o countenance such a situation as is thus presented, violates two essentials of justice. The one is that the jury must be kept completely free from any opportunity of communication during the trial, except under the most exceptional circumstances calling for a direction from the Court; and, secondly, that nothing must occur during the trial of a case from which a suspicion may arise that any taint attaches to the proper and meticulous fairness which must always surround the administration of public justice .

(At 123-24.)

[102] In my view, both *Cameron* and *Masuda* are distinguishable. Here, the irregular conduct consisted of one incident involving a properly assigned sheriff who had authorization to interact with the jury, but during that interaction made a "thoughtless" mistake--one that the trial judge found carried "no malice towards the [appellant]" (*Athwal-4* at para. 9). The conversation with the juror did not occur during deliberations. There was no communication between the jury and a Crown witness or some other person with an interest in the trial. It was clear from the judge's inquiry that the question posed by the juror went unanswered. In other words, the jury was in precisely the same position before and after the impugned incident. It was not "drawn in to the matter" (*Athwal-4* at para. 50). Finally, the exhibit in question consisted of records showing the dates and times of phone calls between various subscribers in January and February 2007. The records formed part of a set of admissions identifying the names of the subscribers associated with particular numbers. None of this evidence was in dispute at the trial. The jury was bound to accept the admissions. As correctly noted by the judge, the evidence was "straightforward" (*Athwal-4* at para. 48).

- [103] Given the overall context, it was reasonably open to the trial judge, in the exercise of her discretion, to deny the mistrial application and to continue with the trial. Whether a given situation necessitates the granting of a mistrial involves a highly individualized inquiry, informed by myriad factors. This includes the stage of the proceeding at which the application arises; the nature of the conduct or event said to taint the administration of justice; and its likely effect, real or perceived.
- [104] In *R. v. Labelle* (1981), 63 C.C.C. (2d) 403 (Ont. C.A.), for example, a juror asked a court constable about a piece of evidence that had been ruled inadmissible. The juror posed the question during deliberations. The constable asked the Crown about the evidence and, based on the answer received, told the jury that the evidence had been "ruled out" (at 406). Notwithstanding that conduct (which I consider more serious than the irregularity in this case), the appeal court upheld the trial judge's decision to decline a mistrial on the basis that the irregularity was "not fatal" (at 407). "[I]n substance", the court constable "had given the jury the same instruction that [the trial judge] would have given the jury" (at 407).
- [105] In this case, the trial judge exercised her discretion judicially. She conducted an inquiry into the matter, directly questioning the sheriff about the circumstances of the incident. The appellant's trial counsel participated in that inquiry, identifying issues that--from his perspective--required canvassing by the judge. The judge provided comprehensive reasons for not granting a mistrial. She was alive to the defence concerns about actual prejudice and the appearance of unfairness (Athwal-4 at paras. 24-35). She recognized the seriousness of the sheriff's conduct and the fact that an irregularity of this sort, depending on the circumstances, "can be grounds for a mistrial" (at paras. 43-44). However, after assessing the actual effect of the conduct and satisfying herself that the sheriff had not engaged in "any other misconduct" with the jury (at para. 56), the judge concluded that re-assigning the sheriff, addressing the matter in open court, and providing the jury with remediating instructions was sufficient to avoid a mistrial. From the chosen remedies, "the public [could] appreciate how seriously such misconduct is taken by all the participants in the court process" (at paras. 57-58).
- [106] Defence counsel agreed with the trial judge that a mid-trial instruction addressing the issue was not necessary. The Crown had only one more witness to call after the mistrial application and the defence did not call a case. In her final instructions to the jurors, the judge made it clear to them that if they had questions arising from the evidence, there was a specific process for them to follow:

If, during your discussions, you have questions, please put them in writing in a sealed envelope and give it to the sheriff who will be outside the door of the jury room. He will bring the envelope to me and I will discuss the questions with the lawyers. You will be brought back into the courtroom and I will reply to your questions.

I ask that you put your questions in writing so that I understand exactly what it is that you want done or answered. Be as clear and specific as possible. In that way, I can be more accurate and helpful in my reply.

[107] The Crown did not call further evidence in relation to the exhibit. It also limited its closing submissions on the phone records to the surrounding admissions, focusing the jury's attention on the evidence that it was bound to accept as a matter of law. Properly then, the Crown did not seek to take advantage of possible juror confusion as revealed through the sheriff's conduct. The judge's final instructions reflected the same approach, telling the jurors that when the Crown and defence agree on certain facts, the jury "must take those admitted facts into account, along with the rest of the evidence, in deciding [the] case".

[108] The appellant has not shown that the trial judge misdirected herself in law or made a palpably wrong decision in denying a mistrial. Accordingly, I would not accede to this ground of appeal.

Disposition

[109] For the reasons provided, I would dismiss the appeal from conviction for first degree murder.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Grauer"

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