

CANADA / JUDGMENT

R. v. Correia

2024 BCCA 361

COURT

British Columbia Court of Appeal

DECIDED

24 October 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCCA 361 R. v. Correia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Correia,

2024 BCCA 361

Date: 20241024

Docket: CA48295

Between:

Rex

Appellant

And

Colin Raymond Correia

Respondent

Corrected Judgment: The cover page of the judgment was corrected on October 25, 2024 and on November 4, 2024.

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 certain witnesses and any undercover police officers, see 2022 BCSC 647. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Voith

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated
April 25, 2022 (R. v. Correia, 2022 BCSC 647, Vancouver Docket 27475).

Counsel for the Appellant:

D.M. Layton, K.C.

S.E. Elliott, K.C.

Counsel for the Respondent:

R.A. McConchie

F. Mahon

Place and Date of Hearing:

Vancouver, British Columbia

March 13-14, 2024

Place and Date of Judgment:

Vancouver, British Columbia

October 24, 2024

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Voith

The Honourable Justice Skolrood

Summary:

On May 29, 2010, two civilians were fatally shot in their rented residence near Cranbrook, British Columbia. The police theory was they were killed by mistake and that the intended target was a previous tenant of the residence who was a member of a criminal gang. On June 8, 2018, Mr. Correia was arrested on the murder, and he made inculpatory statements in the following police interrogation. At trial he was acquitted of the murders following a ruling that his inculpatory statements were inadmissible under the common law confessions rule because they were

induced by a combination of police trickery and his diminished ability to think clearly that had contributed significantly towards his decision to speak to police. The Crown appeals from the acquittal. Held: Appeal allowed. The verdict is set aside and a new trial is ordered.

The scope for a Crown appeal is narrow; the Crown must establish an error of law that had a material effect on the outcome of the trial. Here the Crown has satisfied its heavy burden of persuasion. The conduct found to be police trickery was entirely contrary to the record of the interviews and, in any event, did not rise to the standard of police trickery that would justify excluding the evidence under the jurisprudence. The finding of a diminishment in his ability to think clearly falls short of a finding he lacked an operating mind.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This is a Crown appeal from the acquittal of Colin Raymond Correia on two counts of first degree murder. The charges arose from the fatal shootings of Leanne MacFarlane and Jeffrey Taylor on May 29, 2010, in their rented residence near Cranbrook, British Columbia.
- [2] The Crown's appeal from the verdict in this judge-alone trial relates to two rulings by the judge excluding evidence. One ruling applied the common law confessions rule to exclude a series of Mr. Correia's inculpatory statements to police. The other ruling excluded evidence regarding the outsole size of Mr. Correia's shoes. The Crown challenges both rulings.
- [3] I am persuaded the Crown has met its heavy burden of persuasion on the admissibility of the inculpatory statements and that there is a reasonable likelihood the verdict would not have been the same had errors in respect of the inculpatory statements not occurred. Accordingly, I would allow the appeal on this basis.
- [4] As I have concluded that the issues concerning the inculpatory statements are determinative of the appeal, I will not address the admissibility of the evidence on the outsole size of Mr. Correia's shoes. That issue, in my view, should be addressed afresh on a new trial on the record developed in that proceeding.

Introduction

- [5] The theory of the Crown was that Mr. Correia and a co-accused were members of a gang engaged in criminal activity, including dealing in illicit drugs, and that they attended the residence intending to kill Doug Mahon, a member of the rival gang who had resided there previously. The Crown contends that unknown to Mr. Correia and his co-accused, Mr. Mahon had moved from the residence months before the shootings and it had been re-let to Ms. MacFarlane and Mr. Taylor. In the Crown's theory, the two victims were shot and killed by mistake.
- [6] The rivalry between the two gangs had resulted in an earlier plan to kill Doug Mahon. That plan had involved Mr. Correia (among others) engaging with a third person to carry out the alleged murder plot, but that person did not follow through on the plan. Mr. Correia was tried and convicted in 2013 of conspiracy to murder in relation to that plan. He was

sentenced to 13 years' incarceration. In dismissing Mr. Correia's conviction appeal in *R. v. Correia*, 2016 BCCA 330 ("Correia #1"), this court explained that the conspiracy on which Mr. Correia had been convicted ended on May 14, 2010, before the double murders on May 29, 2010.

- [7] Mr. Correia had served a significant portion of his sentence for conspiracy to murder and was on parole when he was arrested on June 8, 2018 and charged with the two counts of murder now before us.
- [8] In the voir dire concerning the admissibility of inculpatory statements made by Mr. Correia to police after his arrest for murder, the judge ruled that the common law confessions rule applied to render the statements inadmissible. The judge found that there was a reasonable doubt that the statements of the accused were not voluntary because the statements "were induced by a combination of police trickery and 'a diminished ability to think clearly'" which "contributed significantly towards his decision to speak with the police" (Voir Dire #2, indexed as 2020 BCSC 608, at para. 31).
- [9] During the hearing of the appeal, counsel for Mr. Correia confirmed that neither trickery nor the facts that Mr. Correia had generalized anxiety disorder or had "a diminished ability to think clearly" were sufficient bases on their own for the judge to exclude the evidence.
- [10] The judge's reference to Mr. Correia's "diminished ability to think clearly" relates to the evidence of two forensic psychiatrists, one called by Mr. Correia, and the other by the Crown in reply. The experts' evidence was that at the time of the police interviews, Mr. Correia suffered from a condition referred to as generalized anxiety disorder.
- [11] Mr. Correia testified on Voir Dire #2 that he was anxious and confused during the interviews and that "his head was a mess".

A Crown Appeal and the Standard of Review

- [12] This appeal comes within s. 676(1) of the Criminal Code. That provision allows for a Crown appeal from an acquittal only on a ground of appeal "that involves a question of law alone". It is well settled that the approach we must bring to a Crown appeal under s. 676(1) is strict and is limited to questions of law alone that have a material bearing on the acquittal.
- [13] The issue for us is whether the Crown has established such an error in law. In answering this question in this case, it is vital to recognize the general fact-rich nature of a judge's inquiry into the voluntariness of inculpatory statements: *R. v. Oickle*, 2000 SCC 38. That factual nature does not allow us to interfere with the ruling, provided that the judge has considered all the relevant circumstances and properly applied the law: *R. v. Spencer*, 2007 SCC 11 at para. 17.
- [14] In certain circumstances, a trial judge's shortcomings in assessing the evidence can constitute an error of law, such as making a finding of fact for which there is no supporting evidence or assessing the evidence based on a wrong legal principle: *R. v. J.M.H.*, 2011 SCC

45 at paras. 25, 29. It is not enough, however, to simply assert that a trial judge committed a legal error with respect to the assessment of evidence - appellate courts must articulate with precision how the trial judge erred in law: *R. v. Hodgson*, 2024 SCC 25 at para. 40. It is, further, an error of law to find a fact grounded in conjecture or speculation: *R. v. Clark*, 2015 BCCA 488 at paras. 42-44, citing *R. v. Martin*, 2010 NBCA 41. Once an error of law is established, the Crown must also convince the appellate court to a reasonable degree of certainty that the verdict would not necessarily have been the same had the error not occurred: *Hodgson* at para. 36.

- [15] Even where a trial judge articulates the correct legal test, an appellate court may still find an error of law if the judge's reasoning and application demonstrate a failure to apprehend the law properly: *R. v. Chung*, 2020 SCC 8 at para. 13.

The Positions Respecting the Inculpatory Statements

- [16] The Crown contends the judge erred in law in excluding Mr. Correia's inculpatory statements by:
- i) finding the statements were improperly induced as a result of "police trickery". The Crown says the judge's finding of "police trickery" was entirely unsupported by the evidence, failed to consider the relevant circumstances, and was based on an erroneously hobbled view of legally acceptable police interviewing conduct;
 - ii) failing to apply the correct analysis on the issue of inducement; and
 - iii) according weight to the expert evidence on generalized anxiety disorder without determining the disputed facts underlying the opinion, and misdirecting himself on the law on expert evidence.
- [17] Mr. Correia disputes each of these assertions, and says that, globally, the Crown's appeal is a challenge engaging the facts found by the judge and accordingly is beyond the proper scope of a Crown appeal. He says further that the conclusion shows that the judge necessarily accepted that Mr. Correia's version of events was credible, and that it is beyond our role to interfere with the inferences the judge made in relation to voluntariness.

My Conclusions

- [18] From my review of the record, including all of Mr. Correia's statements between June 8, 2018 and June 10, 2018, and in the context of the jurisprudence on the common law confessions rule, I conclude:
1. The judge erred in law in labelling the impugned police conduct as "police trickery" in two separate ways:

- a) the facts he found amounted to "police trickery" are entirely unsupported and contrary to the record of the interviews, and rely upon speculation by the judge as to there being inevitably factual overlap between the offence of conspiracy to murder and the offences on which Mr. Correia was detained; and
 - b) even were those facts supported by the evidence, the flaws in police conduct found by the judge do not rise in law to the standard of "police trickery" discussed in the jurisprudence.
2. The judge erred in law in concluding that Mr. Correia was induced to speak to police through a combination of "police trickery" and a "diminished ability to think clearly", neither of which on its own was sufficiently substantial to offend against the principles and the differing interests protected by the confessions rule. That is, the conclusion in *Voir Dire #2* is untethered to the jurisprudence relating police misconduct to a fairness analysis, and the significance of the detainee's operating mind to his exercise of free will in speaking to the police.
- [19] Each of these conclusions, alone, in my view, fatally undermines the judge's ruling to exclude the inculpatory statements. Further, I am persuaded that the errors made were material to the acquittal; one cannot say that the verdict would necessarily have been the same had legal error in respect to excluding the inculpatory statements not occurred.
- [20] Given my conclusions on these two issues, I do not address the ground of appeal concerning the expert evidence. I would set the verdict aside and order a new trial.

Background and the Ruling on Inculpatory Statements

- [21] The sequence of events leading to the critical interviews is described well by the judge in *Voir Dire #2*. I replicate his description here for convenience:
- [10] [Mr. Correia] was arrested in Edmonton where he was living with his family and working as a foreman building a tunnel for the Edmonton Transit System. The arrest occurred on Friday evening, June 8, 2018, at 5:37 p.m. Upon arrest, he was advised of his rights, including his right to call counsel. He was presented to a telephone at the Edmonton police station in a private room. He indicated he did not intend to call counsel and he did not need counsel, and he did not call at that time. He was reminded later that he had these rights. His response was the same. Ultimately he decided to call his lawyer on the second day and this was promptly arranged, and did occur. There is no criticism to be made of any of the police officers or any part of the investigation with respect to that aspect of the case.
- [11] He was transported shortly after his arrest to an RCMP detachment in a suburb of Edmonton called Sherwood Park, and he stayed there until Sunday evening, waiting to be transported to the Vancouver area to pursue these charges. I infer and am satisfied that the wait of several days at that location was solely so that the interview team could have uninterrupted time with him to use their various techniques to attempt to get information and to create an environment where he would speak about the crime he had been arrested for. When he

arrived in custody at the detachment, the interview team had already been there and was preparing for the two-day event that was about to occur.

- [12] At the outset, the accused was unwilling to talk to the officers at all. At most, he would make a comment or a question, be unhappy with the police response, and retreat into phrases such as "I am done" or something similar. I am satisfied that the phrase "I am done", and similar phrasing, meant "I am done speaking".
- [13] The interviewers had come prepared to answer any evidentiary disputes that might arise between them and the accused. By Saturday, the accused had begun to make what the Crown would argue are incriminating statements. By Sunday, it is arguable that he had made significant incriminating statements. It is not necessary for me to determine on this voir dire if those statements are indeed incriminating.
- [14] The interview approach of the team was not one of yelling, accusing, or insulting. Rather, some might call it an approach that used logic to convince him that he would benefit in many ways if he told the police the truth. Others might call it an approach that used manipulation and/or trickery to convince him that he would benefit in many ways if he told the police the truth.
- [22] The judge listed what he termed "techniques" used by the police and made several findings rejecting defence criticisms of police conduct (Voir Dire #2 at para. 15):
1. An attempt on the first evening to make him feel uncomfortable. On the evening of his arrival at about 8:00 p.m., that is the Friday night, it was known by the officers that he had worked a full day at his physical labouring job and he was tired. He told them numerous times he wanted a cell and a bed so he could sleep. He was denied that until 11:13 p.m. I infer that the interview team wanted to start the interviews that evening while the accused was in an unrested state. It turned out to be ineffective, at least on that evening. Frankly, that approach would have doomed the Crown's attempt to prove voluntariness on this voir dire had it continued. However, it did not continue. I am satisfied that was because it did not work.
 2. The above approach changed dramatically from that point forward. The team moved to a "we are your friends who want to help you" approach [my characterization]. They arranged for Mr. Correia's partner to attend for a visit with him in the presence of the officers. They brought him, from that point forward, restaurant food for all his meals and, although duplicitous, there is nothing inherently wrong with any of that or with the "I am your friend" approach.
 3. Over approximately 48 hours of interviews, from Friday evening to Sunday evening, and excluding times when he was walking to and from his cell or speaking briefly at his cell, there were six longer interviews in interview rooms totalling approximately eight hours. The longest was 103 minutes, the shortest 31 minutes. I am satisfied this was appropriate and does not contravene any aspect of the voluntariness issue.

4. They attempted to convince him they were interested in what he could tell them about the person that the accused said had been the prime mover of the murders, had been present at the time, and was in effect, the boss of the organization behind it. The approach was that he would feel much better if his boss was in jail for it, even if he were also in jail. It was clear to the interviewers and to anyone listening, including myself, that this was of great interest to the accused. I am satisfied this was appropriate and does not contravene any aspect of the voluntariness issue.
5. He indicated he wanted some form of immunity and was willing to assist the police and/or the Crown in that regard. The defence argues this as an inducement and that the Crown allowed the accused to continue to believe that this was a real possibility. However, the evidence does not support that position. In this regard, two things flow from the evidence:
 - a) the issue of immunity or some kind of deal was raised by the accused, never by any of the interviewers; and
 - b) each time the accused raised it, the interviewers emphatically stated that they had no authority to make a deal of that sort and it was not even a topic of discussion, as far as they were concerned.

I do not accede to this defence argument.

[23] Last, the judge described police conduct on which he rested his conclusion of "police trickery" (Voir Dire #2 at para. 15):

6. And finally, to assist in overcoming the accused's reluctance to speak about the crime, one of the interviewers and later a second one, told him, and I paraphrase, that he did not have to talk about the murders, he could simply talk about the offence of conspiracy for which he had already been convicted and served his sentence, and therefore he would not have to worry about it being used against him because he had already been tried and convicted for that. The interviewer first raised this issue only minutes after the accused had finally spoken to his lawyer by telephone.

The defence argues that this line of questioning and persuasion on the part of the police was improper, had a direct result on the subsequent decision of the accused to speak to the police, and should lead to the conclusion that his decision to speak from that point was involuntary.

The balance of this judgment addresses this issue raised by the defence.

[Emphasis added.]

[24] The judge next recounted certain statements from the police interviews made on June 9, 2018, after Mr. Correia had finished speaking to his lawyer, saying that the lead police interviewer was "arguably misleading and at best confusing" in these passages ("A" representing Mr. Correia and "Q" representing a police officer):

[16] .

A: you can talk to my lawyers. And anyways you know, my life is at stake dude. This is a hundred per cent (100%) bullshit what you're saying.

Q: Then tell me, tell me everything around that time. You know it and I know it. And here's reality, something legal, I'm not a lawyer. Your lawyer gives you good advice you gotta-, here's something legal here. You could...

A: My lawyer told me to shut my mouth so...

Q: Yeah, totally.

A: ...I'm not gonna [go] against her so...

Q: That, but just so you know, you've been charged and convicted for that conspiracy. You can't be recharged for that right? That's a done deal. That ship's already sailed. So, sitting here and, and, afraid to tell the story because of what happened in the past uh, you know, and you can't be re-convicted and recharged for that, that offence. I wanna know about what happened because whatever plan was put in place over here that led to the conviction...and uh, another plan actually gets followed through and in, in, and innocent people died. Innocent people that literally had no idea what was goin' on and really had no uh, no business - in this game at all.

[25] The judge also replicated passages from statements made the following day, June 10, 2018, by a second police interviewer to Mr. Correia:

[17]

Q: [the lead police interviewer] said yesterday that (inaudible) you've already been tried and convicted and done a jail time for a (inaudible), right.

A: Yeah.

Q: So if you could tell the story around that piece, there's, you're not gonna self incriminate cause you've already, you can't you've be [sic] tried for that. And the guy that you were sent to kill and order that was given, that guy's not dead. Right.

A: Okay.

Q: So, I don't know but is that something that you do wanna talk about.

A: Talk about the conspiracy to commit murder of Doug MAHON.

Q: Yeah. Cause you were convicted for it, you've done your time.

A: Yeah.

[26] And in an interview that same day with the lead police interviewer:

[19]

Q: Yeah, because there's a lot in there that happens that, again, you've gone to court for that, you've already been convicted. You can't be recharged for that.

A: (inaudible)

Q: And ultimately we're not investigating that cause it's already happened, it's in the past, you've already (inaudible) your time. It'd be considered double jeopardy.

A: Yeah. [Emphasis added.]

- [27] In his reasons, the judge noted that Mr. Correia began to make the most significant inculpatory admissions a short time after those comments. He said:
- [21] Pages 14 and 15 are what I read from and have those comments. On page 25 of that same transcript, the most significant inculpatory admissions begin to be made. It is difficult to conclude that the conversation about double jeopardy made 10 pages earlier was not a factor that contributed to the making of inculpatory statements 10 pages later.
- [22] Further, the accused had commented a number of times after those comments that he should be speaking to his lawyer again. That was deflected and ignored by the officers who changed the topic and Mr. Correia took the bait and moved along with the changed topic.
- [28] The judge then considered the competing evidence of the two forensic psychiatrists. He observed that both experts agreed that Mr. Correia suffered from generalized anxiety disorder, but they differed in their conclusion of the effect of the disorder on the issues before him. The judge found he did not need to choose between the two opinions. Assuming that discussion of the conspiracy on which Mr. Correia had already been convicted would necessarily incriminate him in the two murders for which he was under arrest, the judge said:
- [27] Neither of the foregoing opinions cause me to totally reject the opinion of the other. I am satisfied that they are both reasonable opinions for the doctors to have formed, in view of the evidence, and I do not reject either of them outright.
- [28] This tactic by the police was a trick. The interviewers purported to give legal advice indicating that "you're not gonna self incriminate" with respect to the conspiracy charge, but did not tell him that he was, of course, going to self-incriminate with respect to the charge then under investigation (if he decided to speak about the conspiracy).
- [29] Together with that, I cannot ignore the opinion of Dr. Brink that in his state of heightened anxiety, Mr. Correia made self-incriminating statements "with a diminished ability to think clearly". I am cognizant of the fact that Dr. Lohrasbe comes to a different opinion. While I do not reject the sentiments of Dr. Lohrasbe, they do not cause me to entirely ignore the opinion of Dr. Brink. It is not necessary that I choose between the experts. Both have important comments to make, some of which I accept in varying degrees from both of them.

[30] The burden is on the Crown to prove voluntariness. Neither the defence, nor Dr. Brink, needs to satisfy me beyond a reasonable doubt that Dr. Brink's opinion is accurate, in order for me to rely, to some extent, upon that opinion. The extent to which I do so bears on the question of whether I will be left with a reasonable doubt about whether or not the statements are voluntary.

[31] The evidence fails to establish beyond a reasonable doubt that the statements of the accused were voluntary. Simply put, they were induced by a combination of police trickery and "a diminished ability to think clearly". Together, these contributed significantly towards his decision to speak with the police.

[Emphasis added.]

[29] The judge did not determine the effect of the "deflected" request of Mr. Correia to speak to his lawyer, referred to by the judge in his para. 22 (above para. 26), leaving that to a Charter compliance voir dire. That issue is not before us.

Discussion

The Common Law Confessions Rule and Inculpatory Statements

i) Overview

[30] The test for admissibility of evidence is a question of law but whether the test was met is a question of mixed fact and law: Oickle at para. 22.

[31] The governing authority in respect of the admissibility of inculpatory statements under the common law confessions rule is Oickle. Where an accused makes an inculpatory statement to a person in authority such as a police officer, it is presumptively inadmissible: Oickle at para. 68. Admissibility depends upon the Crown satisfying its burden to prove, beyond a reasonable doubt, that the statement was made voluntarily. This inquiry is "contextual and fact-specific", requiring a judge to weigh the relevant factors to determine whether the accused had a meaningful choice to speak to the police: R. v. Tessier, 2022 SCC 35 at para. 68.

[32] In assessing voluntariness, a judge must consider whether the police used threats or inducements, whether the conditions of an interrogation were oppressive, whether the accused had an operating mind, and whether the police engaged in "trickery". In Tessier, Justice Kasirer for the majority of the court explained:

[68] ... These factors are not a checklist: ultimately, a trial judge must determine, based on the whole context of the case, whether the statements made by an accused were reliable and whether the conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to a person in authority [citations omitted].

[33] Justice Jamal, writing for the majority in R. v. Beaver, 2022 SCC 54, described the balance of interests engaged in the analysis of inculpatory statements [citations omitted]:

- [46] At the heart of the confessions rule is the delicate balance between individual rights and collective interests in the criminal justice system The "twin goals" of the rule involve "protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes" On the one hand, the common law recognizes an individual's right against self-incrimination and right to remain silent, such that an individual need not give information to the police or answer their questions absent statutory or other legal compulsion; on the other hand, the police often need to speak to people when discharging their important public responsibility to investigate and solve crime.
- [47] Voluntariness, broadly defined, is the "touchstone" of the confessions rule Voluntariness is a shorthand for a complex of values engaging policy concerns related to not only the reliability of confessions, but also to respect for individual free will, the need for the police to obey the law, and the fairness and repute of the criminal justice system. Involuntary confessions can be unreliable, unfair, and harmful to the reputation of the criminal justice system A statement may be involuntary "because it is unreliable and raises the possibility of a false confession, or because it was unfairly obtained and ran afoul of the principle against self-incrimination and the right to silence"
- [48] ... When assessing the voluntariness of a confession, the "trial judge must determine, based on the whole context of the case, whether the statements made by an accused were reliable and whether the conduct of the state served in any way to unfairly deprive the accused of their free choice to speak to a person in authority" The trial judge must consider all relevant factors, including the presence of threats or promises, the existence of oppressive conditions, whether the accused had an operating mind, any police trickery that would "shock the community", and the presence or absence of a police caution. These factors are not a checklist that supplants a contextual inquiry
- [34] In *R. v. Hosack*, 2022 BCCA 226, this court explained how these doctrines are considered:
- [20] The threats or inducements doctrine asks whether the police offered a quid pro quo to obtain a confession and, like the oppression doctrine, is primarily concerned with its reliability. Conditions of an interrogation are oppressive where they are so distasteful that they overbear the suspect's will. The operating mind doctrine requires that the suspect is aware of what is being said and that it is being said to police who can use it to their detriment, and is primarily concerned with fairness and the rights of the accused. These three doctrines are to be considered together. Considerations of police trickery involve a distinct inquiry aimed at maintaining the integrity of the criminal justice system and ask whether the police conduct in question would shock the community, although police deception is also relevant to voluntariness at large: *Oickle* at paras. 57, 58, 63, 65-70.

[35] I will address first the judge's conclusion that the two aspects, "police trickery" and a "diminished ability to think clearly", combined to induce Mr. Correia to speak, "contributing significantly towards his decision to do so". While, as I will explain later, I do not consider that the conclusion of "police trickery" was open in law to the judge in the face of the record before him. I accept for the purpose of this discussion that the judge's finding of "police trickery" is not disturbed.

ii) Inducement and Significant Contribution to Decision to Speak

[36] The judge found police behaviour which he characterized as "police trickery", combined with Mr. Correia's mental state which he described as a "diminished ability to think clearly", "induced" Mr. Correia to speak to the police about the murder, and that together, those factors "contributed significantly towards [Mr. Correia's] decision to speak with the police": Voir Dire #2 at para. 31.

[37] It may be that the judge used the term "induced" consistent with the following and more ambivalent phrase, "significantly contributed to his decision to speak". However, lest it be intended to be a finding of inducement as discussed in the jurisprudence, I observe that the use of the word "induced" here does not fit within the law of confessions. That law treats "induce" as a circumstance giving hope of advantage or fear of prejudice to the degree that the "will of the subject has been overborne": Hosack at para. 20.

[38] Here, the judge did not identify an inducement such as discussed in the cases. He rejected the defence submission that the police, by continuing to allow Mr. Correia to believe there was a possibility of some form of immunity, had created a form of inducement, noting the idea of immunity was raised by Mr. Correia and emphatically rejected by the police officers. While the word "induced" was used by the judge before the term "police trickery", there is no suggestion in his reasons that the police behaviour identified as "police trickery" was accompanied by or amounted to a quid pro quo. I conclude that there was no proper basis on which police behaviour could be characterized in law as an inducement.

[39] The judge's alternative expression was that "police trickery" and a "diminished ability to think clearly" "contributed significantly towards his decision to speak to police".

[40] I discuss police trickery in isolation below. It suffices here to note that unlike the other considerations listed in Tessier, "police trickery" is treated as a distinct inquiry: Oickle at para. 65. Yet, at the same time, it is related to voluntariness at large: Hosack at para. 20. Oickle explains that the main concerns in the "trickery" doctrine are fairness and maintenance of the integrity of the criminal justice system, such that "trickery" may render a confession inadmissible even if it is voluntary and does not offend the Charter.

[41] The second aspect, a "diminished ability to think clearly", is related to the requirement that the accused had an operating mind when he made the inculpatory statements. In *R. v. Whittle*, [1994] 2 S.C.R. 914 at 939, Justice Sopinka for the court described this test in these words:

The operating mind test, therefore, requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused. ... In determining the requisite capacity to make an active choice, the relevant test is: Did the accused possess an operating mind? It goes no further and no inquiry is necessary as to whether the accused is capable of making a good or wise choice or one that is in his or her interest.

[42] He said further at 941:

The operating mind test ... includes a limited mental component which requires that the accused have sufficient cognitive capacity to understand what he or she is saying and what is said. This includes the ability to understand a caution that the evidence can be used against the accused.

[43] While mental clarity is clearly related to the concept of an operating mind, one cannot say simply that a diminished ability to think clearly will negate the presence of an operating mind as described in Whittle and other authorities. That this is so is recognized by counsel's frank acknowledgement that neither police trickery nor a diminished ability to think clearly, by themselves, would justify exclusion of the inculpatory statements. In counsel's submission, both were required in combination to reach the point of inadmissibility.

[44] We are left then with some trickery that engages some concern for fairness but is not such odious behaviour as to shock the community, and some recognition of a degree of befuddlement of Mr. Correia but not to the extent he did not know what he was saying, to whom he was saying it, or that his statements could be used to his detriment.

[45] In my view, this combination of part-way characteristics fails to address or to identify a core concern that would justify the exclusion of the evidence within the guiding authorities. Respectfully, it is opaque and impervious to understanding how and which values protected by the confessions rule, as described by Justice Jamal in *Beaver*, were fatally short changed.

[46] On this basis alone, I would allow the appeal.

iii) Police Trickery

[47] I turn now to the Crown's challenge to the finding of "police trickery".

[48] The confessions rule is robust regarding police trickery, allowing considerable latitude to police investigating crime, so as to accommodate the conscionable needs of a case. In this spirit, the leading cases caution against employing the concept of "police trickery" to unduly limit police tactics, holding to the purpose of repressing police conduct that would "shock the community". In *Rothman v. The Queen*, [1981] 1 S.C.R. 640 at 697, Justice Lamer famously explained this approach:

the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on

their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.

[Emphasis added.]

- [49] The acknowledgement in this appeal that the identified "police trickery", by itself, would not render the inculpatory statements inadmissible recognizes that the strategy of the police in this investigation does not rise to the level of shocking conduct contemplated by Oickle or described in Rothman.
- [50] In any case, the finding of any trickery on a factual level, in my view, comes within the narrow ambit in which an appeal court may, and should, interfere. I conclude that the record of the interviews, reviewed below, is incapable of supporting the judge's factual conclusion that Mr. Correia was deprived of advice that what he may say in respect of the double murders could be used as evidence at a trial of the charges on which he was detained. Further, although not essential to my conclusion, I conclude that the judge engaged in conjecture in finding Mr. Correia would self-incriminate on the murder charges if he talked about the conspiracy.
- [51] While the police may have hoped that in speaking about the conspiracy Mr. Correia would decide to go further and reveal what he knew of the murders, it was speculation at the interview stage whether speaking of the conspiracy would open him to addressing the murder, and as evident in Correia #1, the offences were separate in time - they were different events.
- [52] These features, in my view, demonstrate legal error in the judge's conclusion that the police engaged in police trickery by leaving Mr. Correia without advice of his potential jeopardy on the murder charges should he speak to police about the conspiracy.
- [53] Further, the conclusion of police trickery fails to apply the sturdy standard for permissible police interviewing techniques consistent with the recognition in Rothman that police must not be hobbled, absent behaviour that would shock the community or give rise to unfairness in the criminal process.
- [54] In my respectful view, the passages from Voir Dire #2 I have replicated above demonstrate legal error in the judge's characterization of the police utterances and the police strategy of inviting discussion on the established offence of conspiracy to murder, as "police trickery".

[55] I turn now to some of the details of the record of interviews. The issue of police trickery engages the assurances given by police to Mr. Correia that he was protected from further legal proceedings on the conspiracy by the principles of double jeopardy. Mr. Correia says, and the judge accepted, that because the police did not accompany that advice with the immediate statement that he would, nonetheless, self-incriminate on the murder offence by talking about the conspiracy, they confused the extent of Mr. Correia's protection for his statements and so engaged in "police trickery". In addition to the passages referred to by the judge in Voir Dire #2 (replicated at paras. 21-24 above), Mr. Correia also relies upon this explanation made by the lead police interviewer just before Mr. Correia made his first inculpatory statement:

Q: ... So you remember like what what [second police interviewer] said is is true. I mean because you've been charged for the conspiracy, you can't be recharged for that conspiracy. That's that's come and [gone]. But, you know, obviously everything we talk about is evidence, but understanding and can be used in court regardless of which investigation, but that's why I wanted to be able to talk to you about the plan that was originally discussed, way back when, whenever it happened and why that how that came about and why that came about. ...

...

Q: And who, Yeah. We don't, I mean we don't have to talk about things that you're uncomfortable with and I want you to know that obviously, I mean yeah, we are collecting evidence and and and this conversation is evidence and anything you say is evidence that can be used in court. And if you don't feel comfortable talking about that specific day, I'm comfortable with that, I'm okay with that. Cause I understand everything you were saying outside. I understand you're you're [sic] hesitations and your concerns. Because we we can't do anything for you. There's being offered for you. But ...

A: Yeah, that's what I mean.

Q: It is evidence.

[56] I would add to that excerpt this passage that follows immediately from the above passages:

Q: ... But that's why we wanna talk about, you know even and and and this is completely consistent with what [second police interviewer] and I said from day day one and even [third police interviewer]. Let's talk about them. Let's talk about this plan. Let's talk about what why some fucktard decided that he has to put a plan in place and why he didn't go fucking carry it out himself. Right. Or or why he didn't do something. Why why is he going to get other people to go and do it? Using them as pawns. And then leaving em out hanging to dry. Because we don't have to talk about that day if you don't feel comfortable with it. I just wanted you to be clear, cause I don't want you to ever think or or that we're playing any games or or we're lying to you in any way. Obviously we're collecting evidence, this is all evidence to be used in court. But no you can't be charged for that conspiracy again cause that that has already been dealt with. But you know and I know and [second police interviewer] knows, sorry [second police interviewer] is that you know,

that whole plan and that whole discussion that is something that happened between a bunch of people.

[Emphasis added.]

[57] In Mr. Correia's submission, the failure to refer expressly, at this point in the interviews, to the possibility of Mr. Correia incriminating himself on the murder charge if he talked about the conspiracy provides sufficient evidence to support the factual findings that the police engaged in trickery and left him with the thought he did not have to worry about his words being used against him. And he submits that this negates the Crown's submission that the interview transcripts incontrovertibly show that the police told Mr. Correia that what he said could be used on the murder charges in court.

[58] Respectfully, Mr. Correia's submission fails to capture the plain content of the interviews. They demonstrate that the police advice on protection related only to adverse consequences of speaking about the prior charge of conspiracy to murder on which Mr. Correia had been tried and convicted. The phrases replicated by the judge demonstrate that this is so:

- "You've been charged and convicted for that conspiracy";
- "You can't be recharged for that, right"?;
- "That's a done deal";
- "That ship's already sailed";
- "... you can't be re-convicted and recharged for that, that offence";
- "You've gone to court for that, you've already been convicted";
- "You can't be recharged for that"; and
- "We're not investigating that cause it's already happened ... you've already ... your time. It'd be considered double jeopardy".

[Emphasis added.]

[59] The police had consistently cautioned Mr. Correia that what he said was evidence and could be used against him. This began with their initial warning when they arrested him for the double murders of Ms. MacFarlane and Mr. Taylor. Mr. Correia, consistent with the information imparted by the police, continually demonstrated his awareness that the "double jeopardy" related to his conviction for conspiracy to murder Doug Mahon and that he was and remained in jeopardy on the two murder charges. For example, after talking to his lawyer on June 9, 2018, Mr. Correia expressed concern to the police about landing in jail and receiving "toe tag parole". He was in no doubt as to his right to silence on the charges he was facing and he repeatedly referred to his lawyer's advice to say nothing to the police.

[60] On June 10, 2018, the day after he spoke to his lawyer, Mr. Correia made his inculpatory statements. Contrary to statements to us that Mr. Correia sought a deal after he had started to incriminate himself (with respect to the murders), (a factual matter relevant to his mental clarity), these exchanges precede what has been identified to us as the first inculpatory statement:

A: Know what, like I wanna protect myself, you know like like basically I've been thinking and its like if you guys can give me a deal or something ...

...

A: And I can be a Crown witness if you want.

...

Q: ... I've just gotta tell yah, a couple things. And it's just the way the law works in Canada. That, I can't offer you anything.

A: No, I know you have to talk to Crown.

Q: Right. Well, yeah, the like lots of those things that happen are beyond [second police interviewer]'s and my control.

Q: Um, I'm glad you're saying that to me cause then I can actually I can the the uh, we can talk about the elephant in the room. [Second police interviewer] and I don't have that ability or that power to do that here. And we don't have any effect on whether you choose to tell the story or not, and say hey, there's a deal waiting for you. We just don't have that ability.

A: No, I understand I understand ...

[61] In this portion of the interview, again before the breakthrough incriminating statement, Mr. Correia again recognized the extent of his jeopardy, referring to the mandatory sentence for first degree murder in the event he was convicted:

A: Well I'm getting the brunt of it and I'm gonna be in till the next twenty-five, this is bullshit ...

[Emphasis added.]

[62] Later in the interview, after the first inculpatory statement, Mr. Correia again sought immunity for speaking about the murders, but the police emphasized this was not available. Examples include:

A: ... But I want some kind of protection and immunity from Crown and become witness. I want you to go talk to them.

...

A: I want to be let off lighter. I don't wanna have a life tag. Kay.

...

Q: Well and we've told you outside that we don't have that ability for any type of immunity. And we can't, that's not even on the table right now for us to talk about.

...

A: Well then (inaudible) I just wanna maybe discuss this with a lawyer and maybe Crown or something before I go any further but, I'm willing to talk about it but I just wanna make sure that ...

Q: Okay.

A: All I want is uh, some immunity.

...

A: Like I said, I just wanna wait until get some of my counsel. You know like I said, you can.

...

A: It's more, I just don't I just don't wanna incriminate myself. I I want, I'd like to tell you the story but I'd like to just uh, like I'd like some kind of fuckin insurance that I don't get a life tag.

Q: And honestly, they if I was to tell you I could give you assurances, I want you to walk up, take that bottle of water and walk the fuck out cause it's not true. I can't.

A: I know.

Q: Nor can [second police interviewer], nor can anybody.

[Emphasis added.]

[63] After this portion of the June 10 interview, Mr. Correia asked for a rest period:

A: ... I just I wanna go relax right now man.

...

A: Yeah, well come back later, go relax for a bit.

[64] More than three hours later, the interviewers returned to Mr. Correia. Mr. Correia referred to them as "trying to open [him] up". The lead interviewer agreed they were trying to open him up and said:

... Am I trying to get you to open up? Abso - fuckin - lutely I am because I know it is the right thing to do ...

[65] In the interview that followed, Mr. Correia gave the highly inculpatory account of events including being with the "boss" that is the heart of statements tendered by the Crown, and is excluded.

- [66] On my reading of the entirety of the interview transcripts, it is apparent from Mr. Correia's questions and comments about being a "toe tag", getting a "life tag", and facing a possible 25-year jail sentence, that he understood he was in jeopardy for murder and that he understood the ramifications of such a conviction. This understanding is consistent with the police's unwavering statements that Mr. Correia's words were evidence and could be used as evidence in court, as well as the police officers' consistent prompt rejection of any discussion of a promise of immunity or "a deal".
- [67] On any objective reading of the transcripts of the interviews, the police clearly related the purpose of the interviews to Mr. Correia, which was to gather information in relation to the murders for which Mr. Correia had been arrested. The transcripts, including the excerpts above also show that the police declined to offer any hope of immunity for the murders, and in seeking immunity Mr. Correia demonstrated he knew what he was saying, to whom he was speaking, and his potential jeopardy for murder. There simply was no evidence that objectively supports the view that the police tricked Mr. Correia by somehow confusing him on his protection regarding the conspiracy to murder Doug Mahon with the serious jeopardy he faced on the two charges of murder he was facing.
- [68] I conclude that a fair and objective consideration of the transcript reveals no evidence of police conduct that could reasonably be seen as "police trickery". The judge's reference to such underhandedness, or characterization of it as improper police conduct, demonstrates an error in law that, by itself, fatally undermines the verdict.

Conclusion

- [69] I conclude the judge erred in law when finding Mr. Correia's inculpatory statements were inadmissible. The verdict of acquittal, therefore, cannot stand. I would set it aside and order a new trial.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Voith"

I agree:

"The Honourable Justice Skolrood"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/24/03/2024BCCA0361cor2.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-correia-2024>

Prepared on 28 October 2026 · Esheria