
CANADA / JUDGMENT

R. v. Davidson

2017 BCSC 2497

COURT

Supreme Court of British Columbia

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2017 BCSC 2497 R. v. Davidson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Davidson,

2017 BCSC 2497

Date: 20170811

Docket: 64595-2

Registry: Chilliwack

Regina

v.

Shiloh Davidson

Before: The Honourable Mr. Justice Armstrong

Ruling on Voir Dire

re Voluntariness of Accused's Statements to RCMP

Counsel for the Crown:

J.S. Barbour

D.P.H. Tsui

Counsel for the Defence:

J. Heller

Place and Date of Trial/Hearing:

New Westminster, B.C.

June 27-30, 2017

July 4-6, 2017

Place and Date of Judgment:

New Westminster, B.C.

August 11, 2017

- [1] THE COURT: These will be the reasons on the Crown's application. If a transcript should be required, I reserve the right to edit the transcript to ensure that it conforms to my intention in the reasons. Nothing in the result or in the reasoning will change.

Introduction

- [2] Shiloh Davidson ("Mr. Davidson"), is charged with second degree murder under s. 733.1 of the Criminal Code, R.S.C., 1985, c. C-46 [the Code].
- [3] This voir dire concerned the voluntariness of statements the accused gave to members of the RCMP and Abbotsford Police on May 13 and 14, 2015, concerning the murder of Giuseppe Zecca ("Mr. Zecca") on May 10, 2015. Mr. Zecca died from a stab wound.
- [4] On May 13, 2015, Mr. Davidson was arrested in connection with Mr. Zecca's murder. This murder occurred in a wooded area in Abbotsford where Mr. Zecca and other homeless people were living. It was near Mr. Davidson's place of residence at the time. At the time Mr. Davidson was a heroin and methamphetamine addict.
- [5] The events surrounding his arrest and transportation to the Abbotsford Police detachment are not controversial, and do not factor in the voluntariness analysis. There is no issue that the accused was given the appropriate Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 [the "Charter"] and statement cautions, or that he exercised his right to counsel after arriving at the detachment.
- [6] Each of the interactions between the accused and the police, including his arrest, the transportation to the detachment, movement to and from his cell, and the actual interview were recorded. Audio recordings were taken where possible, and audio-video recordings were taken of the actual statement at the detachment and were presented as part of the Crown's evidence.
- [7] After processing the accused at the detachment on May 13, 2015, he was photographed and placed in cells. He was provided new clothing and access to legal advice.

- [8] Throughout the interview process, Mr. Davidson appeared to be fed and provided adequate fluids. There is no suggestion he was deprived of any physical needs, or that he was threatened by any of the officers. He was transferred to and from his cell for interviews by Constable Ian Alldritt ("Cst. Alldritt") who recorded his interactions with Mr. Davidson during the times he was with him.
- [9] At the time of his arrest, Mr. Davidson was informed that he was arrested for Mr. Zecca's murder. Later he was told he was under arrest for murder, but not charged.
- [10] Mr. Davidson was interviewed on May 13, 2015, from 9:17 pm to approximately 33 minutes after midnight. Later in the morning of May 14, 2015, the interview was continued, beginning at about 8:53 am, and continuing to 12:38 pm
- [11] After the interview was completed, the accused participated in a re-enactment in and around the scene of Mr. Zecca's death. The re-enactment appears to have lasted from approximately 1:00 pm to 2:41 pm, although the times on the transcript were uncertain.
- [12] During the lead up to the interviews, the investigators had planned the details of how the interview would be conducted. Corporal Emilie Tousignant ("Cpl. Tousignant") was described as the overall manager of the interview, although when she testified she was unable to confirm the role she played. She was present only during the interview of the accused on the first day and observed that interview from a room close to the actual interview room. Constable Dave Derusha ("Cst. Derusha") was the primary interviewer and Cst. Alldritt was a secondary interviewer. Cst. Alldritt, as I have indicated, accompanied the accused to and from the cells for these interviews.
- [13] In addition to the audio-video recordings of the interviews, the interviews were transmitted to a nearby office in which officers observed the process and made notes. Cpl. Tousignant was present in that room for some of the time on May 13, 2015, and observed the interview. She was not present in the room, nor did she observe the events, or any part of the events, involving the interview that took place on May 14, 2015.
- [14] The overall plan was for Cst. Derusha to interview the accused on May 13, 2015, and for Cst. Alldritt to join the interview on May 14, 2015, to introduce the accused to some of the evidence about the murder and to explain the investigation process.
- [15] Throughout Mr. Davidson's interviews, the police pursued four themes. First, the police repeatedly discussed the accused's connection with an Andre Provencal ("Mr. Povencal")-- Mr. Provencal and the accused were known to have been in the vicinity at the time of the deceased's death. Second, the police suggested that they had incriminating evidence that implicated the accused when, in fact, they did not have that evidence. Third, the police focused on their need to hear and understand the accused's involvement in Mr. Zecca's death. And fourth, the police intimated that by speaking to the police, the accused might lessen the charges laid against him. They repeatedly described the differences between first-degree murder, second-degree murder and manslaughter.

- [16] Before the commencement of the second interview, the interviewers were aware the Crown had approved charges of second-degree murder, but they did not communicate this fact to the accused at any time on May 14, 2015.
- [17] Over the course of both interviews, Mr. Davidson informed the officers that he wished to remain silent and he did not want to speak unless his lawyer was present. There were approximately 54 interjections asserting this position. He also told the police he wanted to be returned to his cell because he was tired. His requests were ignored.
- [18] Also before the second interview, the accused informed the police he was experiencing withdrawal symptoms from his addiction to heroin and methamphetamine. He said at one point that he was hurting, that he was hot and cold, and that he was tossing and turning.

The Interview Themes

Andre Provencal

- [19] Mr. Provencal was known to the accused and it appears to have been known to the police that he was in the vicinity of the accused and the deceased at the time of Mr. Zecca's death. Cpl. Tousignant apparently interviewed him for some time. During the interview, he denied being present during the murder and, according to Cpl. Tousignant, did not give any interesting details about Mr. Zecca's death, although she did draw some conclusions from misinformation he provided. After the interview, Cpl. Tousignant reported to Cst. Derusha that Mr. Provencal had been interviewed but did not indicate that he had passed on any important details during that interview.
- [20] Nevertheless, near the end of the May 13, 2015, interview with Mr. Davidson, Cpl. Tousignant entered the interview room. She had decided that the interview would end at this point and said to the accused:

Well I had the luxury of spending several hours with the lovely uh young guy yesterday named Andre, and I'm just going to leave you with that. The chance you're being given right now to speak for yourself was given to other people and they took that chance so have yourself a good night and we're gonna see you tomorrow [morning].

- [21] Cpl. Tousignant said that it did not occur to her that this comment might have caused the accused to worry overnight that Mr. Provencal may have tried to implicate him in Mr. Zecca's death. She also confirmed that it would be improper for the officer interviewing Mr. Davidson to lie about the information that she had received from Mr. Provencal.
- [22] During the accused's first encounter with Cst. Alldritt, on May 14, 2015, he expressed some concern about and interest in Mr. Provencal. He discussed Mr. Provencal with Cst. Derusha when the interview reconvened. He was informed that things had "changed overnight" and that Mr. Provencal had not been released or charged in relation to Mr. Zecca's death.

- [23] Cpl. Tousignant testified that Mr. Provencal had been informed of the charges he faced before his interview. It is her practice to tell suspects when charges are approved, although she agreed that the timing of that disclosure can be delayed for specific reasons, such as when officers believe sharing that information might make a suspect hostile. She did not suggest there was any reason not to inform Mr. Davidson that the Crown approved charges against him early on May 14, 2015.
- [24] She testified that there is a fine line between police trickery and dishonesty with interview subjects. She indicated that informing a suspect that maintaining silence might mean that the person is guilty would also be inappropriate. Most people do not want to incriminate themselves, and the police must use different techniques to obtain information.
- [25] On May 14, 2015, Cst. Derusha informed the accused that Cpl. Tousignant had spoken to him and provided him with details of Mr. Provencal's "lengthy interview". He also told the accused that some of the information Mr. Provencal had provided had been corroborated by other witnesses. When the accused expressed interest in what Mr. Provencal had said, Cst. Derusha simply reiterated that Mr. Provencal had given a lengthy interview and provided interesting details that had been corroborated. Cst. Derusha then told the accused:

. . . as it stands after speaking with [Mr. Provencal] especially, there's evidence that was learned that corroborates a lot of that other evidence that we were speaking about . . . What do you think [Mr. Provencal] told us?

- [26] The accused said he did not know. Cst. Derusha told the accused he wanted to hear "your end of the story" and went on to say:

So that whole night last night or this morning, they're working away interviewing more people, getting more evidence, and that's why it's important that with all this evidence speaking and telling us things, it's important that . . . if the evidence is pointing towards you, that we need to figure out okay well why, A, is it pointing towards you? . . . I'm still sitting here and it's not very clear as to what happened and transpired. And when you tell me earlier, you know what if that person didn't mean to hurt or kill them. Okay, that's important that, that we understand, we don't know certain. . . letters of that alphabet to fill in the gaps okay, but I'm telling you, they're filling in really quickly.

DNA, Video and Fingerprint Evidence

- [27] Cst. Derusha also made comments to Mr. Davidson about DNA evidence, video and fingerprint evidence. During the first interview, Cst. Derusha emphasized the importance of gathering evidence to the police mandate, and informed him that someone on his team would explain some of the evidence they had collected. He said:

... there's probably reasons why things happen and transpire and that's why it's kinda important that we understand and figure out okay what did happen but that's where we need to understand the grand scope of things and [really] take a step back and analyze and look at all of the information and data because evidence is a very unique thing and, and uh I have a partner ... who has some will explain the evidence [who was part of the team] ...

[28] Cst. Derusha told the accused that:

... in Canada ... we can't just have the police aimlessly running around grabbing anyone and arresting them for murder right?

[29] Once again, he highlighted the difference between charges and arrests, and the process that goes into arresting people for crimes.

[30] Cst. Derusha then began a discussion about the evidence and the distinction between Canada and North Korea. He described the mandate of police in this country is to collect evidence, like video evidence, DNA. This exchange on the topic occurred:

Cst. Derusha: ... That retrieve and collect information and evidence with respect to what has occurred right so um --

[Mr. Davidson says:] Mm hmm.

...

[Cst. Derusha] So when we talk about collecting evidence when you know we got video surveillance, we got DNA, DNA is a big a big part of it, right and we also have witnesses right that's a part of the evidence collecting process ...

[Mr. Davidson says:] Mm hmm.

[31] While Cst. Derusha likely intended to explain how evidence is needed to corroborate other facts and make connections with an investigation, his confidence had a clear implication for the accused that the police had already gathered evidence of this type.

[32] During the second interview, Cst. Derusha emphasized that a member of the investigative team would be giving Mr. Davidson the evidence presentation. That person would provide him with the most up-to-date information about the evidence they had collected so far and the nitty-gritty as far as details were concerned.

[33] Then Cst. Derusha began talking again about DNA. He said:

... our specialists develop profiles basically from DNA, they're, the probability of, of selecting uh that individual or that person and tie it into an offence is like in the trillions. Right so there's definitely no other person that could have contributed that ... DNA or that evidence to that location, right.

And he explained that Cst. Alldritt would be coming in and would discuss a little bit more of the "DNA-type stuff".

- [34] Cst. Alldritt eventually entered the interview room and stated that he was there to show Mr. Davidson "a very small snippet" of the evidence they had gathered so far. He also explained that the investigation had been moving very quickly and that the evidence indicated Mr. Davidson's involvement "in the shadow".
- [35] Cst. Alldritt then assured the accused he would be honest with him. He discussed the concept of perjury and told him that it was important for him to work with honest police staff. Cst. Derusha then chimed in and said that the police cannot legally lie.
- [36] Cst. Alldritt then said he would give an overview of what the police do in these investigations. He described the management of crime scenes and how DNA is collected. He talked about fingerprints and video cameras.
- [37] Cst. Derusha then suggested that it would be detrimental to the investigation if they simply gave evidence they had accumulated to the accused without giving him an opportunity to tell his side of the story. The accused asked what kind of evidence the police had. They did not answer him. They reiterated that they had witness statements and were talking to other people who said they were sure that the accused knew who they were and said that they were helping the police paint a picture. Cst. Alldritt said: "Today's your opportunity to paint your part of that picture, 'kay, that's what today is about."
- [38] Without disclosing any precise evidence that was in the police possession, Cst. Alldritt continued:

So we, we we take what they have, what we have and we take it away and we try and prove that the stuff that they've said is true and there's numerous different ways that we do that. So I just showed you, you know, the physical evidence, the DNA, the uh, the CCTV cameras there.

- [39] Cst. Alldritt returns to the discussion of DNA and Cst. Derusha explained that DNA evidence is particular. It holds a lot of weight just because it is so unique and incredibly accurate and because "you can't argue with it". He stated that video surveillance and fingerprint evidence work in much the same way. He then explained what judicial authorizations and warrants were, and that the officer has been writing warrants for days. Cst. Alldritt then began explaining blood splatter analysis evidence and extensive information yielded from that. The accused asked if they were still looking for weapons, to which Cst. Alldritt responded:

Any time you want to tell me what happened here, go ahead. You know this is your chance, this is your chance to change your part of the picture here, Shiloh, that's, that's why we're here.

- [40] When the accused asked if the police had surveillance or fingerprints, Cst. Alldritt said that he was not willing to tell the accused what they had, since that would be unfair.

[41] Cst. Alldritt reiterated that the investigation was accelerating and that every few minutes they were finding more stuff down there. He emphasized that this is why the accused remained in custody. Cst. Alldritt goes back yet again to discuss DNA and CCTV footage, fingerprint and blood spatter evidence. He said:

All that [stuff], when you start to put it together, it's like okay, it's looking like this, okay what they're telling us there, there's truth to it, okay. So it's not someone coming in and feeding us bullshit.

[42] In a further attempt to get Mr. Davidson to speak, Cst. Derusha said:

So if everything's jiving together and, and everything is starting to look really uh rigid so to speak . . .

. . .

. . . and corroborating the, the evidence, but Shiloh's sitting here going wait, yeah, you guys are pointing the finger at me but this is what's happening.

[43] In the end, the only evidence revealed that I could discern from the conversations between Cst. Alldritt and the accused related to "Patricia", who had picked him, the accused, out of line-up. Because that identification seemed to have little to do with the offence, the accused reasserted his right to silence at that time.

[44] By the end of the interview, the officers had communicated almost no evidence concerning Mr. Zecca's death to Mr. Davidson. It does not appear there was any fingerprint evidence, video evidence, blood spatter or DNA evidence ever collected by the police.

Denigrating the Accused's Right to Silence

[45] The police during the interview stated that they wanted to understand the "other side of the coin", that is Mr. Davidson's view. They repeatedly asked him to share his point of view. Later they told him:

. . . we're gonna have to speak with you and understand where your point of view is and what happened and what occurred and that's very important that we come back to the contextual uh side, other side of the coin so to speak.

[46] They tried to convince him that he had a limited opportunity to explain his involvement in Mr. Zecca's death, and that if he were not guilty, he would speak to the police. They told him if he had a role in Mr. Zecca's death, they still needed a statement but they could understand that he would not want to speak.

[47] When the officer discussed the accused's right to remain silent, he mischaracterized the right as protecting him so that he could tell his side of the story. The interviewer suggested that if that opportunity was wasted, this case would go "straight to trial and execution-type thing".

[48] Next, in response to the accused's repeated assertion of the right to silence, the police repeated that he had been arrested for murder and must have a lot of questions running through his head. When Mr. Davidson indicated he did not have any questions, the officer said:

. . . if you didn't do anything and wouldn't you have more questions . . . this doesn't make sense you know and ask me questions type thing so I just think that if you wanna kinda understand who your interpretation of, of uh Joe is to you and where he lived type of thing so I have an, a sense . . .

[49] The accused repeated his desire not to talk.

[50] Next, the officer told the accused that if he did something, he respected him not wanting to speak to the police but if he "didn't do something, had nothing to do with this, then it is important that the police know that as well". Again the accused declined to speak. To that, Cst. Derusha responded: "It's important that if you are innocent we want to be able to rule you out right that would be our job."

[51] Shortly before the end of the first interview, after explaining the conditions necessary for a first-degree murder charge, Cst. Derusha implored the accused to fill in the missing letters to complete the picture. He said:

So we have all this evidence, independent evidence of whether what was observed [what video surveillance] again DNA there's lots of different things that are starting to go like this and they're jiving together and, and that really solidifies the investigative facts as to what happened right and that's why it's very important that, that the police are not blind and tunnel visioned as to what happened . . . I come in as a, almost a separate identity from the investigative team to be able to speak to someone like yourself and understand okay what's your perspective . . .

[52] He underscored that Mr. Davidson could provide information that would corroborate his own position. He reiterated that hearing from the accused was really important since the police did not know what happened.

[53] When the accused failed to respond, Cst. Derusha stated that the accused was at a fork in the road, and could choose between doing the right and wrong thing. He told him that as they obtained more evidence from other witnesses, his opportunity to speak was lessening. He emphasized that they needed to hear his perspective on why the murder happened, and again the accused reiterated his wish to remain silent.

[54] During the second day, Cst. Derusha told the accused that, if he was not involved with Mr. Zecca's death:

... we need, you need to tell me that. But we also need to get into you know where you, okay, say you're not, you're, you're there, you're not part of it and you know you didn't do any of this, like you 'kay, you need to tell me, like okay, okay, fair enough, let's let's tell me where you were, what you were doing and we'll try and corroborate that too to support what you're telling us. Because I think, as I was saying earlier that you know we don't want to be tunnel vision.

[55] After professing his honesty and telling the accused that he was not part of the investigative team, Cst. Derusha told the accused that the investigative team was pursuing leads, and that the police had been working throughout the previous night on getting more evidence. He reiterated:

... that's why it's important that with all this evidence speaking and telling us things, it's important that the ev-, if the evidence is pointing towards you, that we need to figure out well why, A, why is it pointing towards you? 'Cause if you're saying you didn't do it, great, great, just tell me that and, and tell me where you were otherwise and we'll substantiate that and we'll have to figure out who did it.

[]

.. I don't know all the details but it is pointing towards you right now ... when they're put in a position that they're at a fork in the road between the right and wrong thing, they're gonna do what benefits them ...

[]

Because if you did do this, if you did take the life of Joe, don't say anything. Absolutely don't say anything. ... But if you didn't have anything to do with this, that's important to know as well, we need to know that. Where were you, ... who were you speaking with, all that kind of stuff that, that helps us understand the investigative material.

[56] Cst. Derusha told the accused:

... as an adult, [you] have the choice, to, make the right decision and do what is right. We're here investigating a, a wrong, obviously somebody's life being taken away, no matter what it is, th, that, they've done, is a wrong.

[57] He referred again to the accused's right to counsel when he said: "... I always say that it would be great advice" -- referring to the right to remain silent "... but, you also have the ability to make an adult decision, as well."

Lesser Charge

[58] Before Mr. Davidson was interviewed, he conversed with officers concerning his arrest charge status. At one point, he said [as read in]: "I hope I'm not being charged with this."

[59] The officer responded [as read in]: "Oh well, you're not. You're not charged at this moment. You're under arrest, okay? Do you understand the difference between being charged?"

- [60] The accused said he did. When he asked what kind of murder charge was being considered, the officer told him, "it's just murder."
- [61] Cpl. Tousignant then asked if the accused understood the offences described to him that he was arrested for. She told the accused that she would be glad to explain it and that she was not here to trick him in any way.
- [62] Throughout both days, the accused expressed concern about the differences between charge and arrest. He also asked whether he was facing first or second degree murder, or manslaughter charges. The police reiterated that, "it's just murder", and that he had not yet been charged.
- [63] Before the accused spoke with Cst. Alldritt he said to the accused [as read in]:
- Okay, you want to be clear of that, right? You are not charged with it. You're being arrested for it, okay? There, that's said. There is a huge difference, right?
- [64] The accused said he clearly understood the difference between charge and simply being placed under arrest. Yet during the second interview, Cst. Derusha repeated this advice, and he said:
- . . . there's a huge distinction between, uh, what would be, otherwise known as first degree murder -
- [65] Davidson agreed, yes. The officer told him about the range of possible charges from first-degree to second-degree murder, or manslaughter, and if the accused shared information about his involvement, that would help the police.
- [66] Later in the first interview, the accused had articulated his view that he had not been charged with anything, and mentioned that this had given him a "glimmer of hope". Cst. Alldritt then revisited this distinction when he became involved in the interview. He talked about the differences between first-degree and second-degree murder. He said:
- . . . at the end of the day people have died, when people die they die and whether by accident or, or, or it was pre-meditated or it wasn't pre-meditated these are the key elements and factors that we need to figure out why it is it happened.
- [67] During the second interview, Cst. Derusha continued telling the accused that Mr. Zecca was dead and somebody had intentionally killed him. Reiterating his concern about the potential differences in his jeopardy between manslaughter, first and second-degree murder, the accused asked: ". . . what if they necessarily didn't mean for him to die or something or like?"
- [68] Cst. Derusha then professed his honesty and told the accused that he was not part of the investigation team again, but that the evidence about the case was pouring in. When the accused asked how long he would be in custody, Cst. Derusha neglected to tell him that he had already been charged with second-degree murder, and would not be released.

[69] Further on, Cst. Derusha changed course in his inquiry. He said to the accused:

... remember that communication street is a two way street, right. I, I'm trying to obviously talk to you as, as much as possible and ask you questions and give you the opportunity to kind of tell me ... you know what this is what happened, or this is where I was. But it has to be a two way street, right, you have to kind of let me know, okay well, this is where I was and this is what happened and then you know what, then we can go out and kind of corroborate that information, right. That, that would only be fair for, for me.

[70] Cst. Derusha told the accused he needed to know where the accused was, and if he had nothing to do with the crime. After a lengthy exchange, the accused said, "I'm really not feeling well, and don't want to sit in the room any longer". He yawned.

[71] Cst. Derusha told the accused that:

... in Canada ... we just can't have the police aimlessly running around grabbing anyone and arresting them for murder ...

[72] Once again, he highlighted the difference between charges and arrests, and said:

... evidence has been identified to suggest that you were part of this. Okay, and what's important here is that we do speak with you. I think, I think if we didn't speak with you, we, we would be doing the entire judicial system a, a disservice ... we need to be able to speak with you and hear your side of the story as to where you were, what you were doing, who you were [talking] with so that you know what, hey, you know what, we're gonna go talk to Rob.

[73] Cst. Derusha returned to the nature of the charges and clarified:

If, if somethin' happened, that, spiraled out of control, as you said ... and the person didn't mean for it to happen ... and you did not mean to do it or, or, it did not mean to get to that point, we need to know that. That would be very important for us to know ... 'Cause ... we spoke about yesterday's story with the intent, remember the gun robbery, going down ...

[74] Referring to the differences between first and second-degree murder, and manslaughter.

If the intent was different, the outcome, Shiloh, you gotta tell us, man. That's important for you, you as a human being, to tell us that. What happened?

[75] This exchange actually referred to an earlier exchange in which the constables described the difference between first and second-degree murder that was exemplified by an apparent grow op operation, in which the accused had attended at the front door of a house and simply fired a gun at the person who came to the door, indicating that the accused had a premeditated intent to commit the murder, rather than simply engage in the theft.

[76] The police then reiterated that there was a huge distinction between manslaughter, second-degree murder and first-degree murder, and the importance of intent. To this the accused asked, "What's manslaughter like?" Cst. Alldritt told the accused that if a person in a fight punches another person, not intending to kill the person but he dies, the intention of that person who threw the punch was not for the person to die, so manslaughter would be the charge. Immediately following that, Cst. Alldritt said:

... if the outcome ... in Joe's case, is very much different from what, the intention was, that would be really, important, for you, to say this. Like ... you're seein' how this is unfoldin' here, these people are, painting this picture?

... and the picture gets painted, and if, you don't want to, you know, have your say, there's others havin' their say ... You don't get ta, ta paint that picture. And, let's be honest ... the intention part of it, that's somethin' that has to come from you, Shiloh. You can tell us about intention there. If it was, because, you know, people always want to think the worst ... So unless you can actually interject with some facts and truth, you can, you can stop them havin' the worst possible

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[77] After that, the two officers and Mr. Davidson continued a discussion about the different levels of premeditation and in a general sense, without reference to the particular charge and Cst. Alldritt explained:

Second would be, slightly different from that? And ... the fact that they, the planning wasn't, as detailed as, as, as a first-degree murder? That uhh, that they have the intention of goin' on, it's more than manslaughter. Okay?

...

They have intention of going to harm and possibly killing that person. This is something between the two.

[78] Crucially, in response to this discussion, the accused asked the officers:

... if I just break it down for you, and tell you guys exactly what happened and stuff like [that], is there anyway like it's gonna benefit me ...

[79] Cst. Alldritt responded:

Absolutely. You're provin' tons of different things ta, to lots of different people, Shiloh? Tell me what happened.

[80] Cst. Derusha then said:

There's a huge distinction between, between that second, and manslaughter, and first degree. If there's a, if there's a premeditated, po, component, we need to know that. That's great. But if it's something that spiraled out of control and you couldn't, not have handled that? We need to know that, that's a very important thing.

[81] Cst. Alldritt then said:

If the intent was different from the outcome, Shiloh, you gotta tell us, man. That's important for you, you as a human being, to tell us that. What happened?

[82] Cst. Derusha asked the accused if it was something that had got out of control or was planned, and Mr. Davidson said no.

[83] Towards the end of the interview, after he had made admissions about the offence, the officers asked Mr. Davidson if he had any questions, and he asked the officers, "Well, what does it seem like to you guys? Like a murder charge or does it seem like a manslaughter, or like is it like that you're -- is it -- is that your expertise?", and Cst. Alldritt responded:

. . . I'll not be the one making the decision on that, basically what happens is, we take all the stuff we have over here, and now you've given, your account, remember we said we did the picture and you get to colour -

. . .

Ultimately it's gonna be, you know, Crown Counsel, um, the ones who, who, define what it is, based off the facts that we'll figure out [and] what it is.

[84] At no point did the officers inform the accused that Crown counsel had already approved the second-degree murder charges earlier in the day.

The Parties' Positions

The Crown

[85] The Crown contends that a broad contextual analysis of the facts should not leave the court with any reasonable doubt concerning the voluntariness of the statement. The Crown says nothing in the interactions between the accused and the interviewers suggest that his decision to speak was a product of an inducement, oppression, a lack of operating mind, or other police trickery. The Crown claims that the accused received legal advice, and was treated in a respectful and courteous manner throughout the interviews. His physical needs were met. His addiction did not compromise his ability to withstand police questioning. His demeanour at the time of the arrest and when speaking to Cst. Alldritt when making his statement, and when attending the re-enactment, did not suggest that any of his actions were involuntary.

[86] The Crown also argues that the police did not misrepresent any evidence they had. They simply explained investigative techniques and tools that they had, rather than leave the accused with a false impression that they had obtained evidence that implicated the accused. In the Crown's view, Cpl. Tousignant accurately reported about Mr. Provencal. She said his untruthful evidence was contradicted by other evidence, which had moved the investigation along. Thus, her assertion to the accused that others were talking about the events that occurred was correct.

- [87] In any event, there was no suggestion by either Cst. Derusha or Cpl. Tousignant that Mr. Provencal had implicated Mr. Davidson and that the assertion that Mr. Provencal had spoken to the police was true and nothing in the interactions between the accused and the interviewer suggests that this decision to speak was affected in any way by the exchange concerning Mr. Provencal by any oppression, trickery or inducement.
- [88] The Crown relied on *R. v. Oickle*, 2000 SCC 38 [Oickle]; *R. v. Spencer*, 2007 SCC 11 [Spencer]; *R. v. Coaster*, 2014 MBCA 108; *R. v. Rennie* (1981), [1982] 1 All E.R. 385, [1982] W.L.R. 64 (which was cited with approval in *Oickle*); *R. v. Hosack*, 2012 BCSC 2139; *R. v. Tan*, 2014 BCCA 9 [Tan]; and *R. v. Nguyen*, 2017 BCSC 832 [Nguyen].
- [89] The Crown contends that exclusion cases cited by the accused involve much more egregious features than are present in this case and do not assist his argument that the statement was made involuntarily.
- [90] Overall, the Crown contends that an objective assessment of all the circumstances, gives no support to the view that the accused was oppressed in any way nor was his will overborne, nor was he tricked in any way into making his statement.

The Accused

- [91] The accused argued that when the following factors are taken into account:
- the oppressive impact of tricking the accused into thinking they had evidence that did not exist;
 - the suggestion that his silence was tantamount to an admission of guilt;
 - The suggestion that he had a limited opportunity to present his side of the story and defend himself, and that opportunity was slipping away; and
 - the repeatedly ignored assertions that he did not want to speak to the police as advised by his lawyer;
- there is a basis and a foundation for the court to have a reasonable doubt that his statement was involuntary.

- [92] The accused contends that he gave the incriminating statement because he was placed in somewhat of an oppressive environment. He argues he was tricked into believing that the police had DNA, CCTV, video footage and fingerprint evidence that pointed to him as the guilty party. The police intimated that Mr. Provencal had implicated Mr. Davidson in the offence, although that suggestion was a thin implication.

- [93] The accused argues that the officers told him that his silence was tantamount to an admission of guilt and that the worst might be thought about him if he did not speak. In this case, the worst presumably was a charge of first-degree murder. The accused says he was induced by the police assertions that it would be better for him if he told the story because inferred in that exchange was the offer that he could avoid a first-degree murder charge by explaining his role in Mr. Zecca's death.
- [94] The accused also argues that he lacked mental resilience throughout the interviews, most obviously in the second interview when he articulated the deleterious effects of his drug habit and the effects of withdrawal.
- [95] The accused placed significant emphasis on *R. v. Hammerstrom*, 2006 BCSC 1700 [Hammerstrom]; *R. v. Fitzgerald*, 2009 BCSC 1599; *R. v. Johnny*, 2014 BCSC 812; *R. v. Dhaliwal*, 2016 BCSC 1966 [Dhaliwal]; *R. v. Cairney*, 2009 ABQB 123; and *R. v. Gyles*, 2015 MBQB 21.

Law

- [96] The overarching principles governing the law of voluntariness of a confession to persons in authority were clearly set out in *Oickle*. If a statement is made as a result of threats or promises, oppression, impairment to an operating mind, or other police trickery, and the trier of fact has a reasonable doubt about that voluntariness based on those possibilities, the statement must be excluded.
- [97] Mr. Justice Iacobucci stated that while the overarching concern is with a statement's voluntariness, he said at para. 47:

The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive.

- [98] Where the accused's right to silence is breached, the subsequent confession will be admissible under the *Oickle* test. In *R. v. Singh*, 2007 SCC 48 [Singh], Charron J. said that, if after considering all of the surrounding circumstances there is a reasonable doubt as to voluntariness, then the statement must be excluded.
- [99] Mr. Justice Iacobucci described the types of inducements that are germane to this case. He said holding out the possibility of a reduced charge in exchange for a confession could lead to a finding that a statement lacked voluntariness. This is an important point relied upon by the accused.
- [100] Mr. Justice Iacobucci said at para. 49:

It is improper for a person in authority to suggest to a suspect that he or she will take steps to procure a reduced charge or sentence if the suspect confesses. Therefore in *Nugent*, *supra*, the court excluded the statement of a suspect who was told that if he confessed, the charge could be

reduced from murder to manslaughter. See also *R. v. Kalashnikoff* (1981), 57 C.C.C. (2d) 481 (B.C.C.A.); *R. v. Lazure* (1959), 126 C.C.C. 331 (Ont. C.A.); R. J. Marin, *Admissibility of Statements* (9th ed. (loose-leaf)), at p. 1-15. Intuitively implausible as it may seem, both judicial precedent and academic authority confirm that the pressure of intense and prolonged questioning may convince a suspect that no one will believe his or her protestations of innocence, and that a conviction is inevitable. In these circumstances, holding out the possibility of a reduced charge or sentence in exchange for a confession would raise a reasonable doubt as to the voluntariness of any ensuing confession. An explicit offer by the police to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances.

[101] In *R. v. Nugent* (1988), 84 N.S.R. (2d) 191, 63 C.R. (3d) 351, referred to by Mr. Justice Iacobucci, the majority of the Nova Scotia Court of Appeal came to the similar conclusion that it was improper for a constable in that case to imply to a suspect that he might face a reduced charge by cooperating with the police in giving his statement. As Jones J.A. explained:

60 Against that background, Constable Cleary referred to the Druhan case. Constable Cleary made it crystal clear that Druhan was convicted of manslaughter and escaped life imprisonment because he had co-operated with the police and had given a statement. The inference was clear that if Nugent confessed the police might be able to assist him in a similar way. Shortly after that, Nugent gave an oral statement admitting the killing. In my view, that statement was induced by hope of advantage held out by the police, and was clearly inadmissible. . .

[102] In *Spencer*, Madam Justice Deschamps emphasized that if a court finds that a suspect has been induced to make a statement, it must consider other factors and undertake a contextual analysis as well as the traits and circumstances of the individual being interrogated. At para. 13, she said:

With respect to promises, which are at issue in the present appeal, this Court has recognized that they "need not be aimed directly at the suspect . . . to have a coercive effect" (*Oickle*, at para. 51). While Iacobucci J. recognized in *Oickle* that the existence of a quid pro quo is the "most important consideration" when an inducement is alleged to have been offered by a person in authority, he did not hold it to be an exclusive factor, or one determinative of voluntariness. On the contrary, the test laid down in *Oickle* is "sensitive to the particularities of the individual suspect" (para. 42), and its application "will by necessity be contextual" (para. 47). Furthermore, *Oickle* does not state that any quid pro quo held out by a person in authority, regardless of its significance, will necessarily render a statement by an accused involuntary. For example, an offer of psychiatric or psychological assistance, although "clearly an inducement, . . . is not as strong as an offer of leniency and regard must be had to the entirety of the circumstances" (para. 50). Inducements "becom[e] improper only when . . . standing alone or in combination with other factors, [they] are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne" (para. 57).

- [103] This reiterated Iacobucci J.'s finding in *Oickle* that the vulnerability of the suspect and his special circumstances are relevant. The strength of mind and will of an accused, the custodial surrounding and the effect of the discourse will be considered: see para. 42. In *Singh*, Charron J. also explained the application of the reasonable doubt principle at para. 38.
- [104] As stated already, under the common law rule, the onus is on the Crown to prove voluntariness beyond a reasonable doubt. The mere presence of a doubt as to the exercise of the detainee's free will in making the statement will suffice to ground a remedy, and by contrast to remedies under the Charter which are subject to the court's discretion under s. 24(2), a violation of the confessions rule usually always warrants exclusion. In *Oickle*, Iacobucci J. noted that the wider protection afforded under the confessions rule is in explaining why he rejected the suggestion that the jurors should be regarded as subsuming the common law rules.
- [105] The police have a right to speak to an accused person provided they do not breach the right to silence, and they may continue an interview or engage in legitimate persuasion in an effort to obtain evidence, as described in *Singh* at paras. 28 and 46. Persistence in continuing an interview of an accused, despite repeated requests by accused to remain silent, may raise a doubt that the statement was the product of the person's free will to speak to the police: see *Singh* at para. 47.
- [106] Madam Justice Charron noted that the focus of the inquiry will be the conduct of the police and how it affected the accused's ability to exercise free will. The test is objective, but will take into account the individual characteristics of the accused. An argument that a suspect has been induced by police conduct to waive the right to silence engages a contextual analysis of the inducement and other oppressive circumstances that might operate together to render the statement inadmissible. If the trier of fact has a reasonable doubt about voluntariness, the statement must be excluded. The mere presence of a quid pro quo is not determinative, but is to be considered in the contextual analysis.
- [107] The vulnerability of the suspect is an issue, as are all of the other special circumstances. Police trickery is another factor to consider when assessing voluntariness of an accused's statement or when assessing whether voluntariness has been displaced by oppressive circumstances. While courts are not to unduly limit police discretion, they must not condone trickery that is appalling so as to shock the community: see *Oickle* at paras. 65 and 67.
- [108] In *Hammerstrom* at para. 101, Madam Justice Neilson (as she then was), described two types of police trickery. One operates on the mind of an individual and is subsumed in the general topic of oppression whereas the other focuses on the interests of the community and is dealt with under the rubric of police trickery and shocking to a community. In the latter, the focus is on the community whereas in the first type, it involves an assessment of the mind of the individual.

- [109] In Hammerstrom, the accused was charged with second-degree murder of his girlfriend whose body had been found in a vehicle behind a Superstore in Surrey. During a police interview, a surveillance tape reportedly from the store was placed on the table which the accused would have seen, and might have inferred incorrectly it had come from the store. The court accepted that the placement of the video, marked with the store name on its label in the interview room, was an appropriate police interview technique.
- [110] However, during the interview, an officer asked the accused if there was any reason why he would be seen getting out of the car from surveillance points in the area of the crime scene that might have been caught on video. In fact, there was no such footage. The police suggested that it was up to the accused how to respond. Neilson J. concluded that:
- [93] a reasonable person hearing those statements about the tapes would conclude that the police had videotapes showing him getting out of the car at the time of the crime that implicated him in the crime.
- [111] She found that the police trickery operated on the accused's mind and was decisive. It was based on the explicit misleading statement and representation of false evidence which created the clear causal relationship between the trick and the confession. The accused's responses showed he believed that his involvement had been captured and that concurrently his resolve to remain silent crumbled. He testified that he felt as if the interview were just a formality, and that he was bound to go to jail, and Neilson J. found that this caused Mr. Hammerstrom to abandon his volition and intent to remain silent, and confess. His statement was excluded.

Discussion

- [112] I have referred to a number of the excerpts from the transcripts of the accused's statement. I have taken into account all of the transcript references set out above, and others of the statements in the interview, and the portions that I have excluded are examples of salient features of the statement but are not exhaustive of all the relevant portions. I also have taken into account the accused's demeanour during the several hours of his interview. At times he appeared generally unwell showing signs of fatigue, soreness, and sweating. At times he asked to leave the interview room. At times his anger and frustration erupted, but for the most part he remained calm and lucid. I accept that the police treated Mr. Davidson with a degree of calm and persistent inquiry but nothing in their technique was aggressive or threatening of him.
- [113] Throughout Mr. Davidson's interviews, the police pursued four themes.
- [114] First the police had informed the accused on May 13, 2015 that they had spoken to Mr. Provencal and by referring to Mr. Provencal, who was known to the accused and to have been in the vicinity, they indirectly suggested that Mr. Provencal may have implicated Mr. Davidson in the murder. I take into account that Cpl. Tousignant's tone when she said to Mr. Davidson on the evening of May 13, that she had spoken with Mr. Provencal at length, and

invited him to think about it overnight. This statement must be considered in view of the remarks later in the inquiry that the evidence other witnesses were giving evidence that was pointing to the accused's role in the death.

- [115] On the second day, the accused inquired about Mr. Provencal's whereabouts and displayed his interest in him. The officer's repeated references to Mr. Provencal and the fact that he had provided information that corroborated other witnesses. Later, they asked Mr. Davidson to explain why the evidence was pointing in his direction. In making that comment, the police were referring to evidence that they had obtained from witnesses as well as other evidence.
- [116] Underlying these comments was an untruth. Mr. Provencal gave no evidence about Mr. Zecca's death or the accused, and said nothing that implicated the accused. Although he had lied to the police and the lie gave the police some information about his involvement, he did not give any details about the murder of Mr. Zecca. Coupled with the other issues I have referred to, I find the accused's vulnerability and fear were fed by the unfounded suggestions that Mr. Provencal had given evidence. It is also significant that Cpl. Tousignant testified specifically that she did not give Cst. Derusha any details of the conversation that she had with Mr. Provencal.
- [117] The second theme developed by the interviewing officers concerned the types of evidence being gathered. After being introduced to the accused, Cst. Alldritt explained that he would present some of the evidence that the investigators had gathered. Mr. Davidson was informed several times about the DNA evidence and early in the exchange Cst. Alldritt told Mr. Davidson about the types of tools that the police used in investigations generally, without specifically referring to the investigation into Mr. Zecca's death. But when Cst. Derusha informed the accused that the police generally obtain video surveillance, DNA and witness statements to corroborate information that they had already obtained, again the police actions were not problematic.
- [118] However, more problematic are the two occasions when Cst. Derusha used the language communicating to the accused that DNA and video evidence in connection with the death had been obtained. He said:
- . . . you know we got video surveillance, we got DNA, DNA is a big a big part of it right and we also have witnesses right that's a part of the evidence collecting process . . .
- [119] He then repeated the sum of the evidence from the witnesses was corroborative of the evidence, and he again said:
- . . . we have all this evidence, independent evidence of whether what was observed [what video surveillance] again DNA there's lots of different things that are starting to go like this and they're jiving together and, and that really solidifies the investigative facts as to what happened right and that's why it's very important that, that the police are not blind and tunnel visioned as to what happened.

- [120] The Crown pointed out the remarks made by the police did not clearly say they had this type of evidence that implicated the accused. In my view, only a very sophisticated person might have construed those words as something other than an assertion that the police had DNA and video surveillance relating to Mr. Zecca's murder, and that some of that evidence was pointing to him. While the police never made the categorical statement, their mention of having DNA, video and fingerprint evidence was intended, in my view, to convince the accused that the evidence was in their possession and that together with the other witness statements, was implicating him in the crime, so that he would confess.
- [121] During the interview, Cst. Alldritt returned to this subject. He said that the DNA evidence had been obtained from the scene when in fact no DNA evidence had been obtained. The accused was left to speculate as to why DNA might have been found at the location of the murder.
- [122] I am satisfied that these deceptive remarks contributed to the accused's vulnerability, and may have undermined his intention to remain silent. In arriving at this conclusion, I also considered that he was experiencing the symptoms of withdrawal. These factors operated on his will to remain silent because, coupled with the possibility of the first-degree murder charge, these statements were part of the sophisticated police technique to suggest, without actually describing the evidence pointing to the accused, that this was his opportunity to avoid the more serious charge and that if he confessed to facts that might have supported a lesser charge, he would not face the first-degree murder allegation.
- [123] The third theme pursued by the police was that the accused should feel compelled to tell the police his side of the story. They insisted that he should speak to them, despite his repeated requests to be returned to a cell and his refusal to abandon his right to silence. In an effort to convince the accused to abandon that right, which he had been advised by his lawyer to preserve, the police encouraged him to be an adult and to provide a statement. The clear implication was that withholding his side of the story was in some way childish.
- [124] The interviewing officers also challenged his right to silence by telling him that if he had not done anything, he should have more questions to ask of them, and that if he had done nothing and if he had nothing to do with Mr. Zecca, he should tell them. They implied that if he was innocent he would speak to the police.
- [125] Finally, they attempted to undermine his right to remain silent indirectly by implying that his only opportunity to tell his side of the story was during this police interview and that this opportunity was rapidly closing when the urgency did not actually exist.
- [126] I am satisfied that the suggestion that his continued silence as per his lawyer's advice was childish, coupled with the police suggestion that if he was not guilty he should speak, clearly undermined his ability to withstand questioning and to stand on his right to silence.

- [127] The fourth theme discussed by the police concerned the distinction between first-degree murder, second-degree murder and manslaughter. The context of the discussion preceding the accused's statement leaves little room for doubt that Mr. Davidson was cognizant of the risk of a first-degree murder charge and the importance of premeditation, and that he could deflected it if he in fact told the police what had occurred. Thus, when he embarked on his statement, it is quite likely that he held in his mind that a first-degree murder charge could be avoided by making a statement.
- [128] The manner and forcefulness of the officers' encouragement for him to give his version of events, notwithstanding his repetitive refusal to speak to the police up to that point, also leaves little doubt that it is likely that his inculpatory statement was made because of the police assurances that his statement would "absolutely benefit him". The police strategy of continually referring the accused to a possible range of charges, including first-degree murder, while telling him that it would benefit him to tell his side of the story, was a type of trickery designed in my view to undermine his will to remain silent. The strategy planted the possibility that the accused could be charged with first-degree murder unless he explained that he did not have a premeditated plan, in which case he could be charged either with manslaughter or second-degree murder.
- [129] There were repeated discussions about the differences between the three types of charges, noting the importance of intention which were, in my view, significantly misleading, as the constables would have no influence on the outcome of charges. Mr. Davidson had already been charged with second-degree murder charge before the second day of interviews began. The officers returned to this subject numerous times, well knowing that the second-degree murder charge had been approved. The officers withheld the fact that the Crown had already approved the second-degree murder charges before the interview began.
- [130] Cpl. Tousignant said she would not have withheld that information from an accused without a compelling reason. The only reason that can be inferred in this case is that the police believed that the accused would not have abandoned his right to silence if he had known the charge had been approved early that morning, because at that point, there would be no risk of a first-degree murder charge. They withheld this fact so as to enhance the inducement of the possibility of a lesser charge if he explained his involvement. There was no uncertainty in the interviewer's mind that his jeopardy at that stage was settled at second-degree, and I find the police statement that it would absolutely benefit the accused if he told his story was in fact misleading. In the context of the discussions about lessening the charges against him, it was a classic example of an inducement as described in Nugent. It militates against the finding that the statement was voluntary.
- [131] I pause to note that the exchange that occurred when the police uttered their absolute confirmation of the benefit to Mr. Davidson is, although not directly parallel to the circumstances in Nugent, but had a close similarity to the case in Nguyen. In neither of those cases did the police actually offer a reduced charge on the basis of the statement being given; rather they held out and focused on the differences between first-degree and

second-degree murder charges as a basis for which the person would be prepared to abandon their right to silence.

- [132] It must be remembered that the officers repeatedly told Mr. Davidson that he had an opportunity to tell his side of the story, to fill in his part of the picture, and that his opportunity was lessening all the time. He was repeatedly reminded of the differences between the two murder charges and the distinction between arrest and charge. Thus, in the overall context of the police remarks, I am satisfied he was responding to their representations, and in part that he was required to give a statement to save that vanishing opportunity that would result in his facing a less serious charge. In the context, the officers' answer to his question, "is it going to benefit me" could fairly be misconstrued as an assurance that the lesser charge would be available once he made a statement.
- [133] I am also satisfied that the officers' actions in withholding the fact that he was already charged when they induced him and the belief that the charges had not been laid, and that he had an opportunity to fill in the picture in a way that could lead to a lesser charge was the type of trickery described in Hammerstrom that was misleading and intended to trick the accused into giving up the right to silence without necessarily rising to the level of shocking to the public, which is the other aspect of police trickery.
- [134] I am also of the view that the references to DNA and video evidence given by the police implied that they had possession of this type of evidence and was designed to erode his confidence in his resolve to remain silent. Although the impact of these statements may have been less influential, they were part of the context in which he chose to abandon his right to silence.
- [135] I have taken into account the cases cited by the Crown. In particular, I note the facts in Tan are somewhat distinguishable from this case. Tan was an appeal dealing with a statement admitted at trial. The accused had taken the issue of misstatements of evidence made by the police, the deception, combined with a lengthy interview and a false statement, but the Court of Appeal simply accepted the trial judge's finding of fact that the accused's will had not been overpowered or he had not been tricked and accepted the trial judge's finding. The facts in the case are not parallel to the facts in this case.
- [136] In Nugent, the accused argued his statement was obtained under oppressive and coercive circumstances. The questioning had been persistent and the accused fatigued. After an extensive review of the evidence, the trial judge concluded that the accused spoke freely with an operating mind. Again, the underlying facts are substantially different than this case, and the conclusion is based on the trial judge's contextual treatment and analysis of all of the facts.

- [137] Lastly, in Hosack, Schultes J. reviewed the evidence extensively and concluded simply that the police did not contribute to an atmosphere of oppression or misstate facts to an extent undermining the accused's voluntariness. The court did refer to Hammerstrom and concluded that a clear link was necessary to connect the accused's belief that he had been caught on the video and confessed in response to aggressive questioning. In Hosack, Schultes J. did not find any such link between the facts and the accused's statement.
- [138] Overall, and for the reasons that I have stated and for the reasons that will follow, I find that the Crown has not proven beyond a reasonable doubt that Mr. Davidson's statement was voluntarily made. It will be excluded from the evidence at trial.
- [139] To summarize, the two interviews of the accused were carried out over almost seven hours, most of which the accused insisted on his right to silence. The length of the interview and persistence of the questioning may have affected Mr. Davidson's ability to choose to speak, although he did not show any physical signs of wilting under the interrogation. His condition, although not overtly demonstrating any physical demeanour that played a part in his statement, remained a factor in the background.
- [140] In my view, the police misrepresented the true facts concerning evidence by inference or implication suggesting that it pointed to him without any legitimate basis for the suggestion. I do accept that when the police suggested that if the accused was not guilty he should not speak, and if he was innocent that he should speak, portrayed his silence as a negative admission. These comments, particularly in light of the intense focus on the different offences, were coercive such that he was more likely to abandon his choice to remain silent because of those features.
- [141] Before Mr. Davidson confessed, he was told by the police that cooperating would absolutely benefit him, even though the charges had already been laid. It seems to me that the accused asserted his right and his desire to end the police interview approximately 54 times, and that he was forceful and adamant, and that it is thus not unreasonable to conclude that his question as to whether or not the statement would benefit him, as responded to by the police, would have been an influence.
- [142] The repetitive focus on the three possible charges, including the first-degree murder charge, was the genesis of the fear which eventually resulted in his decision to tell the story. This feature of the interview has also instilled in him a sense that, if he did not tell the story, the worst would be inferred and that meant a charge of first-degree murder was possible.
- [143] The police did not specifically equate the worst with a first-degree murder charge but in the context of the exchanges that were occurring, it was not unreasonable that the suspect would consider the worst as a first-degree murder charge.

- [144] It was a further concern to me that after the accused gave his statement and before the re-enactment, the police failed to disclose to the accused that the second-degree murder charge had been approved. He asked what they thought and they responded, the decision remains with the Crown, without telling him that the decision was already made. Thus his interest and willingness to do the re-enactment was based partly or wholly on the police's failure to properly inform him of his jeopardy and, in a way, that it was a dishonest misrepresentation of the circumstances that existed at the time.
- [145] It is also important to observe that challenges for the interviewers included the need to be subtle and indirect when attempting to induce confessions from suspects. However, when words and statements are obscure or subject to different interpretation, the circumstances of the suspect, including the ability to make subtle distinctions, can be significant. In this case, I have concluded that there are parts of the police questioning that lack clarity and may have led Mr. Davidson to perceive the police had evidence they did not have, and to perceive that the inducement offered was meant as an attack in his ability to remain and choose to remain silent.
- [146] The question of police trickery and inducement I have referred to operated together in leaving me with a reasonable doubt that he gave up his right to silence because of the pressure and confusion regarding the charges which the police knew did not exist at the time, and which they led him to believe could be resolved if he gave a statement.
- [147] One aspect of police trickery is more nuanced than the others. The officers engaged in an effort to obtain the complete confidence of the accused when they said "the police can't legally lie" and "I will be honest with you", and they discussed perjury and the other incidences of police lies and the misconduct of their duties. The police are entitled to misstate facts or lie from time to time to a suspect provided those actions do not go to the point of undermining or oppressing the suspect to the extent that his will to remain silent is overborne by the context of those untruths.
- [148] It seems to me that if the police had intended to follow that strategy, they should be careful not to further mislead a suspect by saying they will not lie. In the context of this case, the assurances of the officers' truthfulness and honesty might very well have influenced the accused when he naïvely assumed that the police were offering him a benefit in exchange for his statement when he asked if his statement would be a benefit. Standing alone, this issue would not cause concern, but in the context of the overall representations and misstatements of fact, I have referred to it as one feature that erodes my confidence that the statement was voluntarily made.

[149] The question and the context of the question, "will it benefit me if I break it down for you", and the answer, "absolutely", satisfies me that Mr. Davidson construed that exchange as an inducement that if he spoke about this involvement, and there was no premeditation, he would be charged with a lesser charge or would likely be charged with a lesser charge, and I am satisfied that this is the type of inducement that was described in Oickle at para. 57, where the Court said:

In summary, courts must remember that the police may offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne.

[150] In this exchange, I have reached the conclusion that the will of Mr. Davidson was, as a result of the inducement and all of the other in circumstances, overborne.

[151] Mr. Justice Schultes said in Dhaliwal, at para. 235:

The contextual inquiry then becomes, as Lord Morris put it in *Director of Public Prosecutions v. Ping Lin* . . . "was it as a result of something said or done by a person in authority that an accused was caused or led to make a statement". In other words, what was the causative link, if any, between things done by the police or their agents here and Mr. Bedi's statements?

[152] The interviewers repeatedly told him they needed his version of the facts and his opportunity to provide his version was waning. If this assertion had been made without ongoing discussion of the differences between the first and second-degree murder, it might not have been unduly influential. However those assertions made of the potential charges promoted the idea that by giving the statement and abandoning his right to silence, the decision-maker would take into account his statement and prefer a lesser charge.

[153] The theme that Mr. Davidson had an obligation to speak to the police and that his refusal was childish is also a factor. The police are not allowed to denigrate an accused lawyer's advice, or a lawyer or advice received from a lawyer, yet referring to one's decision to stand on the right to silence as childish, as contrasted with an adult act of providing a statement, is problematic. This is another feature of the interview that raised, in my mind, a doubt that the statement was voluntary.

[154] As I said, this is a case in which the multiple features of the police conduct contribute to my doubt.

[155] Taking into account the impact of all of these matters, I have reached the conclusion that Mr. Davidson's statement was not voluntary and that his statement will be excluded from evidence in the trial.

"Armstrong J."

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