
CANADA / JUDGMENT

R. v. Dhillon

2001 BCCA 555

COURT

British Columbia Court of Appeal

DECIDED

26 September 2001

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Citation:

R. v. Dhillon

Date: 20010926

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Docket:

CA025344

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

GURMIT SINGH DHILLON

APPELLANT

Before:

The Honourable Madam Justice Prowse

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Low

S. R. Chamberlain, Q.C.

Counsel for the Appellant

K. Ker

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

6-7 February, 2001

Place and Date of Judgment:

Vancouver, British Columbia

26 September, 2001

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Madam Justice Prowse

The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Mr. Justice Low:

- [1] This is an appeal from a conviction for first-degree murder.
- [2] On 15 April 1977, the body of Carolyn Lee was discovered in a wooded area in Port Alberni, B.C. She was twelve years old. Forensic evidence established that she had been raped and bludgeoned to death. During the initial investigation, R.C.M.P. detectives considered the appellant to be a suspect. However, there was insufficient evidence to lay a criminal charge against him.
- [3] Human seminal fluid taken in 1977 from the vagina of the deceased remained available. It was used for DNA testing commencing in 1992. Forensic scientists later matched the DNA in the seminal fluid to DNA in the blood of the accused. This resulted in the accused being charged with the first-degree murder of Carolyn Lee on 13 March 1997.
- [4] Following a month-long trial, a jury convicted the appellant of first-degree murder on 3 December 1998. The trial judge sentenced him to the mandatory sentence of imprisonment for life without eligibility for parole for 25 years.
- [5] There can be no question that the evidence would satisfy any trier of fact that somebody abducted, raped and murdered the deceased. There can be no dispute that the killer, or killers, committed the offence of first-degree murder.

- [6] The sole issue at trial was whether the evidence proved beyond a reasonable doubt that the appellant was the person who committed the offence, either alone or with another man.
- [7] The appellant raises seven grounds of appeal:
 - [1] That the trial judge erred in not granting a judicial stay of proceedings because of pre-charge delay.
 - [2] That the trial judge erred in not permitting counsel for the appellant to examine prospective jurors at large on the issue of impartiality arising out of the ethnic origin of the appellant.
 - [3] That the trial judge erred in ruling valid a warrant that authorized the taking of a blood sample from the appellant for DNA testing.
 - [4] That the trial judge erred in not instructing the jury that the Crown's DNA evidence had no probative value, or, in the alternative, limited probative value, if they were not satisfied beyond a reasonable doubt that there was only one male donor to the DNA material taken from the vagina of the deceased.
 - [5] That the trial judge erred in not instructing the jury that there was no direct evidence that the appellant committed the crime and that the Crown's

case was entirely circumstantial. [6] That the trial judge erred in failing to adequately review the evidence and relate it to the issues.

- [7] That the guilty verdict was unreasonable and unsupported by the evidence.

Overview

- [8] Carolyn Lee finished her dance class at the Pat Cummings Dance School at about 6:30 p.m. on 14 April 1977. The school was located on Athol Street, between 1st and 2nd Avenue, in Port Alberni. Both Pat Cummings and Nancy Nass saw the girl leave the school, headed toward 2nd Avenue, at about 6:30 p.m. She usually walked the three or four blocks to her family's restaurant, the Pines Café located on 3rd Avenue, after her dance class. She did not arrive there.
- [9] Between 6:45 and 6:50 p.m., Janice Pierce was walking along 2nd Avenue to her 7:00 p.m. dance class. She exchanged greetings with the deceased about half a block from the dance school and about 2 1/2 to 3 blocks from the Pines Café. Janice Pierce was the last Crown witness to see the victim before the abduction.
- [10] A search for the victim began when she did not arrive at the family's restaurant when expected. After making some inquiries on his own, her father reported her missing to the R.C.M.P. at 8:28 p.m. on 14 April 1977. The search lasted until about 4:50 p.m. on 15 April 1997 when Lyle Price, a local farmer, located the body on his property near Cox Lake.

- [11] Mr. Price's farm was 21/2 miles south of Port Alberni at the south end of Cox Lake. The neighbouring Murray residence was at the north end of Cox Lake. Franklin River Road joined the two properties. An old logging railway bed, the Cox Lake trail, also connected the two properties near the lake. Only certain vehicles could travel the trail, as there was a large mud hole on the trail between the two residences.
- [12] In response to urging by police that rural residents check their property for the missing girl, Mr. Price checked the trails on his property on his dirt bike. A short distance from the Murray residence, Mr. Price found a set of tire tracks that he would not normally have expected to see at that location at that time of year. He did not touch the tracks; he just followed them about 100 yards up the road where he saw the body from about twenty yards. Without going closer, he turned around and made his way to the Murray residence where he called the R.C.M.P.
- [13] Several R.C.M.P. officers met Mr. Price at the Murray residence. Mr. Price led the officers on foot to the location of the body. The young girl was found clothed in only a blue ski jacket and a pair of blue and white running shoes. Sgt. Blair and Cst. Terhorst secured the area and waited for Cpl. Mitchell, the identification officer, to arrive and photograph the scene. The police located a number of clothing items in the bushes about 36 feet off the Cox Lake trail and about 250 feet from the body.
- [14] On the jacket of the victim the police found a partial footprint. It was thought to have been made by a hiking boot and soil from it was dissimilar to the natural soil at the crime scene.
- [15] Mr. Price testified that the first place that he noticed the tire tracks was at a fork in the road about 100 yards from where he found the body. The terrain at the fork was quite muddy and there was no slippage or backing up evident from the tire tracks. These facts, in conjunction with the appearance of the tracks themselves, led Mr. Price to believe that they had been made by a light duty, four wheel drive vehicle. At the fork, both the front and rear tire tracks were clearly visible and appeared to have been made by a vehicle with four heavy, lug-type truck tires.
- [16] Although the trail leading away from the fork was soft and muddy in some places and hard or grassy in others, Mr. Price was able to follow the tire tracks to the place where he found the body.
- [17] The investigating officers noticed an area near the body where there were broken tree branches and debris. They determined that a vehicle turning around had caused this damage. The area was designated the "turn around".
- [18] The impressions of a heavy lug-type tire were evident sporadically from the fork all the way to the turn around. Cst. Suwinski found one impression of a summer tire of such poor quality that the tread pattern could not be determined. Beyond the fork, only heavy lug-type tire impressions were evident.

- [19] Photographs, measurements and drawings were taken of one clear tire impression at the fork. Sgt. Blair and Cst. Suwinski noted numerous similar tire impressions. Mr. MacKenzie, a local tire storeowner, attended the scene at the request of the R.C.M.P. By comparing the tread pattern and size of the markings to actual tire stock, he concluded that the impressions were consistent with having been made by Seiberling 700/15 heavy lug tires.
- [20] Once the type of tire had been identified, the R.C.M.P. began looking for vehicles with four Seiberling 700/15 heavy lug tires. On 25 April 1977, they discovered that the appellant owned a 1977 Blazer with four Seiberling lug tires.
- [21] How the investigators came to discover the appellant's vehicle is of interest. The description of that evidence is conveniently set out in Appendix A to the Crown's factum as follows:

[Cst.] MacDonald was with the Port Alberni R.C.M.P. GIS division in April 1977. As part of his role in the investigation of the murder of the deceased he checked vehicles in Port Alberni to see if their tire treads matched the tire impressions found at the crime scene. On April 25, 1977 he received information from citizens indicating that one Rose Mickey had said she was assaulted out by Cox Lake about 2 or 3 weeks earlier. Cst. MacDonald interviewed Ms. Mickey and obtained a written statement outlining the circumstances of her attack. On May 12, 1977 she assisted a police artist in preparing a composite sketch of her attacker. Before taking Ms. Mickey's statement, Cst. MacDonald and Sgt. Blair had Ms. Mickey try and point out the location of her assault. She was unable to direct them to the exact area. However, Cst. MacDonald drove down the trail where the deceased's body had been found and at the "turnaround" location Ms. Mickey expressed a belief that she had been assaulted there as she recognized some derelict vehicles in the area. Upon their return to Port Alberni, Cst. MacDonald drove Ms. Mickey around for a while trying to find the location where her assailant had released her but they were unsuccessful. Mickey did describe her attacker's vehicle as a blue and white Blazer or Jimmy and as a result of this information they drove around trying to find a vehicle that matched her description. Cst. MacDonald drove along 2nd Ave. and in the 2900 block saw a vehicle in a driveway that matched the general description she provided. Ms. Mickey said the vehicle was exactly like her attacker's and appeared to be frightened. Cst. MacDonald noted that the vehicle had tire treads that matched the Seiberling tread the police were looking for. He memorized the vehicle license plate and address and returned to the detachment. A check of the license plate revealed the Appellant to be the owner of the vehicle. On May 7, 1977 Ms. Mickey viewed a photograph album containing recent photographs, which included one of the Appellant. She was asked to look through the album and to try and identify anyone who was her attacker and resembled him but made no selection. Cst. MacDonald then took her back to the Appellant's photograph and asked Ms. Mickey if he was her attacker. Ms. Mickey indicated that he definitely was not and added "he wasn't Hindu".

- [22] Cpl. Mitchell, the identification officer, compared an impression of the left rear tire of the appellant's vehicle with a photograph of the tire impression at the crime scene. The size and pattern fit but he found no accidental characteristics in the crime-scene impression so he did not examine the tires from the appellant's vehicle for such features.
- [23] Sgt. Blair interviewed the appellant on 26 April 1977. The appellant gave a statement containing an alibi for the night in question and he allowed the police to examine his vehicle.
- [24] The appellant told the police that on the evening of 14 April 1977, he worked at his father's foundry until 5 p.m. After work, he had a couple of drinks with his father, some co-workers, and two men who had come by the foundry to do some business. By sometime between 6:30 and 7:00 p.m., most of the men had left the foundry and the appellant and his brother helped their father, who had had too much to drink, into his house on the premises. The appellant locked up the foundry, drove his Blazer through a car wash and went to the beer parlour at the Beaufort Hotel. He had a few beers and called his girlfriend, Sharon McLeod, a few times but she was not at home. About 8:30 p.m. he recalled that Ms. McLeod called the bar looking for him and the bartender paged him to take the call. He left the beer parlour at about 9 p.m. to drive home and was followed by Ms. McLeod who had been waiting for him outside in the parking lot.
- [25] Sharon McLeod and her two children were living with the appellant in April 1977. She and the appellant married in 1981, separated in 1983 and divorced in 1985. Her account of the events of the evening in question is much different from that of the appellant. She testified at trial that on 14 April 1977 she had dinner ready at about 6:30 p.m. and the appellant had not yet returned home from work. She drove first to the foundry and found the gates locked. Then she drove around to the local drinking establishments that he was known to frequent, including the Beaufort Hotel, to look for his vehicle. She was unsuccessful in locating his Blazer, so she went home.
- [26] Ms. McLeod then called several bars looking for the appellant but did not find him. It was close to 7 p.m. and she was checking on dinner when she saw his vehicle travelling south on 3rd Avenue. She assumed that he had gone to the corner grocery to buy cigarettes. He did not return immediately as she expected, so she fed the children and put them to bed.
- [27] The appellant arrived home in an unfriendly mood at approximately 7:30 p.m. As far as she could remember, he had the usual grime from the foundry on him. He asked Ms. McLeod to come downstairs and wash the truck. This request was unusual, as it was the middle of the week and she usually washed the truck on weekends. Ms. McLeod noticed that the truck was covered in mud and was unusually dirty. She assumed that the appellant had been out "bush bombing". The inside also had to be cleaned, as there was mud on the passenger seat and smudges on the inside of the windows. Inside the vehicle, she found a small blue barrette, a very small bow-shaped barrette and an earring.

- [28] The appellant showered while Ms. McLeod cleaned the vehicle. When he was finished showering, he came downstairs and cut off the steering wheel cover. He then went upstairs to have dinner.
- [29] The R.C.M.P. did not interview Ms. McLeod until 1983. In December 1983 she underwent hypnosis but denied in cross-examination that this was done to replace a barren memory. She was aware that the appellant was under suspicion because she was at home with the children when the R.C.M.P. came to question him about the tires on his Blazer. After the R.C.M.P. officer had been to the house, she began to take notes in her journal about her thoughts at the time. In 1983, she said that she gave the relevant pages from her journal and the barrettes and earring to Sgt. Martin.
- [30] In 1994, Alice Lazorko went to the R.C.M.P. and reported a recollection of events that occurred in 1977. At trial she testified that on the day of the murders she was driving north on 3rd Avenue waiting to make a left turn when she noticed a truck driving south on 3rd Avenue. She reported that a dark man was driving the truck and a young Chinese girl was in the back seat with a man who had blonde hair. The girl appeared to be yelling at Ms. Lazorko and trying to get up over the front seat. The blonde man pulled her back down and buried his head in her neck. The young girl was wearing a dark blue jacket with green on it. At the time, Ms. Lazorko dismissed the actions of the girl as being rude or critical of her driving. She went to police years later because she came to the realization that the young girl might have been yelling at her because she was driving a decommissioned R.C.M.P. vehicle and the girl needed help. Her report to the police in 1994 was precipitated by visions she had of the girl yelling at her and she finally realized that the vehicle occupants were concerned about her car and not about her driving. She testified that in 1977 she knew of none of the details about how the victim died and at no time had any description of what the victim had been wearing. Many years later she was able to identify the time of the experience through reference to a number of personal events in her life, particularly the purchase of the R.C.M.P. vehicle on March 26, 1977. There was documentary evidence confirming the date of the purchase.
- [31] A helpful description of the forensic testing of the exhibits in this case is set out in Appendix C in the respondent's factum:

On April 18, 1977 Dorothy Clark, an analyst in the hair and fibre section of the forensic lab in Vancouver, received a number of exhibits from Cst. Terhorst including items of clothing from the deceased and a known hair sample (head and pubic) from the deceased. She received known hair samples (head and pubic) from the Appellant at a later date. She examined the exhibits and compared the known hair standards for both the deceased and the appellant with unknown hairs found on the deceased's sweater and leotards. As a result of her examinations she concluded that the pubic hair found on the deceased's sweater was foreign to both the deceased and the Appellant. Similarly, all unknown scalp hair that was foreign to the deceased and found on her clothing was also foreign to the Appellant. Four unknown scalp hairs on the deceased's clothing (sweater, leotards and jacket) found inconsistent with either the deceased or the Appellant were

described as light in colouring and indicative of Caucasian origin. A slight impression of a vibram soled shoe, typical of a work boot, was found on the deceased's jacket and was photographed by Cpl. Mitchell. Ms. Clark examined this impression in an effort to determine the type of sole and shoe size that caused it. She was unable to say anything conclusive about the footprint as the impression on the back of the jacket was insufficient for examination purposes. In July 1977 Ms. Clarke received two further police exhibits, the two vacuum cleaner bags and their contents (one obtained from the Appellant's house on April 26, 1977 and one obtained by the R.C.M.P. when the interior of the Appellant's Blazer was examined also on April 26). She examined the contents of the bags for human scalp hair and also for a missing earring matching the one left in the deceased's ear. Ms. Clark compared the human scalp hair found in the vacuum bags to the known standards for the deceased and the Appellant. She was unable to find any scalp or pubic hairs in the vacuum bags that were similar to the deceased's. In August 1981, Julian Ann Graham, a hair and fibre analyst with the R.C.M.P. forensic lab in Vancouver, received scalp and pubic hair samples taken from one P.R. Koserich and compared them to the pubic hair found on the deceased's sweater (Ex. #3) and scalp hairs found on the deceased's leotards, ski jacket and a blanket and concluded that Koserich's known hairs were not consistent with the questioned hairs. In November 1989 she reached a similar conclusion in respect of known hair samples from T. Gallagher. David O'Keefe, a serologist with the R.C.M.P. forensic laboratory in Vancouver received Ex. #21 and #24 from Cst. Terhorst on April 18, 1977. He also received a number of items (clothing) from Ms. Clark on May 3, 1977. He examined a number of exhibits for the presence of blood and prepared a bloodstain from the known sample from the deceased. O'Keefe examined Ex. #21 (comprised of three components - 21-A, five swaps; 21-B and 21-C microscope slides) for the presence of human semen. Human semen and spermatozoa were present in all three components of Ex. #21. No semen was found on any of the clothing items. O'Keefe also examined a number of items for the presence of blood. All items were negative in that regard, except for a soil sample and the deceased's jacket (Ex. #18). Blood on the jacket was typed and found to be consistent with the deceased's blood. In the spring of 1977 Brian Richardson, a chemist with the R.C.M.P. forensic lab in Vancouver, examined a number of samples of soil taken from the crime scene area as well as soil in the footprint on the deceased's jacket. As a result of his examination he reached the following conclusions: [1] the soil found on Ex. #18 (the jacket) contained one small spherical particle that appeared to be metal.

- [2] the soil found on Ex. #18 was different to the soil found under the deceased's body.
- [3] the soils from Ex. #27-29 (soil samples from the area where the clothes were found, the road near where the clothes were found and the area where the deceased's body was found) were different from the soil removed from Ex. #18.
- [4] none of the soil samples examined contained a spherical object except Ex. #18.

In November 1989, Tony Fung, a chemist with the R.C.M.P. forensic laboratory in Vancouver, received Ex. #18 (jacket) and Ex. #27 (debris from jacket) and police exhibits #58(a) and (b) (soil from the foundry perimeter). He examined and compared the exhibits and reached the following conclusions: [1] Ex. #27 was too minute and not suitable for a proper soil comparison;

[2] although somewhat beyond his experience and expertise, he used a magnetic lab stirrer and passed it over Ex. #18 and Ex. #27 to see if it could pick out anything containing iron - the results were negative.

In April 1997, Arid Lacis, an electron microscopist, received Ex. #27 from Tony Fung as well as a number of earrings (Ex. #20 (from deceased's ear) Ex. #37 (from Appellant's ex-wife) and Ex. #40 (from deceased's family). In July 1997 he received a number of soil samples from Cpl. Paulson. As result of his examination of the various earrings, Lacis found that the earring from the deceased's ear and from her home and the earrings the Appellant's ex-wife found in his car were all different. Lacis was initially requested to examine Ex. #27 for the presence of carbonaceous particles, e.g. coke or coal. Examination under a stereomicroscope revealed 19 dark or black particles possibly the type he was looking for, 18 of which were irregularly shaped. One particle (#8) was different than the others - it was a round bead. Further examination of the particles revealed a distinct difference between particle #8 and the other 18 particles. Particle #8, an iron bead, originated from a location where ferrous metals were cast, welded or flame cut. In February 1998 Lacis received Ex. #26, a vacuum cleaner bag containing the results of the police examination of the Appellant's vehicle on April 26, 1977. Lacis was asked to examine and compare the contents of the bag with the dirt from the jacket (Ex. #27). In particular he was asked to examine the contents of Ex. #26 to determine if there were any beads similar to particle #8 from Ex. #27. Microscopic examination of an extract from Ex. #26 revealed 51 particles described as dark beads. The beads, although not exactly the same, were found to be very similar in their surface features and chemical composition to particle #8 from Ex. #27.

[32] As he had done in his 1977 statement to the police, the appellant raised an alibi. The Crown's factum usefully provides a summary of the defence evidence in this regard:

At trial, the appellant denied abducting the deceased, sexually assaulting her and killing her. During his testimony, the Appellant largely confirmed the contents of his statement and outlined his best recollection of events from the day of the deceased's disappearance. After a day of work at his father's foundry, he blew the dirt off his work clothes with the air hose, washed his hands and then had a couple of drinks on the premises with his father, his brothers, Cory Porter and others. Before he left the premises, he helped his intoxicated father into the house. He then drove his Blazer to the Somass division car wash, washed the vehicle off and then went to the Beaufort Hotel. The Appellant recalled arriving at the Beaufort shortly after 7:00 p.m. He recalled talking to one man from a baseball team and then Don McMurtrie. He remembered Kenneth Sherman serving him beer, but not his first beer. He called his girlfriend a couple of times but was unable to reach her. Around 8:30 p.m. Sherman paged him to the telephone and he spoke to his girlfriend at that time. He remained in the bar for a short period of time and then went home. As he came out of the bar, he saw his girlfriend sitting in her vehicle outside the pub. He went over

to talk to her and learned she was very angry. He denied washing his vehicle off when he got home and said he did not have a steering wheel cover. In cross-examination the Appellant confirmed that he was proud of his [then] new vehicle and liked to keep the Blazer as clean as he possibly could, washing it every day at [a] ... car wash. He confirmed that he would keep the same work clothes all week and to avoid work grime being transferred to the interior of his vehicle he would blow his clothes off with the air hose and wash his hands... [The Appellant] admitted that travelling down 2nd Avenue from the foundry was a frequent route for him. He also acknowledged that he was familiar with the area of Cox Lake, as he had been going up there since he was a teenager. The Appellant acknowledged that he relied upon his April 26, 1977 statement in order to remember the events of April 14, 1977. He clearly confirmed that it was not his habit to change his clothes at work and that he did not have change of clothes at work. When confronted with the contents of his statement and the reference to "grabbed my lunch kit and clothes" he explained that he meant his coat but conceded that was not what he had told the police. John Merry, a friend of the Appellant, worked in the Alberni foundry from time to time. The foundry was an iron-casting foundry and used black sand as part of the process. Employees would get very dirty from work, covered in black sand as well as grease and other materials. At the end of the day people would attempt to clean themselves through use of the air hose and washing hands et cetera in order to avoid, as much as possible, tracking the dirt into a vehicle. Merry recalled that the Appellant, as well as most employees in the foundry, wore Moulder work boots -slip on boots with little in the way of tread on the bottom. Don McMurtrie recalled seeing the Appellant in the Beaufort Hotel on April 14, 1977. McMurtrie went to the Beaufort with Wes Dutton in the early evening, towards dusk, sometime between 7:00 and 8:00 p.m. Not long after they had been there, about 20 minutes, the Appellant came in, bought them a beer and sat down with them for a short period of time. McMurtrie recalled that the police contacted him by telephone on April 26 or 27, 1977 asking him if he had seen the Appellant in the bar on April 14. It was not until a few years later (1984) that he police interviewed him and he provided more information to them. Cory Potter went to the Alberni foundry on April 14, 1977 to discuss business with the Appellant's father. Between 4:00 and 5:00 p.m. he and Carl Poznikoff met with Mr. Dhillon Sr. in the little house on the foundry grounds. They drank rye whiskey and chatted. At 5:00 p.m. they went out to the foundry and joined the crew, including the Appellant, for more drinks. Porter and Poznikoff left the foundry between 6:15 and 6:30 p.m. As they were leaving Porter saw the Appellant helping his very intoxicated father into the house. Porter went home and arrived there at about 6:45 p.m. Porter recalled that the Appellant was still in a dirty condition from work when he left the premises. Kenneth Sherman was the bartender at the Beaufort Hotel on April 14, 1977. He provided a statement to the police on April 27, 1977. Sherman died before this trial was heard. However his statement was marked Exhibit # 194 during the trial and was admitted as evidence possibly supportive of the Appellant's alibi. Sherman saw the Appellant around 7:45 p.m. when he returned from a break. He was unable to say how long the appellant had been in the bar.

- [33] A major point urged by the defence at trial was the absence at the crime scene of any residue from the foundry where the appellant worked. It was the position of the defence that the appellant left his place of work with his work clothes on. Sharon McLeod agreed in cross-examination that as far as she could recall the appellant had the usual work grime on his clothing when he arrived home that night. The defence had Jonathan Gough, a professional engineer, conduct a videotaped experiment on July 28, 1998 in an attempt to simulate what may have occurred in this regard. The appellant participated in the test. It involved the types of material found at the foundry that might be transferred from the appellant's clothing to clothing like that worn by the victim. It was Mr. Gough's opinion that if the appellant were the assailant and dressed in his dirty work clothes at the time of the assault, it would have been impossible for some of the foundry material not to have been transferred to the clothing of the victim. He did not examine the clothing actually worn by the victim, nor the vegetation in the area. Nor did he take into account the possibility that there might have been more than one person involved in the commission of the offence. He also agreed in cross-examination that he had not considered the possibility that the victim was ordered to remove her own clothing. Of course, he also had to agree that he did not know if the perpetrator of the crime had changed his clothes prior to the assault.
- [34] I will deal with the DNA evidence when I discuss the fourth ground of appeal.

Delay

- [35] A few days before the commencement of the trial, the appellant sought a judicial stay of proceedings due to delay. He claimed that his rights had been breached under ss.7, 11(b) and 11(d) of the Canadian Charter of Rights and Freedoms. He asserted that he could not make full answer and defence because, due to the passage of the time from the murder to the laying of the Information (20 years), he could not muster the evidence to confirm his alibi, the police kept no records of the interviews they conducted to check out his alibi, the DNA material was no longer suitable for additional scientific testing, the diary made by Sharon McLeod and apparently given by her to the police in 1983 went missing, and his successful completion of a lie detector test in July 1977 led him into believing he had no need to preserve evidence of his alibi.
- [36] The appellant does not allege post-charge delay. In order to succeed on the argument based entirely on pre-charge delay he had to establish prejudice to his right to make full answer and defence.
- [37] In my opinion, the record in this case clearly indicates that the Crown could not have laid the charge earlier than 1997. Until shortly before that date, they did not have sufficient evidence to warrant the laying of a charge against the appellant. It was not until the latest DNA tests were in hand that the Crown had evidence with the potential of making a case against the appellant. It is extremely unlikely that the balance of the evidence in this case would have been enough to result in a committal for trial following a preliminary hearing or to survive a no-evidence motion at trial had the Crown elected to proceed by direct

indictment.

- [38] The Crown contends that the passage of time created more difficulties for the prosecution than for the defence. The Crown had the onerous task of disproving the alibi advanced by the appellant at trial and raised in his statement to the police in 1977. The Crown also points out that in that statement the appellant said he had provided the names he could remember of people who would have seen him at the Beaufort Hotel and further stated that he was bad at remembering names. In addition, the evidence of the two people he claims to have seen at the hotel was before the jury, one by way of oral testimony and the other by way of a statement being admitted into evidence by the trial judge.
- [39] I agree with the Crown's submission that the appellant's argument that he might have been able to produce fuller alibi evidence is merely conjectural. The appellant knew he was a suspect less than two weeks after the murder and he had an opportunity from then on to identify any additional witnesses who might help his alibi, if such witnesses existed. Nor do I accept the argument that the appellant was lulled into inactivity as the result of a successful (from his point of view) polygraph test. That result did not amount to advice to him that he was no longer a suspect. In 1984 he was aware that the police still considered him to be a suspect. The evidence does not support the conclusion that this sequence of events deprived the appellant of either the opportunity to pursue his alibi defence or knowledge of the need to do so.
- [40] I do not accept the submission that preservation of the notes made by Sharon McLeod and, according to her, turned over to the R.C.M.P. in 1983, would have revealed something capable of assisting the defence. It is unlikely that the notes would have become evidence. There is no basis for reaching the conclusion that they might have become useful in cross-examination of Sharon McLeod in the defence attack upon her credibility.
- [41] I am also unable to give effect to the argument of the appellant that he was prejudiced in the presentation of his defence because of the unavailability of preserved crime scene material for additional DNA testing. The trial judge dealt with this matter by reference to the evidence of one of the experts, Charland, to the effect that the slides (exhibit No. 21) were still available for further scientific examination. In his ruling on this application, the trial judge pointed out that the Crown did not introduce evidence that the remaining slides could be the subject of further examination. In the result, the jury could only conclude that by the time the appellant had any interest in a further examination, there was nothing useful to examine. The jury could be told by the defence that this was a weakness in the Crown's case because the weight to be given to the arguments on the scientific evidence raised by the Crown had to be considered in light of the possible inability of the defence to arrange for further scientific examination.
- [42] Pre-charge delay will result in a judicial stay of proceedings only "in the clearest of cases": see *R. v. Carosella* (1997), 112 C.C.C. (3d) 289 at paras. 48-53 (S.C.C.) and *R. v. MacDonnell* (1997), 114 C.C.C. (3d) 145 at 153 (S.C.C.).

[43] In his ruling, the trial judge held that this was not a case involving severe prejudice to the ability of the appellant to make full answer and defence. A determination whether this case falls within the clearest of cases was a matter for the discretion of the trial judge. In my opinion, the trial judge assessed the evidence as presented by both sides and also carefully assessed the effects of the long delay between the crime and the laying of charge. The delay resulted in some advantages to the appellant and did not significantly prejudice the presentation of his defence. The delay did not affect the fairness of the trial. I think the trial judge did not err in dismissing the motion and in refusing to enter a judicial stay of proceedings based on pre-charge delay.

Challenge for cause

- [44] Before jury selection the appellant brought a motion under s.638 of the Criminal Code to permit challenges for cause of prospective jurors. The basis of the challenge was that the prospective jurors, due to racial prejudices within the community, might not be indifferent between the Queen and the appellant. On the return of the motion, the trial judge indicated that he would take judicial notice of racial discrimination in the community as contemplated by the leading authority, *R. v. Williams* (1998), 124 C.C.C. (3d) 481 (S.C.C.). The appellant still wanted to frame questions for prospective jurors that "were designed to ferret out latent racial discrimination". The trial judge ruled that the questions would be restricted to those set out in the *Williams* decision.
- [45] In this Court, the appellant argues that the trial judge erred in concluding that he did not have a discretion to permit more probing questions of prospective jurors. The appellant says there is a broad discretion to permit a wider inquiry. The appellant argued in his factum that "... given the heinous character of the crime and the widespread racial discrimination against persons of East Indian origin in the Province of British Columbia" the trial judge "ought to have permitted as a minimum questions that were designed in a subtle way to ferret out from prospective jurors any racist and bigoted views improperly held."
- [46] Before the trial judge counsel for the appellant advised the Court as to the areas he wished to explore as follows:

I'd like to ask a prospective juror, of these classes of people, and list persons born in India, people born in East India and of brown skin colour, people of Japanese origin, people of Chinese origin, east European Caucasians, Scottish Caucasians, which among these people are most likely to commit a crime, and add to that list "none of them". I could ask that question. Which group of those people is likely to commit ICBC fraud? I'd like to be able to ask that same list of people, if you were Minister of Finance [Immigration?], which of those groups of people would you restrict in entry to Canada? Questions along that line, and I'd like to frame maybe up to as many as five or six questions like that that have some subtlety, and I invite my friend's assistance in getting some subtlety to that, but I have applied my mind to that - that's two questions that I'd like to be able to ask. And I think that Dr. Basran can assist, at least on this issue, that to ask the bald questions asked in *Williams* would not very likely, in most cases, elicit an honest response and wouldn't get

at the partiality.

[47] During the challenge process, the questions asked of each prospective juror by counsel for the appellant were as follows:

Would your ability to judge the evidence in this case without bias, prejudice or partiality be effected (sic) by the fact that the person charged is an East Indian, or of Indo Canadian origin? Would your ability to judge the evidence in this case without bias, prejudice or partiality be effected (sic) by the fact that the person charged is an East Indian, or of Indo Canadian origin, and the complainant is a 12 year old young woman, or girl, of Chinese Canadian origin?

[48] The triers of fact found no prospective juror to be incapable of being indifferent. The trial judge excused two members of the panel after they raised concerns about their partiality arising out of the nature of the offence. Counsel for the appellant exercised two peremptory challenges.

[49] In his ruling on this application, the trial judge made it very clear that he used one of the routes open to him in the Williams case to determine that the concern of racial prejudice and consequential partiality on the part of jurors was established. He simply took judicial note of that fact. Therefore, he declined to receive expert evidence on the subject. I do not detect any argument being made on behalf of the appellant that such evidence would have gone to the issue of what questions should be asked of potential jurors during the challenge for cause process under s.638 of the Criminal Code. Therefore, since the trial judge on this aspect of the matter applied law clearly stated in Williams, I find no error in his refusal to receive evidence that, in the circumstances, would have been redundant.

[50] As to the second part of the Williams decision, namely, what form and content the questions of potential jurors should take, the trial judge simply followed the directions of the Supreme Court of Canada in Williams. Although he was concerned that the questions endorsed in the Williams decision "let the potential juror control the result" he felt that the law was clear and that he would err if he permitted inquiry of a broader scope. He also noted the observation in Williams that the initial instruction to the jury by the trial judge about the concern of prejudice and about the challenge for cause process would sensitize the members of the panel "regarding the need to confront racial prejudice" so that "it does not impact on the jury verdict".

[51] In my opinion, the trial judge's analysis was in keeping with the following paragraph in Williams:

[55] At the stage of the actual challenge for cause, the procedure is similarly likely to be summary. The trial judge has a wide discretion in controlling the process to prevent its abuse, to ensure that it is fair to the prospective juror as well as to the accused, and to avoid the trial's being unnecessarily prolonged by challenges for cause: see Hubbert, supra. In the case at bar, Hutchinson J. at the first trial confined the challenge to two questions, subject to a few tightly controlled subsidiary questions. This is a practice to be emulated. The fear that

trials will be lengthened and rendered more costly by upholding the right to challenge for cause where widespread racial prejudice is established is belied by the experience in Ontario since the ruling in *Parks*, supra. The Criminal Lawyers Association (Ontario), an intervener, advised that in those cases where the matter arises, an average of 35-45 minutes is consumed. The Attorney General for Ontario did not contradict this statement and supports the appellant's position.

- [52] The Crown argues that the refusal of the trial judge to expand the scope of the questions of prospective jurors was "in conformity with the established jurisprudence and principles that govern this area". The scope of review on appeal of the exercise of this particular discretion is clearly stated by Moldaver, J.A. in *R. v. Barnes* (1999), 138 C.C.C. (3d) 500 at para. 30(Ont.C.A.):
- [30] In deciding whether the trial judge erred in the exercise of his discretion, it is important to observe that at the appellate level, the issue is not whether the trial judge could have exercised his discretion differently or even whether it would have been preferable had he done so. Rather, to succeed, the appellant must demonstrate that the trial judge committed an error in principle and that in the final analysis, he came to the wrong conclusion. (See *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont.C.A.).)
- [53] It is not necessary for me to cite the many cases that make it clear that the questioning of potential jurors should not be intrusive. It should not involve inquiry into their lifestyles, backgrounds, or personal experiences. In this country, we have not adopted the American model, something the Supreme Court of Canada made express reference to in *Williams* at paras. 12, 13 and 52. The questions should be simple and designed to identify possible prejudice, require the potential juror while under oath to admit to it if it exists, and to impress upon the jurors sworn that they must remain impartial at all times. In my opinion, the questions asked of the potential jurors in the present case were capable of accomplishing all those things in compliance with the law as stated in *Williams*.
- [54] In my opinion, the trial judge correctly applied the law on this issue. I would not give effect to this ground of appeal.

DNA warrant

- [55] The trial judge conducted a voir dire to explore the constitutional validity of a DNA search warrant authorized by a Provincial Court judge on 7 March 1996. The appellant alleged that the police obtained the search warrant unlawfully and contrary to his rights under ss.7, 8, 10 and 11(d) of the Charter.

- [56] As I indicated earlier, the appellant was a suspect from early in the investigation because of the evidence of the tire impressions at the crime scene. Sharon McLeod gave the police additional information in 1983, as earlier described. It was not until 1990 that DNA evidence was first presented to a criminal court in this country. Since then such scientific evidence has become more common.
- [57] In 1977 investigators took head and pubic hair samples from the appellant. In 1991 Constable Dan Smith of the Port Alberni R.C.M.P., who had taken over the investigation in 1988, delivered the samples to the Forensic Laboratory for DNA testing. He was advised in early 1992 that there was insufficient DNA on the samples for analysis. After unsuccessfully attempting to obtain consent from the appellant in early 1992, Constable Smith obtained a search warrant to seize biological products from the appellant for the purpose of DNA testing. However, the appellant subsequently agreed to provide a blood sample and signed a consent form for that purpose. Therefore, Constable Smith did not execute the search warrant. In the voir dire, the trial judge ruled that the blood sample taken in this way (on March 6, 1992) was inadmissible due to the absence of informed consent, following the decision of this Court in *R. v. Head* (1994), 52 B.C.A.C. 121.
- [58] The Crown does not now contend that this ruling was in error. Evidence of the testing of that blood sample did not reach the jury. It is unnecessary, therefore, to discuss the detailed reasons given by the trial judge regarding that exclusion.
- [59] The question, therefore, becomes whether the trial judge erred in ruling admissible the blood sample taken from the body of the appellant pursuant to the warrant issued for that purpose on 8 March 1996.
- [60] The trial judge ruled that the appellant had not established that taking of a sample of his blood pursuant to the warrant breached his Charter rights. He summarized the content of the information to obtain the warrant, as amplified in the evidence on the voir dire, in some detail. He stated his conclusions as follows:
- [22] Has the accused on whom the onus lies satisfied me on a balance of probabilities that there is, on this information, Ex. F., as "amplified" on the review, no basis on which the issuing Provincial Court Judge could have been satisfied that the requirements of Code s.487.05(1) - with specific reference to s.487.05(1)(c) and (d) were made out? [23] The answer is "no". I have set out the information "as amplified". After that exercise what is involved is matter of judgment. In my judgment if one takes into account the statement of Jesse Jack to the effect that the accused had confessed to killing Carolyn Lee, the accused's application collapses. If one sets that information from Jessie Jack aside, what remains, to me, still provides a proper basis for a provincial court judge to issue the DNA warrant. [24] In the result the accused has not established a breach of his Charter s.8 rights in connection with the taking of a sample of his blood on March 8, 1996. The accused's application under s.24 of the Charter to suppress evidence to the effect that a sample of his blood was obtained by the police on March 8, 1996, is dismissed.

[61] (The reference to Jesse Jack, once explained, can be ignored. In the information to obtain, the affiant, Cst. Smith, swore that in 1992 the appellant was charged with a sexual assault on Jessie Jack who claimed that the appellant threatened her by telling her that he had killed Caroline "Lee". He swore further that the Crown entered a stay of proceedings on the charge because the incident occurred when Jessie Jack was intoxicated and her evidence on the issue of consent was unreliable. The Crown did not call Jessie Jack as a witness in the murder trial.)

[62] The Provincial Court judge issued the warrant to obtain a bodily substance for the purposes of forensic DNA analysis pursuant to s.487.05 of the Criminal Code. That section reads:

487.05.(1) A provincial court judge who on ex parte application is satisfied by information on oath that there are reasonable grounds to believe (a) that a designated offence has been committed, [2] that a bodily substance has been found

(i) at the place where the offence was committed,

[2] on or within the body of the victim of the offence,

(iii) on anything worn or carried by the victim at the time when offence was committed, or (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,

(c) that a person was party to the offence, and (d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) from that person

and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a peace officer to obtain, or cause to be obtained under the direction of the peace officer, a bodily substance from that person, by means of an investigative procedure described in subsection 487.06(1), for the purpose of forensic DNA analysis. (2) In considering whether to issue the warrant, the provincial court judge shall have regard to all relevant matters, including

[1] the nature of the designated offence and the circumstances of its commission ...

[63] The scope of review in this court is succinctly set out by Charron, J. A. in *R. v. Grant* (1999), 132 C.C.C. (3d) 351 at p. 540 (Ont. C.A.):

[18] This court is also a reviewing court and the test in *Garofoli* is applicable on this appeal. In addition, the usual deference is owed to the findings of the trial judge in her assessment of the record "as amplified on the review" and her disposition of the s.8 application. In the absence of an error of law, a misapprehension of the evidence or a failure to consider relevant evidence, this court should not interfere with the trial judge's conclusion. [64] Much of the argument before us on this issue involved an attack on the integrity of the evidence sworn to in the information to obtain the warrant in 1992. The reliability of that evidence is not relevant to a determination of the validity of the 1996 warrant issued under the Criminal

Code amendment that came into existence in the interim. The search warrant issued in 1992 was then unknown to the law and the Crown did not rely on it to obtain the blood sample from the appellant in 1992 and did not rely on it at trial.

- [65] The appellant has demonstrated no error on the part of the trial judge in reaching his conclusion as to the constitutional validity of the warrant issued in 1996. Argument before us on this issue amounted to a review of all the information the police had at hand and on weaknesses in the Crown's case in 1996 prior to the obtaining of the additional DNA opinion evidence. After a lengthy voir dire, the trial judge considered all these arguments. In his opinion, there was evidence before the Provincial Court judge that supported the issuance of the warrant under the applicable Criminal Code section. I agree that there was such evidence and I am unable to find any error on the part of the trial judge.
- [66] I would not give effect to this ground of appeal.

DNA evidence

- [67] The appellant contends that the trial judge should have instructed the jury to reject or give little weight to the Crown's DNA evidence unless they were satisfied beyond a reasonable doubt that there was DNA from only one male in the material taken from the vagina of the deceased.
- [68] Before the jury was a large body of relevant expert evidence on the science of DNA (deoxyribonucleic acid) typing, a branch of molecular biology that has been used increasingly for forensic purposes. The Crown called eight experts and the defence called two. It is not necessary to summarize all this evidence.
- [69] One forensic purpose of DNA testing is to attempt to match, or exclude a match, of DNA in the body of an individual with DNA at a crime scene. There are three possible outcomes of a DNA test - a match, exclusion, or an inconclusive result. In the present case, the DNA at the crime scene was found in the vagina of the deceased. It is common ground that the male DNA material in the child's vagina was semen. The Crown sought to prove a scientific match between that DNA and the DNA in the blood taken from the appellant on 8 March 1996.
- [70] As noted above, the early testing in this case was inconclusive. As time passed, the available science became more sophisticated due to the development of more sensitive tests. This permitted scientists to reach conclusions from smaller amounts of DNA material and from degraded material.
- [71] Reduced to simple terms, the scientists give opinions of matches based on their findings as to "loci". Loci are sites on the DNA molecule. The molecule has repetitive sequences of nucleotides (chemical sub-units). As I understand the science, testing involves comparing sequences at specific loci to attempt to determine if there is an exclusion or a probable match.

- [72] Ann-Elizabeth Charland, a reporting officer in the Biology Section of the R.C.M.P. laboratory in Ottawa, did the initial testing on the three swabs taken from the vagina of the deceased and marked Exhibit 21 at trial. She reported in 1992 that the results were inconclusive. (She also examined pubic hair found on the sweater of the deceased and known pubic hair from the appellant but these were unsuitable for DNA analysis.)
- [73] She did another test in 1993 but degradation of the vaginal samples made a match to the appellant inconclusive. However, the results were sufficiently clear to exclude another suspect named Gallagher.
- [74] In 1996, Charland, together with a laboratory partner, using the new blood samples from the appellant and also using more advanced technology, found a four-loci match with the male DNA on the vaginal swab. She described this as a "rare event" with a frequency of occurrence estimated at 1 in 38,000.
- [75] Charland testified that she saw no indication of more than one male donor to the DNA in the vaginal swabs. However, she agreed that she could not scientifically prove that there was only one male donor.
- [76] In September 1993, Thomas Wahl of Genelex Corporation in Seattle, Washington did DNA testing on the vaginal swabs. He confirmed that there was a female and a male component. If I understand his evidence correctly, he identified one locus in the male component. Referring to lighter markings on the graph he agreed that "it is always possible it could be another sperm donor".
- [77] In 1994, Richard Guerrieri at the Roche Biomedical Laboratories in North Carolina did a DNA analysis of the vaginal sample. He found male and female DNA and produced a five-loci profile of the questioned portion of the sample. He testified that the system he employed was not as sensitive as other systems. He did not detect a second male sperm donor but said he could not rule it out.
- [78] In November 1998, another expert, Dr. Owen, of the Helix Biotech Laboratory did DNA tests on the blood sample taken from the appellant and produced a five-loci profile of his DNA.
- [79] Dr. Carmody, a population geneticist, analysed the results described above. Wahl had identified one locus in 1993; Guerrieri had identified 5 loci in 1994; Charland had identified 4 loci in 1996; and Owen had identified 5 loci in 1998. As I understood it, after taking overlap into account, the net result was that 10 different loci were compared and none of these excluded the appellant. Dr. Carmody's opinion was that this profile made it highly unlikely that the male DNA in the victim's vagina came from a person other than the appellant.
- [80] Dr. Carmody used population databases to estimate the frequency of the ten-loci combination. In the overall population, his estimated frequency was one in 165 million males.

- [81] The Crown also called Dr. Chakraborty, an expert in human population genetics, statistics and demography, from the Human Genetics Centre of the School of Public Health at the University of Texas. He also gave the opinion that the 10 loci found in this case were independent of each other. He said such a match was very uncommon. He estimated the frequency at between one in 151 million and one in 165 million for the Caucasian population, which includes people of East Indian origin. In the East Indian population, the estimated frequency was between 1 in 7.6 million and 1 in 8 million. He gave additional frequencies of the same magnitude.
- [82] The appellant called Laurence Mueller, a professor in the Department of Ecology and Evolutionary Biology at the University of California at Irvine. He explained two methods of estimating frequencies - the counting method and the product rule. The Crown experts employed the latter method while he employed the former, more conservative method, to yield a probability in this case of one in 582. He agreed that the counting method is not generally accepted within his scientific community and that the product rule method, although it does not have universal endorsement, is used by most government and scientific laboratories in North America and is endorsed by the National Research Council. He also agreed that a ten-loci match between two unrelated individuals was very uncommon. He was unable to say that he had ever seen it.
- [83] The other defence expert witness was Vanora Kean, a forensic biologist and expert in DNA testing and analysis. She did a critique of the reports of the Crown biology experts. She thought that Charland might have been wrong in excluding Gallagher. She commented on two possible "contamination peaks" on the graph found, but not reported on, by Charland because Charland determined they were shoulders and not indicative of DNA from a different source. Counsel had cross-examined Charland on this finding. To Kean they looked like peaks but she could not reach a conclusion as to whether they were peaks or shoulders. If they were peaks (sometimes called "alleles"), they would be indicative of additional DNA. She opined that weaker dots that showed up on Wahl's test also were indicative of additional DNA being present in the crime scene material.
- [84] In reply to an omnibus question posed by the appellant's counsel, this witness said that on all the scientific evidence she "would report the male component of these four fractions that were tested as being inconclusive". Although she had no difficulty with the identification of the female DNA from the vaginal swabs, she said she would report the male component as inconclusive. She would not include or exclude any male or draw any conclusions about the identity of the male or males. This opinion emerges from the possibility of multiple donors. If there were multiple donors it would not be possible to determine how many or what their genetic profiles were.
- [85] The appellant contends that the trial judge should have told the jury that if they were not satisfied beyond a reasonable doubt that there was only one male donor to the crime scene DNA, the opinions relied on by the Crown had either no, or limited, probative value. His counsel argues what he calls the "soup" theory. He says that there was some evidence of

more than one donor of the male DNA rendering scientific attempts to find a match with known DNA material problematical. The jury should have been told, the argument continues, that unless the Crown proved beyond a reasonable doubt that there was only one male contributor, the match to the appellant's DNA relied upon by the Crown had to be disregarded or given little weight. Counsel says that the Crown's DNA opinion evidence was "the only evidence of substance" against the appellant.

[86] The appellant relies on the decision in *R. v. White* (1998), 125 C.C.C. (3d) 385 (S.C.C.) to the effect that in cases where there is but one piece of circumstantial evidence capable of proving guilt, the jury must be told that the piece of evidence must be accepted beyond a reasonable doubt before there can be a conviction.

[87] I do not agree that this is such a case. Although the importance of the DNA evidence cannot be overstated, it was only one of several pieces of evidence in the case against the appellant. Throughout his charge, the trial judge made this apparent to the jury by using words that were favourable to the defence case. Here are some examples:

Do not ever forget that in dealing with the results of a DNA analysis placed before you by the Crown, you are at the best, from the Crown's point of view, dealing with one piece of circumstantial evidence, relevant to the identity of the or a perpetrator, nothing more. DNA profiling differs from earlier forms of identification evidence, such as analysis of blood and dental impressions, only in its increased power to discriminate between individuals. The results of a DNA analysis, placed before you by the Crown is, if you give it all of the weight the Crown urges you to give it, still but one piece of circumstantial evidence which, taken alone, may prove very little. Obviously it proves even less to the extent, in your eyes, that the worth of the Crown's DNA evidence is weakened or destroyed as a result of the cross-examination of the Crown's witnesses or the introduction of expert opinion evidence by the accused. . . .

DNA evidence may, in a particular case, in the eyes of a jury, establish nothing. But even at its best, from the Crown's point of view, DNA evidence can never establish the identify of the perpetrator of a crime. Evidence of DNA profiling, at best, can only determine if the accused's genetic make-up is consistent with the genetic make-up of a DNA sample or samples taken at a crime scene. Nothing more. . . . I tell you, as the judge of the law, that you cannot and must not make the leap from a finding that the accused's genetic make-up is consistent with the genetic make-up of DNA extracted from Exhibit 21, the vaginal swabs, to the conclusion that DNA that was found at the scene of the crime, in 1977, was that of the accused, even if you give the Crown's DNA evidence, every bit of the weight the Crown urges you to give it. . . . Do not be overwhelmed by the aura, of scientific infallibility associated with scientific evidence. DNA evidence is never, even on the Crown's best day, more than an item of circumstantial evidence. That is the best it can ever be, nothing more. Depending upon your view of the evidence, in this particular case, it may be nothing at all. Use your common sense. Assess all of the evidence of the DNA issue. Consider the competing expert testimony. Remember that there is no onus of proof on the accused and that even though the criminal standard of proof, proof beyond a reasonable doubt, applies only to the ultimate issue of proof by the Crown, of the accused's guilt the onus of

satisfying you that the DNA evidence introduced against the accused, by the Crown is reliable and valid, as a piece of circumstantial evidence, is on the Crown.

- [88] In my opinion, these passages indicate that the trial judge, contrary to a submission made on behalf of the appellant, made it clear to the jury that the Crown's DNA evidence (to the extent they accepted it) was but one piece of circumstantial evidence. Standing by itself, it did not identify the perpetrator of the crime. In this respect, the charge is unobjectionable. It was in keeping with the decision in *R. v. Terceria* (1998), 123 C.C.C. (3d) 1 (Ont. C.A.), aff'd [1999] 3 S.C.R. 866.
- [89] To give effect to the appellant's argument on this ground of appeal would amount to requiring an instruction to the jury that the DNA evidence should be considered differently from other circumstantial evidence. However, the DNA evidence was but part of a larger body of circumstantial evidence. To isolate it and require it to be accepted or rejected without regard to the evidence as a whole would be contrary to law: *R. v. Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.).

Charge on circumstantial evidence

- [90] The appellant contends that the instruction to the jury on circumstantial evidence was defective in two respects: (1) the trial judge did not specifically tell the jury that there was no direct evidence against the appellant; and (2) the trial judge instructed the jury, or implied, that in a circumstantial evidence case any reasonable doubt must be based on proven facts. On the latter point the appellant relies on the decision in *R. v. Robert* (2000), 143 C.C.C. (3d) 330 (Ont. C.A.).
- [91] The questioned passages in the charge, commencing with the standard instruction based on *R. v. W.(D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.), read as follows:

The next point within the context of discussing with you, the topic of the testimonial reliability of witnesses, is the fact that the rule of reasonable doubt applies to the issue of the credibility of witnesses and the reliability of evidence. If the evidence of the accused or any - pardon me - if the evidence of the accused, or of any of the witnesses placed before you by the accused, leaves you with a reasonable doubt as to his guilt, after considering it in the context of the whole of the evidence, then you must find the accused not guilty. If the evidence at trial, apart from the evidence of the accused or his witnesses, leaves you with a reasonable doubt as to his guilt, you must find the accused not guilty. This translates into the following for your purposes. [1] You need not firmly believe or disbelieve any witness, including the accused.

- [2] You must find the accused not guilty, if you believe him when he says he was not the killer.
- [3] If after considering all of the evidence in the case, you are unable to decide whom to believe, you must find the accused not guilty.

- [4] Even if you do not believe the accused, you must find him not guilty if his evidence taken alone or in combination with any or all of the other evidence, leaves you with a reasonable doubt as to his (sic) being the killer.
- [5] Even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt that the accused was the killer. If you are not so convinced beyond a reasonable doubt you must find the accused not guilty.

What this really means is this, and you must keep this simple point in mind throughout your deliberations. The accused is presumed to be not guilty and the onus of proof is upon the Crown. And you must not convict the accused of any offence unless having considered all of the evidence, you are convinced beyond a reasonable doubt of his guilt. A reasonable doubt may arise because you believe the accused or because you are not convinced beyond a reasonable doubt that he is lying in his testimony before you, when he says he was not the killer, or because you cannot decide whom to believe, or because some or all of the evidence apart from the evidence of the accused leaves you with a reasonable doubt as to his guilt. I turn to the topic of direct and circumstantial evidence. Before commenting on the evidence in this case, I must give you a particular warning about circumstantial evidence. There are two types of evidence in any criminal case. One is direct evidence, the other is circumstantial evidence. Direct evidence, is evidence which goes directly to the proof of a fact in issue. Circumstantial evidence is indirect evidence. It is evidence of a chain of circumstances from which you are asked to draw inferences which may lead to the proof of the fact in issue. Both direct evidence and circumstantial evidence are admissible as a means of proof. Sometimes circumstantial evidence is more persuasive than direct evidence. The evidence of one witness may contradict that of another, but the circumstances of an event are often not in dispute. I will explain the difference between these two types of evidence by way of examples, which are utterly divorced from the facts of this case. Here is the first example. Suppose a woman is on trial for murder. It is alleged that she killed a man by stabbing him to death. A witness testifies that he saw the accused stab the victim with a knife. This is direct evidence that the accused stabbed the victim. Direct evidence has two possible sources of error. First, the witness might be lying, for one reason or another. Second, the witness might be mistaken, when identifying the accused as the person who did the stabbing. On the other hand, if the witness is not lying or is not mistaken, then the proper conclusion is that the accused stabbed the victim. Now to the second example. Take the same accused and the same allegation that she killed a man by stabbing him to death. A witness testifies that he heard a noise and went into the room where he found the accused standing over the body of the victim, with a knife in her hand. That is circumstantial evidence, that the accused stabbed the victim, since there is no direct evidence from the witness that he saw the actual stabbing. In this example there are three possible sources of error. First, the witness may be lying. Second, the witness may have mistakenly identified the accused. Third, there is the possibility of drawing the wrong inference, arising from the circumstances. For instance, assuming the witness is truthful and not mistaken about the identity of the accused as the person with the knife in her hand, it is still possible the accused did not stab the victim. The accused may have been outside the room when

the victim was stabbed. She may have heard the same noise, entered the room before the witness and innocently picked up the knife. After doing so, the witness came into the room and saw the accused with a knife in her hand. If that actually happened, it would of course be wrong to infer or conclude that the accused stabbed the victim, even though the witness was not lying or mistaken. As you can see, you must be careful when dealing with circumstantial evidence because of the possibilities of error. Before basing a verdict of guilty on circumstantial evidence, you must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts. I should also caution you that an inference is a much stronger kind of belief than conjecture or speculation. If there are no proven facts from which an inference can be logically drawn, it is impossible to draw an inference. At best, you would be speculating or guessing and that is not good enough. An accused must not be convicted on a guess, no matter how shrewd that guess may be. [92] The W.(D.) charge was in an expanded form and was favourable to the appellant. The charge on circumstantial evidence was standard and, in my opinion, unobjectionable.

[93] To tell the jury that the Crown had presented no direct evidence would have been merely to tell them the obvious. The Crown argued its case entirely on the basis that there were proven facts from which the identity of the accused as a perpetrator of the crime should be inferred. Read as a whole, the charge reflects this. Identity was the only element of the offence in issue. All the Crown evidence related to that element was circumstantial and it is inconceivable that the jurors were not alive to that fact.

[94] I am unable to give effect to the argument that the charge might have led the jury into the same error found in the Robert case. In that case, a judge sitting without a jury applied the circumstantial evidence principle in Hodge's case to the explanation given by the accused as to the cause of a fire. This amounted to a reversal of the onus of proof. No such error can be found in the charge on circumstantial evidence in the present case. In addition, the trial judge fully instructed the jury on the onus of proof and reminded them of that onus several times throughout the charge. It cannot be said that they might have been led into the forbidden reasoning suggested by the appellant.

Evidence review

[95] This ground of appeal first appeared in the appellant's supplementary factum. The argument is that the trial judge did not adequately review the evidence and relate it to the issues.

[96] I have read the charge in its entirety and find no merit in this ground of appeal. Since identification was the only element of the offence in issue, the bulk of the evidence and all the submissions were directed to that element. The trial judge reviewed the evidence for the jury chronologically. He dealt thoroughly, and favourably to the defence, with the evidence as to the appellant's statement to police in 1977, the alibi evidence, the evidence of Rose Mickey and the fact that the police found no footwear of the appellant they could tie to the imprint on the victim's jacket. He discussed the DNA evidence in conformity with the decision in *Terceira*.

[97] I do not find any persuasive argument made on behalf of the appellant that the organization and content of the charge could have been improved in any material way. It is difficult to be critical of the charge much less find any significant error in it.

Reasonableness of verdict

[98] Section 686(1)(a)(i) of the Criminal Code reads:

On the hearing of an appeal against a conviction..., the court of appeal (a) may allow the appeal where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence ...

[99] McIntyre, J. stated the scope of appellate review under the section in *R. v. Yebes* (1987), 36 C.C.C. (3d) 417 (S.C.C.). At p. 426, he said as follows:

As a general proposition, the verdict at trial will stand where there is evidence before the jury going in proof of all elements of the offence and where the trial judge has properly charged the jury on all matters of law which arise in the case and has made such references to the evidence as may be necessary to facilitate the application of the law to the facts. However, [s.686(1)(a)(i)] of the Criminal Code provides an additional basis for the challenging of the verdict at trial. A Court of appeal may allow an appeal against a conviction where it is of the opinion that the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.

And at p. 430 he stated the test:

The function of the Court of appeal, under [s.686(1)(a)(i)] of the Criminal Code, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence.

[100] The same court applied the Yebes test in *R. v. Biniaris* [2000] 1 S.C.R. 381. In para. 40 of that decision, Arbour, J. wrote that the assessment by the appeal court under the section "requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction."

[101] The appellant contends that because of weaknesses in the DNA evidence as discussed above, and because of frailties in each of the other pieces of circumstantial evidence, no properly instructed jury could reasonably have convicted the appellant.

- [102] Since the Crown's case is entirely circumstantial, it seems to me that this court must determine whether a properly instructed jury, acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant murdered the victim.
- [103] In my opinion, on the application of the test, the evidence supports the conviction.
- [104] The appellant's argument on this ground of appeal points to a view of individual pieces of evidence that might be taken by a trier of fact. The argument addresses the following pieces of evidence: the alibi of the appellant contained in his statement of 26 April 1977; the voluntary provision by the appellant in 1977 of samples of his hair; the likely absence of blood on the clothing of the appellant; the presence of pubic and scalp hairs at the crime scene linked forensically to neither the deceased nor the appellant; the absence of evidence linking the footwear impression on the deceased's jacket to the appellant; the conclusion of one investigating police officer that the tire impressions at the scene were made by summer tires on the front of the vehicle thereby eliminating the appellant's vehicle (other investigators concluded that the tire impressions indicated Sieberling heavy lug tires all around, thereby being consistent with the appellant's vehicle); the lack of foundry grime found on the body of the deceased or on her clothing; and weaknesses in the DNA evidence. In addition, the appellant argues that it is not reasonable to rely on the evidence of either Sharon McLeod or Alice Lazorko. They did not give their statements to the police until years after the events. Ms. McLeod, the appellant contends, had reasons arising out of her marital relationship with the appellant for wanting to do him harm.
- [105] In my opinion, the evidence was capable of persuading a reasonable jury acting judicially that the only rational conclusion was that the appellant was either the killer of Carolyn Lee, or one of her killers. The argument made on behalf of the appellant under this ground of appeal is a selective journey through the evidence. Under s.686(1)(a)(i) there has to be more than an argument that the defence submissions made to the jury might have persuaded the jurors that they should have a reasonable doubt about the guilt of the accused.
- [106] The jury had a large body of evidence to weigh and arguments from both sides to consider as to the conclusions to be drawn from the evidence as a whole. It had to weigh and consider the evidence of Ms. Lazorko. It had to attempt to address the conflicts in the evidence as between Ms. McLeod and the appellant. Ms. McLeod's evidence was capable of establishing time and opportunity as well as establishing the insistence by the appellant that his vehicle be thoroughly cleaned. There was evidence that the tire impressions at the crime scene were consistent with the tires on the appellant's vehicle. There was evidence that a metal particle vacuumed from the truck of the appellant was consistent with the particle in the footprint on the victim's jacket. The jury had to weigh the alibi as advanced by the appellant in 1977 and at trial. Finally, the jury had before it a body of evidence from which it could conclude that there was a significant scientific match between the male DNA in the vagina of the victim and the DNA in the blood of the appellant.

- [107] The appellant places much reliance on the argument that any conclusion about the DNA match was tainted by the real possibility of a second male donor. The jury had before it opinion evidence, tested by vigorous cross-examination, that there was no scientific reason to believe that there was a second donor or that, if there was, it made no difference to the match. On the whole of the evidence, it was open to the jury to conclude that the evidence indicated a real possibility of a second killer without raising a reasonable doubt about the criminal involvement of the appellant in the murder of Carolyn Lee.
- [108] The appellant relies on several cases in which appellate courts applied s. 686(1)(a)(i) to reverse convictions. Three of those cases hinged upon weak eyewitness identification evidence and have no parallel to the present case. The fourth, *R. v. Khan* (1998), 129 C.C.C. (3d) 45 (B.C.C.A.), was a case that clearly rested on shaky ground. The Crown sought to prove that the appellant had assisted her husband in the murder of their unwanted daughter-in-law. There was no direct evidence against her and the circumstantial evidence lacked scientific reliability. Ryan, J. A. characterized the evidence thus (para. 72): "When examined as a whole, the evidence supports the conclusion that Mrs. Khan knew her husband had killed their daughter-in-law, was not unhappy he had, and tried to protect him from being caught. It is not reasonable to go farther than that. In my view the evidence of Mrs. Khan's complicity in the murder itself is of such an equivocal nature that it cannot sustain more than a strong suspicion of guilt."
- [109] In the preceding paragraph, Ryan, J.A. said this: "I have attempted to identify the areas of the evidence which in my view were so dubious or uncertain that a reasonable jury would attach little or no weight to the evidence, or discount it entirely" (my emphasis). The appellant's argument changes "would" in that sentence to "should". Khan does not restate the test. It is merely an application of the test to a demonstrably thin case. Each case must be decided on its own evidence - what facts the evidence is capable of reasonably proving and what facts might be reasonably inferred from proven facts.
- [110] In the present case, it was open to the jury to accept the evidence of Sharon McLeod and to conclude that Sieberling heavy lug tires on all four wheels of the vehicle made the impressions at the crime scene. It was also open to the jury to conclude that these and other features of the evidence, combined with the opinions of the Crown's DNA experts as to the match between the blood of the appellant and the male DNA in the vagina of the victim, made a compelling circumstantial case that the appellant was the killer or one of two killers. My view of the evidence as a whole leads me to the conclusion that a guilty verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered.
- [111] I would dismiss the appeal.
- "The Honourable Mr. Justice Low"
- I AGREE:
- "The Honourable Madam Justice Prowse"

I AGREE:

"The Honourable Madam Justice Newbury"

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