

CANADA / JUDGMENT

R. v. Handlen

2022 BCCA 304

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 304 R. v. Handlen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Handlen,

2022 BCCA 304

Date: 20220909

Docket: CA45933

Between:

Rex

Respondent

And

Garry Taylor Handlen

Appellant

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Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated January 17, 2019 (conviction) (R. v. Handlen, Vancouver Docket 26757).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

January 17-18, 2022

Place and Date of Judgment:

Vancouver, British Columbia

September 9, 2022

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Butler

Summary:

Appeal from conviction for first degree murder. Held: Appeal dismissed. The appellant was convicted of the first degree murder of a young girl that occurred in the late 1970s. The evidence against him included four written statements by witnesses who had subsequently been hypnotized and the appellant's confession and reenactment obtained during a Mr. Big investigation. The hearsay statements were properly admissible under the principled exception to the rule against hearsay. Although the judge erred by finding that the Hart framework was modified by Bradshaw, that error was to the appellant's benefit. The judge nonetheless found that the confession and reenactment were sufficiently reliable to be admitted, and absent a palpable or overriding error, that decision was entitled to deference on appeal.

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Appendix A

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] On March 16, 2015, Garry Handlen was indicted for the murder of two young girls: Kathryn Hebert, who disappeared in 1975, and Monica Jack, who disappeared in 1978. During a "Mr. Big" police operation, Mr. Handlen confessed to both murders. The trial judge excluded the evidence of the confession in relation to Kathryn, but he admitted it in relation to Monica. Mr. Handlen was tried by a jury and convicted of the first degree murder of Monica. He appeals that conviction, arguing that his confession should not have been admitted. He also challenges the admission of the hearsay statements of four witnesses.
- [2] The Crown did not proceed with the charge in relation to Kathryn after the confession was excluded. Therefore, I will not refer to the evidence in that case, unless it is relevant to the grounds of appeal.

Background

- [3] Monica was likely abducted on May 6, 1978 at approximately 8:00 p.m. She was 12 years old when she disappeared. She had been riding her bicycle home towards the Quilchena reserve, which is located north of Merritt, B.C. along Highway 5 (now Highway 5A, although I will refer to it as Highway 5 for consistency). She had been riding her bicycle with her friend, Debbie John, and they arrived at Debbie's home in Nicola (north of Merritt) at approximately 7:30 to 8:00 p.m. Monica continued riding north towards Quilchena. Her mother, Madeleine Jack (now Lanaro), drove by and spoke with her, and told her to go home. She later drove past Monica again, who was by this time, riding her bike towards home. Ms. Lanaro estimated this to be around 7:00 p.m., and Monica would have been approximately half an hour away from her home.
- [4] Monica's mother was away overnight on a fishing trip. When she returned home the following day, May 7, 1978, she found Monica had not returned home the previous night. She contacted the police around noon.

- [5] Ms. Lanaro went to the local RCMP detachment around 4:00 p.m. and spoke with Constable Nicholls. He telephoned the local radio station and asked them to broadcast that Monica was missing, which they did. Ten minutes later, Monica's brother phoned Constable Nicholls to inform him that he had located Monica's bicycle. He found it at a pull-out on the west-side of Highway 5, approximately 4 miles south of her home. It was lying on the embankment between the pull-out and Nicola Lake.
- [6] At approximately 5:20 p.m. that day, Constable Nicholls spoke with Monica and Graham Whitecross, who lived south of the pull-out. Mr. Whitecross said he was at a boathouse by his property, and saw a person about 200 feet away at the water's edge. He said he saw a truck and camper at the pull-out. Shortly afterwards, he heard a person cry out, but when he looked, did not see anyone. Other eyewitnesses also saw a truck and camper in the area, around the time that Monica disappeared.
- [7] Her remains were discovered 17 years later on June 2, 1995, in a remote area off a logging road on Swakum Mountain, west of Nicola Lake (the opposite side from Highway 5), by a forestry crew during a controlled burn. That location was several kilometres from the site of her apparent abduction.
- [8] Four written statements from eyewitnesses were taken over the next several days. These statements were tendered for the truth of their contents by the Crown at trial as the witnesses were later hypnotized, making their post-hypnosis evidence inadmissible: *R. v. Trochym*, 2007 SCC 6. In summary, their evidence was as follows:
- a) Monica Whitecross: After the hockey game, at approximately 7:30 or 7:45 p.m., she was outside in the garden and saw "Monica or one of the Jack girls" at the end of her brother's driveway. She was on a bicycle and stopped to rest. She only stopped briefly and then carried on towards Quilchena.
 - b) Graham Whitecross: After the hockey game, he walked down the driveway with his son to the boathouse which was located about a quarter of a mile north on Highway 5. When he got to the boathouse, he saw a person approximately 200 feet away by the water's edge, bent over as though he was washing his hands. There was a truck and camper parked there. Mr. Whitecross was cleaning up in the bush by the boathouse when he heard someone--he thought it was a girl--crying out. When he went to the point to look, the person was gone; no one appeared around the camper; there was no sign of movement; and he heard no further noises. The camper was a Security camper, with the door hinged to the left and a square window on the right. After approximately ten minutes at the beach, he went back to the road. He walked about 50 feet towards the camper, where he saw that the door of the camper appeared closed and no one was in sight. After walking slowly for about 100 feet, the camper passed him going towards Merritt, driven by a single male. In total, he was gone from his house for 30 to 45 minutes, and he returned home at approximately 8:00 p.m.

- c) Michael Rose: At approximately 7:30 p.m., he went down the lane from his house to the road, when he stopped at the road to let a camper go by on the road. The camper was coming from Merritt (i.e., heading north) and going very slowly. It was light beige and went over the cab of the truck, behind its tailgate, and covered its tail lights. The truck was a light tan or blue, and he believed it may have been a Ford. He followed it going north towards Quilchena, but it pulled over and stopped at the point. He went on to Quilchena and met some people approximately 100 yards up from the point. He did not remember seeing the camper when he returned 10-15 minutes later.
- d) George Schuman: At about 7:45 p.m., he was driving south towards Merritt when he saw a truck and camper parked on a gravel turn-out, about one or one-and-a-half miles south of Quilchena. The truck was facing south; he thought it was a three-quarter ton; and it was either a custom deluxe GMC or super deluxe Chevrolet. The camper was a cream coloured Okanagan camper with red, yellow, and black stripes; approximately two or three years old; 8.5-9 feet; and may have had some hardware on it, such as a boat rack or some jacks. He saw a bicycle almost directly across the road from the camper, lying on its side.
- [9] Three of these witnesses were related to each other: Mrs. Whitecross and Mr. Whitecross were married, and Mr. Rose was the Whitecrosses' nephew. Mr. Schuman, however, was a stranger. Mr. Schuman heard the report regarding Monica's disappearance on the radio and contacted the police.
- [10] The redacted witness statements are appended as Appendix "A".
- [11] The investigation did not progress for many years. In 2015, the police commenced what is known as a "Mr. Big" operation. It is detailed below.

Issues

- [12] There are two issues in this appeal: the admission of the hearsay statements and the admission of the Mr. Big confession. The judge's reasons with respect to the hearsay statements are indexed at 2016 BCSC 1913 [Hearsay Ruling], and his reasons for admitting the Mr. Big confession are indexed at 2018 BCSC 1330 [Mr. Big Ruling]. The hearsay issue may be broken down into the following sub-issues: i) what I will refer to as the Baltovich issue (or "back dooring" the inadmissible); ii) the necessity component; and iii) the threshold reliability component. A related issue is the judge's refusal to reconsider his ruling (with reasons indexed at 2018 BCSC 2124) in relation to the hearsay statements, which includes two sub-issues: i) the exercise of the residual discretion to exclude the evidence, here based on an abuse of process, and related, ii) a constitutional challenge based on Mr. Handlen's fair trial rights.

- [13] The issues in relation to the admission of the Mr. Big statements are i) that the judge erred in his treatment of confirmatory evidence as a result of *R. v. Bradshaw*, 2017 SCC 35, and ii) that the judge erroneously inferred from his rejection of Mr. Handlen's voir dire testimony that the confession and reenactment must have been reliable.

Discussion

The Admission of the Hearsay Statements

- [14] The four witnesses' statements made in 1978 were rendered inadmissible almost 30 years later as a result of the decision in *Trochym*, also a murder case. In that case, a witness was hypnotized in an effort to extract a better recollection of the time she saw certain events.
- [15] Justice Deschamps, for the majority, concluded that memories collected through hypnosis run the risk of being the product of confabulation resulting in false memories. Such evidence is presumptively inadmissible because "hypnosis and the impact on the human memory are not understood well enough for post-hypnosis testimony to be sufficiently reliable to be used in a court of law" (*Trochym* at para. 55).
- [16] The witness may testify to events that were not canvassed under hypnosis, although such testimony may be tainted by post-hypnosis memories and cross-examination of the witness may be impaired as a result (*Trochym* at paras. 64-66).
- [17] In short, a witness who has undergone hypnosis cannot testify in relation to any event that was the subject of hypnosis because their memory of events may have become tainted, and it is impossible to determine what is a true memory and what is a false memory. The witness may not give evidence with respect to pre-hypnosis statements, as their evidence may have been impacted by the subsequent hypnotic process. At para. 59: of *Trochym*:

Finally, the Clark [*R. v. Clark* (1984), 13 C.C.C. (3d) 117] guidelines do not address the problems of confabulation and memory hardening, or the reality that hypnosis may compromise the right of cross-examination, thereby prejudicing an important instrument in the trial process. Experts appear to agree that neither the experts nor the individuals who have undergone hypnosis can distinguish confabulated memories from true memories. This is problematic for counsel cross-examining the witness at trial, since it will be impossible to challenge the witness on the veracity of his or her memory, except insofar as a post-hypnosis memory is inconsistent with a pre-hypnosis statement.

- [18] Thus, in this case, the witnesses who underwent hypnosis after giving their initial statements could not testify at Mr. Handlen's trial as those statements were the object of the hypnosis.
- [19] As a result of the exclusion of the witnesses' testimony, the question becomes whether the pre-hypnosis statements were admissible under the principled exception to the hearsay rule.

The principled exception

[20] Hearsay evidence, that is an out-of-court statement tendered for the truth of its contents, is presumptively inadmissible at trial. The inability to cross-examine the declarant deprives an accused of the opportunity to test that evidence, and deprives the trier of fact of the opportunity of seeing and hearing the witness, thereby affecting their ability to assess the credibility or reliability of the witness. As noted by Fish J. in *R. v. Baldree*, 2013 SCC 35 there are four specific dangers that arise from hearsay evidence:

[32] First, the declarant may have misperceived the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been wrongly remembered; third, the declarant may have narrated the relevant facts in an unintentionally misleading manner; and finally, the declarant may have knowingly made a false assertion. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination.

[Emphasis in original]

[21] Hearsay evidence is exceptionally admissible if it meets the dual criteria of necessity and threshold reliability (*Bradshaw* at paras. 1, 23). Even if the dual criteria are met, the judge has a residual discretion to exclude the evidence if its prejudicial effect outweighs its probative value (*R. v. Khelawon*, 2006 SCC 57 at para. 3). In a criminal proceeding, there is a constitutional component of the accused's right to a fair trial (*Bradshaw* para. 24).

[22] Necessity has been described in *R. v. Hawkins*, [1996] 3 S.C.R. 1043 at para. 71, as "under the principled framework, hearsay evidence will be necessary in circumstances where the declarant is unavailable to testify at trial". In *R. v. Smith*, [1992] 2 S.C.R. 915, the Court said that "the criterion of necessity must be given a flexible definition capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available " (at 933-934).

[23] The second criterion, threshold reliability, is established when "the hearsay is sufficiently reliable to overcome the dangers arising from the difficulty of testing it", including dangers relating to the declarant's perception, memory, sincerity and narration (*Khelawon* at para. 49; *Bradshaw* at para. 26).

[24] There are two ways of establishing threshold reliability; procedural reliability or substantive reliability. The two approaches may work in tandem and compliment each other (*Bradshaw* para. 32).

[25] Procedural reliability refers to having substitutions in place for testing the evidence, such as video or audio recording, the taking of an oath, or contemporaneous cross-examination (*Khelawon* at para. 63, *Bradshaw* at para. 28). Substantive reliability is established if the evidence is inherently trustworthy, which may include a consideration of corroborative or conflicting evidence. A statement is substantively reliable where it "is made under circumstances which substantially negate the possibility that the declarant was untruthful

or mistaken" or it is "unlikely to change under cross-examination" (Bradshaw at para. 31).

The Baltovich issue

- [26] It appears that the only other case where a similar issue arose was in *R. v. Baltovich*, [2007] O.J. 5488, a decision of Watt J. as a trial judge. In *Baltovich*, two witnesses gave statements to the police, and they were subsequently hypnotized. The Crown sought to have their statements admitted into evidence for the truth of their contents, relying on the principled exception to the hearsay rule on the basis that the evidence was both necessary and reliable.
- [27] Justice Watt excluded the evidence on the basis that the Crown could not use the "back door" to admit what was otherwise inadmissible. He referred to *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 at 784:

As a threshold matter, before discussing the specific requirements of the reformed rule, I would adopt the requirement embodied in the provision proposed by the Law Reform Commission of Canada, and in the English Civil Evidence Act 1968, that prior inconsistent statements will only be admissible if they would have been admissible as the witness's sole testimony. That is, if the witness could not have made the statement at trial during his or her examination-in-chief or cross-examination, for whatever reason, it cannot be made admissible through the back door, as it were, under the reformed prior inconsistent statement rule.

[Emphasis added.]

- [28] Justice Watt concluded that subsequent decisions of the Supreme Court of Canada did not depart from the requirement that hearsay evidence must not only meet the requirements of the principled exception, but also be "admissible as the witness's sole testimony", (*Baltovich* at para. 86) citing *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764 at para. 48; *Hawkins* at paras. 69, 82-83; and *R. v. Couture*, 2007 SCC 28 at para. 7.
- [29] Justice Watt concluded that the rule in *Trochym* excluded the evidence of the witnesses because "each had been subjected to hypnosis and their evidence is not sufficiently reliable to warrant its reception before the trier of fact", and not subject to either of the *Trochym* exceptions (para. 107).
- [30] In other words, because the evidence was excluded pursuant to *Trochym*, it could not be admitted on the basis of the principled exception. In his words, at para. 109 of *Baltovich*:

To conclude otherwise would be to permit the prosecutor to do indirectly what *Trochym* forecloses him from doing directly. Satisfaction of one exclusionary rule would trump a declaration of inadmissibility authored by another.

- [31] In the alternative, Justice Watt considered whether the evidence would be admissible under the principled approach if his application of Trochym was incorrect. He concluded that the decision in Trochym rendered the evidence unavailable, and therefore met the necessity criterion. He concluded, however, that the evidence tendered was not sufficiently reliable, and should not be admitted under the principled exception to hearsay.
- [32] Associate Chief Justice Cullen did not agree with the analysis in Baltovich. In his view, at para. 43 of the Hearsay Ruling, Watt J. interpreted B. (K.G.) too broadly. I agree with Cullen A.C.J. As explained below, in my view the decisions in Khan, Hawkins and Couture support the reasoning and result reached by Cullen A.C.J.
- [33] The four witnesses could not testify as a result of the decision in Trochym, as the majority concluded that any evidence obtained as a result of hypnosis was not sufficiently reliable to be admitted as evidence. That conclusion, in my view, is unassailable. Flowing from that conclusion, a witness who had been hypnotized could not testify at all in relation to topics canvassed under hypnosis. As a result, pre-hypnosis evidence, while otherwise relevant and admissible, could no longer be tendered in court because of a rule preventing the declarant from testifying.
- [34] Similar situations arose in *R. v. Khan*, [1990] 2 S.C.R. 531, and *Hawkins*. The decision in *Khan* was the springboard for the principled exception to the hearsay rule. In *Khan*, the trial judge ruled that a three-year-old victim was not competent to give unsworn evidence pursuant to s. 16 of the Canada Evidence Act, R.S.C., 1970 c. E-10 (since repealed by S.C. 1987 c. 24 s. 18). Thus, her relevant evidence was found to be inadmissible as a result of an evidentiary ruling based on incompetence (a ruling reversed on appeal). In finding that the child's hearsay evidence was admissible, the Court concluded that "the inadmissibility of the child's evidence might be one basis for a finding of necessity" (at 546).
- [35] Thus, despite being excluded under one basis, that same basis provided the footing for the necessity requirement, resulting in the admission of the hearsay evidence.
- [36] In *Hawkins*, the issue was whether testimony at a preliminary inquiry given by Mr. Hawkin's then girlfriend could be admitted at trial pursuant to the principled exception to the hearsay rule. By the time of trial, the witness had married Mr. Hawkins and was no longer a competent and compellable witness as a result of the common law spousal incompetency rule. That rule provides that "a spouse is incapable of testifying in relation to events which occurred both before and during the marriage" (*Hawkins* at para. 37, emphasis in original).
- [37] Thus, evidence that was otherwise relevant and admissible could no longer be given in Court by the declarant. The majority concluded that the evidence was admissible pursuant to the principled exception of the hearsay rule, despite being inadmissible based on the application of another common law rule of evidence. The Court, in the context of discussing the meaning of the necessity requirement, said this at para. 73 of *Hawkins*:

In this instance, we are satisfied that Graham was unavailable to testify on behalf of the Crown for the purposes of the necessity criterion. The prosecution could not call upon Graham to testify as a result of her spousal incompetency, and there was no other means of presenting evidence of a similar value before the court. In both *Khan*, at p. 548, and *[R. v. Rockey [1996] 3 S.C.R. 829]*, at para. 20, the Court similarly found that the necessity criterion would be met in circumstances where a child declarant was legally incompetent to give viva voce evidence at trial.

[38] In *Couture*, the Court discussed the effect of *Hawkins*, concluding at paras. 60-63 that neither the creation of the evidence in *Hawkins* nor the admission of the evidence offended the spousal incompetence rule.

[39] Those cases reflect circumstances where a declarant was barred from testifying as a result of a rule of evidence, but their evidence was nonetheless admitted under the principled exception to the hearsay rule.

[40] In this case, admission of the pre-hypnosis statements, does not undermine the rule established in *Trochym*. The statements were given before the witnesses were hypnotized, and in and of themselves, the statements were not rendered unreliable as a result of hypnosis. That evidence has become unavailable from the declarant as a result of *Trochym*; however, I do not see how considering whether the evidence could be admitted under the principle exception is "back dooring" the evidence any more than it was in *Khan* or *Hawkins*. Rather, the necessity requirement is met precisely because the relevant direct evidence was not available.

[41] In my view, Cullen A.C.J. was correct in concluding that the pre-hypnosis statements may be subject to the analysis found in the principled approach.

Necessity

[42] Mrs. Whitecross was deceased by the time of trial. The defence did not contest the necessity criterion with respect to her evidence. The other three witnesses were alive, and able to testify but for the rule in *Trochym*.

[43] Mr. Handlen submits that Cullen A.C.J. erred in his application of the necessity test, by finding necessity on the basis that the evidence was "necessary for the prosecution's case". He relies on *Smith*, at para. 71. In my view, the judge did not commit that error. He considered, at para. 106 of the Hearsay Ruling, the relevance of the evidence in the context of the Crown's case, which was not an error. He clearly concluded that the necessity element was satisfied because of the application of the rule in *Trochym* at para. 108.

[44] In my opinion, he was correct in that conclusion.

Reliability

[45] The trial judge concluded that the statements also met the test of threshold reliability and could be admitted into evidence.

- [46] The question of what framework should be applied to the admissibility of hearsay evidence is a question of law, subject to the standard of review of correctness (*R. v. Moir*, 2020 BCCA 116 at paras. 80-82, leave to the SCC refused). However, absent an error in principle, the judge's determination of threshold reliability is entitled to deference.
- [47] Mr. Handlen submits that three of the hearsay dangers of admitting the statements were present in this case. Referencing Baldree at para. 32, he says that the declarants may have "misperceived the facts", "wrongly remembered the facts", or may have "narrated the relevant facts in an unintentionally misleading manner". He observes that the trial judge did not refer to procedural reliability, but then he acknowledges that there was no evidence relating to that approach. The admission of the evidence turned on whether, at the threshold reliability stage, the statements were sufficiently reliable.
- [48] Mr. Handlen submits that the lack of contemporaneous cross-examination weighed against admission in this case. He contends that the judge did not properly address the question, dismissing it out of hand because the statements were given so many years ago that the witnesses would not remember much in any event.
- [49] Mr. Handlen points to the differences between the statements to demonstrate how they were unreliable. Mr. Whitecross and Mr. Rose described a truck and camper heading north. Mr. Whitecross said it was a Security camper, and Mr. Rose said the camper was light beige and the truck either light tan or blue. In contrast, Mr. Schuman said the truck and camper was heading south, and the camper was a striped Okanagan model.
- [50] The Crown submits that the judge did appropriately consider accuracy concerns, highlighting the circumstances in which the statements were made: The witnesses came forward voluntarily providing information when it was fresh in their minds. The judge found that the police officer accurately recorded their statements, a finding not challenged on appeal. It would be difficult to be mistaken about seeing something as conspicuous as a truck and camper. Cross-examination would not have added to the trial process, since the statements were given so long ago, and Mr. Handlen was permitted to cross-examine the witnesses on matters bearing on reliability in any event. The three living witnesses testified on the voir dire.
- [51] The trial judge's decision relied on the law as set out in *Khelawon*, as *Bradshaw* had not yet been decided. Although *Bradshaw* clarified the framework to be applied to the principled approach, it did not change the substantive law. Error is not found because the judge did not meticulously apply *Bradshaw*.
- [52] In *Bradshaw*, Karakatsanis J. noted that a trial judge can consider the circumstances in which the statement was made and evidence that corroborates or conflicts with the statement, in assessing substantive reliability (at para. 30).
- [53] Mr. Handlen points to para. 40 in *Bradshaw*, where the Court said:

[S]ubstantive reliability is concerned with whether the circumstances, and any corroborative evidence, provide a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy.

[Emphasis in original.]

- [54] Mr. Handlen does not dispute the truthfulness of the witnesses, but he does contend that cross-examination could demonstrate inaccuracies. He says the judge wrongly relied on evidence as corroboration, when it could not properly be considered as such.
- [55] The trial judge's reasons reflect that he was well-aware of the law and the tests that he needed to apply. The trial judge addressed the issue, raised on appeal, of whether the witnesses collaborated or were influenced by external factors, such as the radio report or police influence. Such is apparent from his reasons at paras. 117-127 of the Hearsay Ruling:
- [117] In the first place, the general context established by evidence extrinsic to the hearsay statements is consistent with those statements. In particular, both the timing and the location of Monica Jack's abduction as established by where and when she was last seen by Debbie John and her mother, and the discovery of her bike at the pull-out, is in general accordance with what the declarants say they saw.
- [118] In the second place, all the statements were taken within days of the events being described when the events would have been fresh in the minds of the declarants. Mr. and Mrs. Whitecross' statements were taken within two days, Michael Rose's statement was taken within three days and George Schuman's statement was taken within four days.
- [119] In the third place, there is nothing in the context of the taking of the statements that would make the declarants feel pressure to mis-describe what they saw, or to succumb to unconscious influence. In the fourth place, although Graham Whitecross and Michael Rose knew each other and had discussed what they had seen before they gave their respective statements, neither of them knew or had anything to do with George Schuman, whose evidence was generally consistent with and corroborative of theirs in so far as the presence of the truck and camper at the pull-out at the material time was concerned.
- [120] While Mr. Schuman came forward to give his information because of what he heard on the radio, there is no evidence of what he heard. The only evidence on the voir dire of the police notifying the radio was that it occurred at about 4:00 p.m. on May 7 before they talked to Mr. Whitecross or Mr. Rose or were aware of the potential involvement of a truck or camper.
- [121] Even if the radio had reported the possible involvement of a truck and camper, it does not support an inference that Mr. Schuman would falsely report seeing such a thing at the pull-out. In his statement, he provided significant details of the truck and camper. It appears objectively improbable that he would fabricate what he saw for no discernible reason.

- [122] There is simply no evidence to establish that there was any advantage to any of the declarants to fabricate a story about seeing a truck and camper at the pull-out if they did not. In a similar vein, there is no logical reason to explain how they could be mistaken about seeing something as obvious as a truck and camper. While people can be influenced by hearing or learning what others have seen or heard, given the proximity of the events described to the statements describing them, and the palpable nature of what they described seeing, it is difficult to understand how or why someone could describe seeing something so obvious if it were not there to be seen.
- [123] Witnesses may of course be influenced in remembering subtle details such as hair or eye colour, height, weight, style of clothing, colours of vehicles etc. Here, however, there is no evident basis for such unconscious influence. Graham Whitecross gave only a brief description of the camper describing it as a Security camper. He said nothing about its size, colour, or the colour of the truck. Michael Rose, although describing the vehicle and the camper, described the camper only as being a light beige colour and "an over cab and behind the tailgate type unit". He describes the truck as "a lighter colour, nothing standing out, maybe a light tan or blue". He described it as maybe having been a Ford. There is thus nothing strikingly similar to how Michael Rose and Graham Whitecross described the vehicle that suggests that they may have collaborated or unconsciously influenced one another in their memory or description. Similarly, George Schuman, who gives a fairly detailed description of the camper does not describe it in a way that is strikingly similar to either Mr. Whitecross or Mr. Rose and suggestive of him being privy to their descriptions before providing his own. In fact, there is affirmative evidence that Mr. Schuman knew neither Mr. Whitecross nor Mr. Rose, and had no discussion with them before he gave his statement. Thus, there is no real opportunity for there to have been any form of influence between the perceptions either of Mr. Rose and Mr. Whitecross, on the one hand, and Mr. Schuman, on the other hand.
- [124] In one detail, Mr. Schuman's statement appears at odds with Mr. Whitecross'. Mr. Schuman describes the truck and camper as pointing south, whereas Mr. Whitecross describes seeing the door at the rear of the camper from a vantage point to the south of the camper. Mr. Rose described the truck turning onto the pull-out while travelling in a northerly direction. Mr. Whitecross subsequently saw the camper having left the pull-out travelling southbound towards Merritt.
- [125] While those are apparently contradictory details which may affect the ultimate reliability of the statements, I do not see in them a reason not to find that in each case the declarant's description of what, when and where they saw what they saw, is generally consistent with the circumstances established by evidence extrinsic to the statements. In this case, there is no basis to conclude that the declarants were untruthful or mistaken when they gave their respective statements.

- [126] Although the accused submits that being deprived of the ability to cross-examine the declarants prevents challenging what the declarants assert they saw, it seems unlikely that after 38 years (or, for that matter, even after a much shorter time) the declarants would be able to do anything other than rely on what they said in their statements made while the events were fresh in their memories, either as a means of refreshing memory, or as past recollection recorded. In those circumstances, it seems likely that the statements would, in any event, even if the declarants were able to testify, assume a dominant part of their evidence.
- [127] In my view, the obvious and palpable nature of the subject matter of their statements, that is, the presence of a truck and camper in a particular time frame and at a particular place, when taken in combination with the absence of any motive to falsify or any realistic basis to misperceive, the concordance of the statements the one with the other, and the statements' concordance with the extrinsic evidence linking the probable abduction of Monica Jack to the same time frame and place, are all circumstances "which substantially negate the possibility that the declarants were untruthful or mistaken" (R. v. Smith at 270).
- [56] Mr. Handlen says that the lack of cross-examination does not allow him to address a possible alternate theory; that there were two trucks and campers. The alternate theory arises from the evidence of the witnesses, in that the evidence of Mr. Whitecross and Mr. Rose did not line up perfectly with that of Mr. Schuman. But that is precisely what allowed the defence to argue, not challenge, a theory of two trucks and campers. As stated by the Crown in her factum, the two-truck theory is not an alternative explanation to the truthfulness or accuracy of the statements--it depends on it.
- [57] The judge looked at the external evidence to corroborate or support the truthfulness and the accuracy of the statements: Monica was seen at specific times and places by both her mother and Mrs. Whitecross. Her brother found her bicycle on the grassy area between the pull-out and the lake, and the evidence of Mr. Schuman who saw a bicycle on the road near the pull-out where the camper/truck was parked. Mr. Whitecross's evidence of hearing a girl cry out from the direction of the pull-out where the camper was parked. No error in reasoning is apparent.
- [58] Mr. Handlen submits that the judge erred at para. 119 of the Hearsay Ruling in relying on the statements themselves as corroboration. The judge was, however, not addressing the issue of corroboration for the truthfulness or accuracy of the statement, but was considering the evidence in the context of whether the witnesses' evidence was the product of unconscious influence, rendering it unreliable.
- [59] In my opinion, the trial judge correctly applied the law, and as such, deference applies to his conclusion that the statements met the threshold reliability test. The statements did not directly implicate Mr. Handlen in and of themselves. But they demonstrate that Monica was likely abducted by a man driving a camper/truck while she was on her way home on her bicycle at around 7:30 to 8:00 p.m. from a pull-out by Nicola Lake.

Reconsideration Application

- [60] Two years after the ruling admitting the four hearsay statements, Mr. Handlen applied to revisit the ruling based on new arguments. Mr. Handlen contended that the admission of the statements breached his Charter protected right to cross-examination and thus breached his right to make full answer and defence.
- [61] He submitted that the statements should also have been excluded on the basis of an abuse of process because the police, by hypnotizing the witnesses, are responsible for the loss of the evidence. He seeks exclusion of the evidence as the remedy.
- [62] The standard of review with respect to this ruling is one of deference. The re-opening of a previous ruling is discretionary and justified only when there is a material change or other event that requires revisiting a ruling in the interests of justice. An appellate court will only intervene if the discretion has not been exercised judicially (R. v. Orr, 2021 BCCA 42 at paras. 47-48, 53-55).
- [63] The trial judge carefully considered the arguments, and in particular the submission that depriving Mr. Handlen of cross-examination of the witnesses breached his Charter rights, and the issue that the evidence may have been the product of inadvertent collusion. He said at paras. 47-49:
- [47] In my view, with respect to the statements of Monica Whitecross, Graham Whitecross and Michael Rose, none of the changes cited by the defence, the new argument based on the Charter, the fact that the accused testified on the voir dire, the evidentiary value of the hearsay statements on the voir dire, or the fact that the Herbert statement was excluded, materially affect the ruling made in October of 2016 with respect to the issue of admissibility.
- [48] With respect to the constitutional dimension of the defence argument, it is clear from Khelawon that the loss of the ability to cross-examine a Crown witness is protected by the presumptive inadmissibility of a hearsay statement, but where the presumption is overcome by other indicia of reliability, society's interest in having the trial process arrive at the truth, is an aspect of trial fairness that operates as a limitation on the accused's s. 7 or 11(d) rights.
- [49] In my view, the other changes relied on by the accused as justifying a reconsideration are simply not material to the question of the admissibility of the statements. Insofar as the accused's right to put the other pre-hypnosis statements of those three witnesses before the jury is concerned, I do not see the justification for it. The other statements are generally consistent. They were not contemporaneously confirmed by the witnesses. They have not been the subject of a reliability analysis and the accused has offered no assessment of their relevance or probative value. If anything, the earlier pre-hypnosis statements appear to be prior consistent statements which would only be admissible in the normal course to rebut the suggestion of recent fabrication, and not as the proof of the truth of their contents.

- [64] The judge found that there was no material change or other event requiring reconsideration, and that finding is entitled to deference.
- [65] Mr. Handlen also submits that regardless of whether the statements met the criteria of the principled exception to the hearsay rule, the judge should have exercised his discretion to exclude the statements on the basis of an abuse of process. He submits that the police were responsible for the absence of evidence. If the police had not hypnotized the witnesses, their evidence would have been available and the witnesses subject to cross-examination.
- [66] In my view, there is no basis for this argument. There have been cases where the police have lost or destroyed evidence that amounted to a Charter violation (e.g., *R. v. Neidig*, 2015 BCCA 489). In my view, the circumstances in this case do not come close. The witnesses were hypnotized 30 years before the Supreme Court of Canada established the rule in *Trochym*. To suggest that the conduct of the police amounted to an abuse of process is without merit.
- [67] In my view, the trial judge did not err in the exercise of his discretion when he refused to exclude the statements after the reconsideration application.
- [68] Mr. Handlen sought to have a post-hypnosis statement from police notes of Mr. Schuman admitted into evidence. That issue was not raised during the voir dire two years earlier.
- [69] The notes were from a police interview in 1996, when Mr. Schuman was shown a photo of the truck Mr. Handlen owned in 1978. That photo was not available at trial. The circumstances are found in the judge's ruling at paras. 52-54:
- [52] The notes of Mr. Schuman's statement in quotations that are pertinent to that question read as follows. After being shown "photos as requested", Mr. Schuman apparently responded:
- Not what I saw. No way the pickup that I saw was a '74. This is a '70, '68 or '69. The pickup that I saw was a light green three-quarter tonne GM or Chev and an eight-foot camper. The tailgate was closed. This is an older pickup. I remember it had a whole bunch of stickers all over the back.
- According to police notes made at 10:15 hours on May 10, 1978, Mr. Schuman described the truck he saw as:
- 1973 or newer Chev/GMC three-quarter tonne.
- According to the admitted statement:
- The truck could have been two to three years old and it was not in too bad a shape.
- He also said it was:
- A pale green newer style Chev or GM (after 1973).

- [53] The truck photograph that was shown to Mr. Schuman in February 1996 is not available. According to documents put before the Court by the accused in support of this application, the photos were taken sometime in 1995. The owner "purchased the truck seven years ago at which time it was essentially in pieces and ready for the boneyard".
- [54] Obviously an important aspect of Mr. Schuman's evidence, from the accused's point of view, is that he consistently described the truck as a 1973 or newer Chev or GMC. In 1996, he asserted it was a 1974 and contrasted it with the photograph which he saw which he described as a 1968 or 1969.
- [70] The judge concluded that the post-hypnosis statements given by Mr. Schuman were not admissible. He did, however, permit cross-examination of Mr. Schuman to establish the foundation for the argument that the truck that he saw did not match the truck driven by Mr. Handlen. He reasoned at paras. 55-57:
- [55] The truck owned and operated by the accused at the time of the Monica Jack abduction was a 1972 Chevrolet. The issue is whether Mr. Schuman's knowledge and experience with pickup trucks enabled him to identify whether a particular pickup truck was a 1973 or later model, and the basis upon which he could make that identification. If his identification of it as 1973 or later was based on his knowledge of and experience with pickup trucks and their characteristics, then his description of it as such has more probative value than if it was simply an estimate based on the apparent condition of the vehicle or a generalized perception of its age. His opinion expressed in the post-hypnotic statement that the truck he saw is not the one depicted in the picture he was shown, is compromised by the passage of time, the apparent condition of the truck in the picture he was shown, and the fact that after seeing the truck and camper, he was hypnotized. In those circumstances, his post-hypnotic 1996 statement lacks reliability.
- [56] As I see it, however, if his description of the truck in his original statement as 1973 or newer Chev or GMC is clarified through cross-examination based on his ability to recognize the particular characteristics of a 1973 or later Chev or GMC pickup, it will provide evidence independent of the passage of time, hypnosis or changed condition of the Handlen vehicle, to permit an inference that it was a different truck.
- [57] Accordingly, while I will not rule the subsequent post-hypnosis police notes admissible, I will permit the accused to cross-examine Mr. Schuman about his ability to recognize and identify characteristics of 1973 or newer Chev or GMC pickups to establish a foundation for an argument that what he saw did not match Mr. Handlen's vehicle.
- [71] In my opinion, allowing Mr. Schuman to give evidence regarding his expertise in relation to trucks permitted Mr. Handlen to lay a better foundation for this argument than if the statements had been admitted. As the judge recognized, the police notes were made 18 years after Mr. Schuman first saw the truck in 1978, and all he was shown was a photo of a truck that was, by then according to the evidence, in pieces.

- [72] In my view, the judge committed no error in his ruling.
- [73] I note, parenthetically, that the trial judge meticulously charged the jury with respect to the use that may be made of the hearsay statements. No error is raised by Mr. Handlen with respect to the content of that instruction.
- [74] I would not give effect to the first ground of appeal.

The Mr. Big Statements and Reenactment

- [75] For many years, Canadian police forces have conducted undercover operations designed to gain the trust of suspects and entice them into a fictitious criminal organization. Once so entrenched, the undercover police officers elicit a confession to the crime they are investigating, sometimes by offering a false confession to the crime by a person who is purportedly suffering from a terminal illness. The operations have been termed "Mr. Big" to reflect the role of the so-called "crime boss".
- [76] In 2014, the Supreme Court released its decision in *R. v. Hart*, 2014 SCC 52, which created an evidentiary framework for the admission of Mr. Big statements. The Mr. Big confessions became presumptively inadmissible, with the onus on the Crown to establish that the probative value of the evidence, demonstrated by its reliability, outweighed the prejudicial effect, defined by the admission of the inevitable harmful character evidence that is admitted as a result of the Mr. Big operations. The majority said, at para. 84-87:
- [84] In this section, I propose a solution that, in my view, strikes the best balance between guarding against the dangers posed by Mr. Big operations, while ensuring the police have the tools they need to investigate serious crime. This solution involves a two-pronged approach that (1) recognizes a new common law rule of evidence, and (2) relies on a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct.
- [85] The first prong recognizes a new common law rule of evidence for assessing the admissibility of these confessions. The rule operates as follows: Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value turns on an assessment of its reliability. Its prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession in context. If the Crown is unable to demonstrate that the accused's confession is admissible, the rest of the evidence surrounding the Mr. Big operation becomes irrelevant and thus inadmissible. This rule, like the confessions rule in the case of conventional police interrogations, operates as a specific qualification to the party admissions exception to the hearsay rule.

- [86] As regard the second prong, I would rely on the doctrine of abuse of process to deal with the problem of police misconduct. I recognize that the doctrine has thus far proved less than effective in this context. While the problem is not an easy one, I propose to provide some guidance on how to determine if a Mr. Big operation crosses the line from skillful police work to an abuse of process.
- [87] The purposes of this two-pronged approach are to protect an accused's right to a fair trial under the Charter, and to preserve the integrity of the justice system. Those are the ends that must ultimately be achieved. This approach strives to reach them by ensuring that only those confessions that are more probative than prejudicial, and which do not result from abuse, are admitted into evidence.
- [77] The decision in Hart was released mid-way through the Mr. Big operation in this case.

The Mr. Big operation

- [78] The police suspected Mr. Handlen of Monica Jack's disappearance early on, first approaching him with respect to Monica's abduction around June 8, 1978. He owned a truck and camper at the time of Monica's murder: a two-tone white and green 1972 Chevrolet Longhorn pickup truck and a light tan or beige Security camper fitted over the truck. He had a previous conviction for rape and was released on parole in 1975. He had already been interviewed by the police for the murder of Kathryn two years earlier. He lived in Langley but had previously considered travelling to Merritt, as evidenced by his parole documents. He had also been given permission to go camping and fishing in Prince George, Macleod Lake, Kamloops, and Barkerville.
- [79] Despite some contact between the police and Mr. Handlen in the 1980s and 1990s, investigation into Monica's murder appears to have largely gone cold until the Mr. Big investigation. That investigation began on November 22, 2013 and involved 103 staged scenarios, of which Mr. Handlen participated in 81, beginning in February 2014. Some of these scenarios involved threats or themes of violence, and Mr. Handlen appeared to be a fully engaged participant in that violence with little reservation. Over the course of ten months, undercover officers increased their contact with Mr. Handlen, offering him employment and the prospect of increasing remuneration and comradeship within the fictitious criminal organization. Mr. Handlen's activities in the organization escalated from non-criminal repossession of vehicles until the end of May 2014 to loan sharking, counterfeit merchandise, contraband cigarettes, and counterfeit credit cards over the summer of 2014.
- [80] When the operation commenced, Mr. Handlen was 67 years old. He had a criminal record (for the aforementioned rape and other offences) and some health issues. He had a propensity to lie to the undercover officers, embellishing or making up incidents, for which he was repeatedly reprimanded. Alcohol consumption was part of several of the staged scenarios in the operation, although Mr. Handlen did not appear to be intoxicated, with

several exceptions. He was paid a total of \$11,710, plus meals and expenses, during the operation. The judge found that Mr. Handlen's relationship with the organization and its members was analytical rather than emotional.

- [81] On November 14, 2014, Mr. Handlen was driving with an undercover officer when they were called for a meeting with the head of the organization, (the Mr. Big), "Agent A". He had been given no indication that the homicides were going to be addressed until Agent A brought up the topic of Merritt. Mr. Handlen expressed uncertainty when Agent A mentioned Monica's name. After Agent A claimed that the police had DNA evidence but that he could help Mr. Handlen if he was honest, Mr. Handlen began confessing. Among other things, he said that he remembered "picking up a broad. Having sex and then I just lost it for some reason. I think I strangled her. I am not sure." He said he knew that Monica was "Native" and agreed that she could have been 11 or 12 years old. He said he "left her someplace. Left her in a, yeah, up on the road somewhere, I did." He added, "[A]ll I can tell you is that I know for sure I went up a dirt road off the highway up a hill somewhere in the Merritt area and I left the body up there." He said he met Monica at the "turnoff on the side of the road along the side of the lake" and that he was on the hill "for about an hour." He was positive he strangled her, burned her clothing, and threw her body behind a log.
- [82] On November 15, 2014, the officers took Mr. Handlen to Merritt for a reenactment. He repeatedly said that he would know the spot when he saw it, but he initially failed to identify the pull-out as they passed Nicola Lake. He expressed uncertainty as to the site's proximity to Merritt but consistently stated that the pull-out was to the left of the highway as they were driving north. He knew that it was by a lake that was close to an Indigenous reserve. He repeatedly said that he did not see anything as they drove north on Highway 5, but when they took the route heading towards Princeton, Mr. Handlen said that the terrain was different and it was "more like the terrain we had back there." When asked how he knew it was Merritt, he said, "I don't remember, it is just where the cops were saying." Unable to find the site, the officers and Mr. Handlen went to Kamloops for the night.
- [83] The following day, one of the officers told Mr. Handlen that he looked it up and knew that the Quilchena reserve was on Highway 5. Mr. Handlen expressed some doubt that it was that area and also said, "I can say exactly what happened but I cannot say exactly what lake or what spot." He repeatedly expressed doubt as to how the police obtained his DNA. Eventually, he located a spot near Nicola Lake that was "similar" but the lake was "too much of a drop" to be right. The spot was the pull-out from where Monica was likely abducted.
- [84] At trial, the Crown led evidence that the water level of Nicola Lake had dropped 0.768 metres between the day Monica disappeared and November 16, 2014.
- [85] The judge summarized the events as they reached Nicola Lake, heading south from Kamloops, in the Mr. Big Ruling:

- [272] As they drove south and reached Nicola Lake, the accused said, "this is it but all those houses on the other side were not there not here. I am almost convinced it is the other way heading down toward Spence's Bridge."
- [273] As they continued south, the accused looked to his right at the lake and said, "I think that was it there". He said it was "similar" and then said, "oh yeah I think that was it. Looks like it. Or a similar place like that. Okay, those houses well must have been here I do not remember any houses that close though. That place has been here a long time". He then said it is similar to that, "right here but that's not it."
- [274] They travelled further south and the accused said, "right there", while looking to his right. He said "turn and let me have a look". He then said "like that, no, too far down. It was lower than this. Lower to the lake. But just hold for sec, there is something there look take a quick look while the car is well no car is coming". They got out of the vehicle and walked towards the lake side. The accused said that it was "too far down it was lower eh?" They got back in the vehicle and the accused said it was "very similar but that is not it."
- [275] The spot where they stopped was the pull-out from which Ms. Jack was apparently abducted. They came to the end of the lake and the accused said, "it's not that lake, not that lake roads too high above the lake." He said "too much of a drop The terrain just isn't right." He said it was "not the spot" and went on to assert that it had to be the other way (toward [Spence's] Bridge). He explained how he left the Merritt area:
- I went from Spence's Bridge and I got onto the Fraser Canyon highway down to a place called Lillooet. Hottest place in the interior. That's right along the Fraser River and went out you go out by Whistler. Come back into Vancouver the opposite way.
- [276] After they drove past the south end of the lake going towards Highway 8, the accused said "[indecipherable] terrain" and "that's where I went up the hill."
- [277] Agent D said the terrain on Highway 8 is like the terrain on 5A going south towards Princeton. He pointed out there are no lakes beside it and "there are considerable drops because the road is higher."
- [280] At one point, he said, "that last spot where we stopped with the flag was there it is similar to that But the terrain is lower. The lake even, it's a rocky beach but It is not high up like this - it is quite a bit lower." He also said, "there is a house on the hill way way out up high up it is not there, there's no road is no house there is nothing so that throws me off that spot." He said, "after I threw the bike in the lake I was looking around and I seen that house, but it is quite a ways away". He went on to say that "the road I went up it will be like that they are going through a terrain like that but steeper steeper."

- [281] He then said, "yeah but it was in sort of a valley went in that way along like that at that angle got steep real went around the corner it got real steep till you got to the top. It wasn't high [indecipherable] it was not that high [indecipherable] trees on the top like that [indecipherable]."
- [282] Later, in deciding where to go next and if they should go back on Highway 5A, the accused said, "I can't remember. The only thing I know is the spot that when I left here came out Spence's Bridge so if it was there in between here and Spence's Bridge, but I do not know now."
- [283] He was asked about the location of the road where he took Ms. Jack. He said the lake was on the pull-out side and the road that he went up was on the opposite side, but he could not remember whether it was just past the end of the lake or before the end of the lake. He said it was a pretty narrow, rustic road and that he went up it.
- [86] Mr. Handlen testified at the voir dire. His position then, as it is on appeal, was that he made it all up. He had details about Monica's murder as a result of media reports and questions from the police. He had difficulty locating the pull-out because he was looking for trees that were burned because he knew that Monica's body was found during the controlled burn. His suggestions as to which direction they take stemmed from his inability to find those burned trees, and he was stalling throughout since he knew they had to leave at a certain time.

The trial judge's ruling

- [87] The judge began with a preliminary discussion of whether the decision in Hart was subsequently modified by Bradshaw (Mr. Big Ruling at paras. 581-620). In Bradshaw the Court restricted the use of corroborative evidence by requiring the truth or accuracy of the material aspect of the hearsay statement to be the only likely hypothesis (at para. 44). Hart, in contrast, allowed confirmatory evidence to "provide a powerful guarantee of reliability" without making it a "hard and fast requirement" (at para. 105).
- [88] The judge below ultimately found that Bradshaw did apply to the Hart analysis but that there was no "bright line rule" restricting the type of corroborative evidence that could be considered (Mr. Big Ruling at para. 617). He did not have the benefit of this Court's reasons in Moir and R. v. Baranec, 2020 BCCA 156, both of which definitively held that Bradshaw did not modify the Hart analysis.
- [89] The judge considered both the circumstances and the contents of the confessions. He acknowledged that the Mr. Big operation was relatively long and had a relatively high number of interactions but weighed this against Mr. Handlen's wariness and suspicion, as well as the limited initial contacts. The judge found that, while Mr. Handlen enjoyed the camaraderie of the fictitious group, he was motivated by self-interest. While there were inducements, including financial ones, the judge found that these did not result in Mr. Handlen ceding his will or autonomy, particularly since he maintained his relationships with people outside of the operation and was not isolated from them. There were some

undercurrents of violence, but they were not directed towards members of the organization, and it was made clear to Mr. Handlen that he could leave without adverse consequences. Mr. Handlen experienced mental health challenges but these were dated, and the judge disbelieved his evidence that he had drug-induced hallucinations during the Mr. Big operation given his relatively high level of functioning. The judge concluded that the circumstances of the Mr. Big operation, as a whole, did not raise anomalous concerns about the reliability of Mr. Handlen's confessions.

- [90] The judge did, however, acknowledge that Mr. Handlen's tendency to self-aggrandize and tell falsehoods could be relevant to his evidence that he had falsely confessed.
- [91] The judge analyzed the reliability of the confession itself. I have set out his summary of the confession in full:
- [667] With respect to the Jack Homicide confession, the accused went into his meeting with Agent A without knowing in advance what he was going to be confronted with and without considering what, if any, response to give. Nor did he have any opportunity to obtain any helpful information.
- [668] When he was first confronted with the information about being linked to the Jack Homicide by DNA, he did not proclaim it as impossible. Instead, he asked the obvious question, "why wasn't I arrested?" When Agent A explained how the DNA match was not yet sufficient to lay a charge but that the police were seeking a further analysis and would "have the final analysis and the relevant documentation for court by December 2015", the accused agreed with Agent A's statement, "so that is not good".
- [669] When Agent A went on to tell him about "witnesses that saw him in the area ... plus the DNA", the accused replied, "I don't know anything. They never said anything to me about that at all".
- [670] When Agent A told him, "the bottom line was they got people that saw you and they got your DNA, that's not good Gary", the accused's response was, "no". When Agent A said, "I don't care if you did it I know you did it and I do not care", the accused response was, "so I am fucked then."
- [671] The accused did not at any time while Agent A was laying out the situation for him, tell the story he testified to on the voir dire, nor did he protest against the authenticity of the DNA.
- [672] Once he had been told by Agent A that he "was not fucked", he began to disclose some details of his involvement with the Jack Homicide, in direct contrast to his earlier assertion that he knew nothing about it. He began by suggesting he was probably "in a drunken stupor". He asserted that he "did not remember her name, but that he strangled her." He said she was "Native." He denied Agent A's suggestion that he saw somebody while he was with Ms. Jack and he denied that "a guy talked to [him]". The accused elaborated on the circumstances that he recalled after Agent A talked about having someone else confess to the crime in the accused's place with "enough information" to "throw [the police] off the

trail".

- [673] The accused said he met Ms. Jack "at a turnoff on the side of the road which ran along the side of the lake." He noted she was riding her bike and pulled in at the turn-off. He threw her in the camper and threw her bike in the lake. He denied recalling seeing people as he did this despite being shown a composite sketch, which he denied was a likeness of him.
- [674] Next, the accused said he "went up a dirt road off the highway up a hill, somewhere in the Merritt area and left her body up there", following which he "went the back road around Merritt somewhere" and "came back out around Squamish [or] Pemberton".
- [675] He confirmed that he spoke to police and that he had told them he was up in the Merritt area "the weekend before" with "three other guys".
- [676] He later said he was "positive" he strangled her and took off her clothes and burned them. He detailed putting her body behind a log in a clearing up the hill.
- [677] The only time the accused acknowledged seeing someone was "on the way back, through the back road, someone asked if my CB worked." He denied ever talking to anybody, saying, "not up there, there was nobody there."
- [678] During the course of the discussion, Agent A raised the issue of the Herbert Homicide. The accused denied responsibility. A little later in the conversation, Agent A suggested that the police might be able "to do the same thing" they had done with the Jack Homicide DNA in relation to the Herbert Homicide. The accused responded, "who says they can't plant DNA."
- [679] In relation to the Jack Homicide, the accused said that it was "a load off my chest, at least, told somebody."
- [92] The judge found several factors that weighed in favour of the substantive reliability of the confession:
- [680] In my view, the way the accused's confession to killing Ms. Jack unfolded, beginning with an initial hesitancy in keeping with the accused's description of himself as being "cagey", then becoming more and more detailed as Agent A's "plan" to protect the accused became more evident, favours its reliability. The accused's denial in the face of suggestions from Agent A that he saw and spoke to somebody, when there is in fact no evidence of such a contact or conversation, buttresses the authenticity of the accused's confession as it demonstrates that he was relying on his own memory of the events, rather than simply being swept along by Agent A's suggested narrative. Similarly the accused's assertion that the composite picture did not match him, in part because he never wore a toque, tends to demonstrate that he was not simply accepting whatever was laid in front of him in order to engage Agent A's help.
- [681] In my view, the detail of the events provided by the accused, 36 years after the fact, without any real warning, contributes strongly to establishing the reliability of his statement. The fact that the accused never questioned the authenticity of the DNA match in relation to the

Jack Homicide, and did not provide Agent A with his present account of being elsewhere at the time of Ms. Jack's abduction and homicide further weighs in favour of the statement's substantive reliability. His assertion that "it was a load off his chest" appears to be a genuine reflection of his feelings rather than a comment manufactured to persuade Agent A that he was telling the truth. The context of the conversation between the accused and Agent A made it clear that Agent A did not need to be persuaded of the accused's involvement in the Jack Homicide.

- [93] The judge held that the reenactment was also reliable, noting some of the confirmatory evidence from the admitted hearsay statements:
- [682] The accused's re-enactment of the offence, that is, his ongoing confession to Agents B, D, and G in the two days following his confession to Agent A has similar indicia of reliability. For example, the accused's assertion while they were en route to Merritt that they needed "to go north of Merritt until we get to a lake on the left hand side of the road", supports the view that he had a picture in his mind of the abduction site from the perspective of someone travelling north on Highway 5A. That is consistent with the evidence of Mr. Rose who observed the camper traveling north before turning off at the pull-out adjacent to the lake to the left. His ongoing observations and commentary to Agents B, D and G similarly demonstrated a person attempting to search his memory to find the location of long past events.
- [683] His assertions while travelling southbound on Highway 5A that the body disposal site was across the lake to his right, matches the route taken by the person driving the camper from the abduction site as witnessed by Mr. Whitecross who saw it travelling southbound when it passed him and his son.
- [684] While I accept that, when the accused found no recognizable location along Nicola Lake for the abduction site, he hypothesized other locations and directions where the abduction and disposal of the body may have taken place, his explanations of his state of mind when he made his admissions are, however, problematic and difficult to rely on.
- [94] In contrast, the judge did not find Mr. Handlen's testimony on the voir dire reliable for many reasons (Mr. Big Ruling at paras. 685-709). Mr. Handlen's position was that he had been motivated to seek out, learn, and remember details of Monica's murder because of various interactions with the police and the detrimental consequences of being a suspect in her murder. The judge found, however, that there was no evidence that Mr. Handlen was subjected to any specific attention for Monica's murder. His evidence was contradicted by his words and actions during the Mr. Big operation. In particular, Mr. Handlen was repeatedly told, and he repeatedly acknowledged, the need to be accurate during the Mr. Big operation--yet he testified that he had been told to just "make up a story". He said that he had previously learned the name of Nicola Lake from the police and media reports--but he never once mentioned the name of the lake during the Mr. Big operation. There were a number of inconsistencies with respect to Mr. Handlen's testimony that he was looking for an area of

burned forest based on what he had read in the newspaper, including that none of the articles he identified mentioned a controlled burn.

[95] The judge acknowledged that Mr. Handlen's position was that there was no holdback evidence and the inconsistencies within the confession and reenactment eroded their reliability (Mr. Big Ruling at paras. 710-731). However, the judge found that those inconsistencies also undermined his evidence given on voir dire, citing multiple examples. The judge concluded that Mr. Handlen's testimony that he told Agent A that "they must have planted [his] DNA" illogical and unsupported by the evidence, especially as he had already confessed to Monica's murder without ever raising any issue about the authenticity of the DNA that the police purportedly had in their possession. In the end, the judge concluded:

[733] In summary, I find the following deficiencies in the accused's evidence: his illogical explanation for what he did and did not tell Agent A and the undercover officers; his improbable explanation for not just identifying any available reasonable site for the abduction on Nicola Lake; his inaccurate assertion that he questioned the authenticity of the DNA with respect to the Jack Homicide to Agent A; his assertion that his mandate from Agent A was not to be truthful but to make up a story about what happened; and the inconsistencies between the second-hand knowledge he claimed to have acquired and stored about the homicide and what he told the undercover officers. In my view, these deficiencies render his alternative explanation implausible. Accordingly, the evidence surrounding the Jack Homicide that is in agreement with his confession can be used as a measure of the confession's truthfulness.

[734] It is clear the ultimate reliability of the accused's confessions to the Jack Homicide is at issue and the Crown's case, with or without the accused's alternative explanation, may or may not achieve the stringent criminal standard of proof. Nevertheless, I am persuaded that in light of the circumstances in which the confessions were made, in light of the confession itself, and in light of the confirmatory evidence taken as a whole and in combination, the threshold issue of "whether the evidence is worthy of being heard by the jury" is satisfied: Hart at para. 98.

[96] Finally, the judge turned to balance the probative value against the prejudicial effect of the confession and reenactment (Mr. Big Ruling at paras. 735-743). The judge found that the probative value outweighed the prejudicial effect, provided that there was an appropriate warning to the jury:

[741] In the present case, the probative value of the accused's ongoing confession to the Jack Homicide lies in his apparent acceptance that DNA could link him to the offence, and his knowledge of details of the crime which, while not withheld from public knowledge, happened many years ago; his apparently genuine attempts to search his memory for details, such as the location of the abduction site, by relying on the presence or absence of mundane features, such as the height of the water to the road, the presence or absence of a house on the hill opposite, the steepness and roughness of the road to the disposal site, the

direction of travel to and from the abduction site, his repudiation of the occurrence of events for which there was no evidentiary support; and ultimately his willingness to confess to a particularly repugnant crime to people whose regard he consistently attempted to garner with self-aggrandizing stories.

- [742] The prejudicial effect of his willingness to join a criminal organization is somewhat dampened by the fact that the simulated offences he was asked to perform were not primarily crimes of violence, but rather involved counterfeit goods, the illicit sale of cigarettes and loan sharking, and the fact that a good portion of the accused's involvement with the organization involved lawful repossession work. To the extent that there was violence woven into the activities that might reflect undue prejudice on the accused, consideration can be given to excising those pieces of evidence. As to the prejudice arising from the prospect that he might choose to testify before the jury and be forced to assert that he lied to the undercover operators, his asserted motive for doing so was not simply to continue with the criminal organization, but rather to prevent what he claimed was pernicious and unjustified attention from the police. He would not have to testify he was bragging about the offence to show he was worthy of being a member of the organization; rather he was attempting to get rid of unwanted attention from the police for an offence of which he claimed to be innocent. In my view, the prejudice in testifying that he lied about his confession is lessened in those circumstances.

Positions of the parties

- [97] Mr. Handlen's arguments on appeal, as I understand them, are two-fold. First, he says that the judge erred in his assessment of confirmatory evidence, since the evidence, following Bradshaw, had to go to the truthfulness or accuracy of Mr. Handlen's statement that he "abducted, killed, and disposed of [Monica's] body". Second, he says that the judge erroneously conflated his rejection of Mr. Handlen's testimony with the threshold reliability of the Mr. Big confession and reenactment. Mr. Handlen submits that once the judge rejected his explanation, the judge had to engage in a Hart analysis *de novo*, without reference to his evidence on *voir dire*. The result, he argues, is that the confession and reenactment were insufficiently reliable and should not have been admitted.
- [98] Mr. Handlen concedes that only the "first-prong" of the Hart test is in issue, whether the probative value of the evidence outweighs its prejudicial effect. He does not rely on the "second prong" and does not argue that the police conduct amounted to an abuse of process.
- [99] The Crown responds that Bradshaw is not applicable to the Hart analysis and that while the judge erred in holding otherwise, his error did not prejudice Mr. Handlen. The fact that the judge rejected Mr. Handlen's testimony did not mean that the testimony vanished; rather, it still had to be considered as part of the surrounding circumstances. In any event, the Crown says, the judge considered markers of reliability in the confession and reenactment that were independent of Mr. Handlen's testimony, and his determinations were amply supported by the evidence. Mr. Handlen's submissions, the Crown says, rely on aspects of

his own evidence that were rejected by the judge or inferences that the judge did not make, without identifying any palpable or overriding error.

Discussion

- [100] I begin with the standard of review. In *Hart*, the majority explicitly stated that trial judges are well-suited to weighing the probative value and prejudicial effect of the evidence, and having heard the evidence directly, they are in the best position to do so. Therefore, their decision will be given deference on appeal (at paras. 108-110; see also *Moir* at para. 82, and *Baranec* at para. 130).
- [101] The Crown acknowledges that, in light of recent decisions from this and other appellate courts, the trial judge erred in his consideration of confirmatory or corroborative evidence by applying the *Bradshaw* framework to the *Hart* analysis (e.g., *Baranec* at para. 137, *R. v. Wruck*, 2020 ABCA 270 at paras. 76-77). However, the Crown submits, and I agree, that any error weighed in favour of Mr. Handlen, as the judge applied a more stringent test to the question of corroborative evidence that was required by *Hart*.
- [102] With that in mind, I start with Mr. Handlen's second argument: that the judge concluded that the Mr. Big confession was reliable simply because Mr. Handlen's *voir dire* evidence was not. As Mr. Handlen puts it in his factum, "it was the rejection of Mr. Handlen's evidence that entitled [the judge] to then rely on the corroborative evidence".
- [103] The test in *Hart* is designed to exclude confessions that have been fabricated because of inducements, either favourable or unfavourable, offered by Mr. Big. In this case, Mr. Handlen testified at length regarding why he falsely confessed--and that evidence was rejected by the trial judge in carefully crafted reasons. When assessing whether the confession was fabricated, then, it was entirely appropriate for the judge to consider Mr. Handlen's stated explanation for confessing.
- [104] Mr. Handlen submits, however, that the rejection of his evidence served "as a proxy for the threshold reliability of the statements". That, in my opinion, is simply not the case. The trial judge considered the reliability of the Mr. Big confession apart from the testimony of Mr. Handlen. He said, at para. 734 of the Mr. Big Ruling:

It is clear that ultimate reliability of the accused's confessions to the Jack Homicide is at issue and the Crown's case, with or without the accused's alternative explanation, may or may not achieve the stringent standard of criminal proof. Nevertheless, I am persuaded that in light of the circumstances in which the confessions were made, in light of the confession itself, and in light of the confirmatory evidence taken as a whole and in combination, the threshold issue of "whether the evidence is worthy of being heard by the jury" is satisfied: *Hart* at para. 98

- [105] Nowhere in the judge's analysis of the reliability of the confession does he consider Mr. Handlen's alternative explanation, let alone infer from his rejection thereof that the confession must have been reliable. I would not give effect to this ground of appeal.

- [106] As for Mr. Handlen's other argument, that the judge erred in his treatment of confirmatory evidence, I again see no merit to this submission. Confirmatory evidence "is not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability" (Hart at para. 105).
- [107] The judge, as quoted above, at paras. 95-96, set out the evidence that he considered was confirmatory of Mr. Handlen's confession and reenactment. This included the escalating detail in the confession, Mr. Handlen's willingness to contest Agent A's suggested narrative, the level of detail, his conduct during the reenactment, and the eyewitness statements. The judge, also set out why he rejected Mr. Handlen's "alternative explanation" that he learned all of this information from the media or the police.
- [108] Deference is shown to a trial judge's decision with respect to the admissibility of a Mr. Big statement. Mr. Handlen has not shown that there is a palpable or overriding error in the exercise of the judge's discretion to admit the Mr. Big statement.
- [109] Indeed, in my opinion, the evidence establishing threshold reliability of the confession and the reenactment was very strong. While confirmatory evidence may not have been necessary, it could--and in this case, did--provide a powerful guarantee of reliability. That evidence was confirmatory of the entirety of Mr. Handlen's confession and reenactment, including the narrow proposition that he abducted and killed Monica before disposing of her body.
- [110] As with the hearsay issue, the judge carefully and thoroughly charged the jury on the use that could be made of the Mr. Big statements and the reenactment. No issue is taken with those instructions.
- [111] I would not give effect to this ground of appeal.

Conclusion

[112] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Butler"

Appendix A

Statement of Monica WHITECROSS [personal information omitted] taken 8 MAY 78:

On last Saturday evening, May 6th, I saw Monica, or one of the JACK girls stop at the foot of my brother's driveway. She was riding a bicycle. The dog had started barking and I looked up and saw her. She was riding with the flow of traffic towards Quilchena. She only stopped for a couple of minutes probably long enough to catch her breath, and went on. This would have been immediately after the hockey game ended at about 7:30 - 7:45 PM. I was working in the garden, so I didn't pay much attention to what happened after that.

My husband Graham and our little boy went for a walk up the road and they were probably already up to the boat house when the JACK girl went past.

The girl's bicycle was a 5 or 10 speed. I can't say for sure that Monica was riding it, but I do know for sure it was one of the JACK girls.

Statement of Graham Burnett WHITECROSS [personal information omitted] taken 8 MAY 78:

On Saturday, after the hockey game was finished I went outside and walked down the driveway. Brian and I were going over to the boathouse which is about $\frac{1}{4}$ mile north of our place towards Kamloops. When we were about half way there I saw Lanny GRAUER and her boyfriend heading towards Merritt. There were other vehicles also, but no one that I knew. Michael ROSE went by also, before GRAUER.

We got to the boathouse and were there by the water for approx. 10 minutes. I saw someone by the water's edge, bent over as though they were washing their hands. They would be about 200 feet away from me, then.

I went back into the bush by the boathouse and started cleaning up a few things. At about this time I heard someone crying out. I thought it was a girl by, by the high pitched sound of her voice. There were two sort of cry's. I thought it was someone that had fallen into the water and when I heard the second one, I raced to the point to look. I couldn't see anyone in sight. The person who was at the water's edge was gone and there was no one around the camper. The door hinged to the left and there was a square window on the right.

I stood for a minute looking up and there was no sign of any movement, or no further noises from the area.

At that time I had the impression that probably a child had not wanted to go back to the camper for supper, or something like that, and the parent had given them a whack. This would account for the noises.

I didn't think any more about it and went back to the beach. I stayed there for about 10 minutes and then went up to the road. I walked about 50 feet toward the camper and the door was closed, and still nobody in sight.

I turned around and walked slowly home. I had gone maybe 100 feet and the rig passed me, going toward Merritt. I think I was gone for about half an hour, and I would say closer to $\frac{3}{4}$ hour. It must have been after 8:00 PM when we got home.

As the person drove past me, I got a look at him. He was looking straight ahead, and picking up speed.

While we were walking home, I recall, I think the camper was first and then Walter OLSOFF from Chapman St. went by.

The vehicle or camper that was there was the same color scheme as a security camper. The tailgate wasn't up so it may have had an over-hang. The truck toned in to the camper. It was a cheap truck, there was no chrome on it, and it just strikes me that it could have been a Dodge.

I was talking with Michael ROSE later, and he recalls seeing the camper and having to stop for it to turn.

Statement of Michael Charles ROSE [personal information omitted] taken 9 MAY 78:

I drove down the lane to the road at about 7:30 PM on Saturday. I stopped at the road to let a camper go by on the road. He was coming from Merritt and travelling about 25-30 MPH I guess. It was going awfully slow.

Graham and Brian Whitecross were walking down to the road. I waved at them and waited for the camper to go by.

The camper was light beige color, an over cab and behind the tailgate type unit. It covered the tail lights of the truck. The truck was a lighter color, nothing standing out. It may have been a light tan or blue. From the general shape and everything I just have the impression that It may have been a Ford.

I pulled onto the road and followed the camper down the road, towards Quichena. It was still travelling fairly slow. The truck slowed down and pulled across the road and stopped at the point.

I drove past and went on towards Quilchena. I met Andy THOMA and Lanin GRAUER who works at the store. They would be 100 yards on up from the point. We stopped and talked for awhile. Andy and Lanin went up to our house and I went on up to the store. I came back about 15-20 minutes later and I don't remember seeing the camper again when I came back.

I couldn't say how many people were in the camper. He may possibly have been travelling slow looking for a place to pull over. There didn't appear to be anything wrong with his driving, other than that it was slow.

Where we stopped and talked with Andy, we could have easily seen the camper. I didn't pay any attention to it.

Statement of George Philyer SCHUMAN [personal information omitted] taken 10 MAY 78:

At about 7:45 PM on Saturday, my wife and I were coming to Merritt from Kamloops. On the right hand side of the road, on a gravel turn-out about a mile to a mile and a half south of Quilchena, I saw a truck and camper. The truck was parked facing South. It was a pale green colored newer style Chev. Or GMC (after 1973). There was a camper on the back, I think it would have been an

Okanagan Camper, Cream colored, with red, yellow and black strips of color on the side. It could have been 2-3 years old and it wasn't in too bad of shape. It was 8½ - 9' camper because the back came down over the truck. It seems to me there was something black on the back of it. There was some hardware around it, maybe a boat rack or something. It looked like it was cluttered up a bit. The black on the back of it may have been a bunch of black stickers in a square, or something. I'm not just sure.

There was a bicycle almost directly across the road from the camper. It was laying on its side sort of on an angle facing towards the north and the lake. It seems to me it was a red colored racing type bike, with white fenders. It was just partly across the white line on the road. I thought some kid had left it, and had gone picking flowers or rocks or something.

We didn't see anybody at all around.

The truck would probably have been a ¾ ton. It was pretty plain, probably a Custom deluxe if it was a GMC or a super deluxe if it was a Chev. I remember the camper as standing out because it had something black stuck or plastered or painted on the back. It seems to me it may have had boat racks on it, and possibly jacks, but I couldn't be too certain.

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