
CANADA / JUDGMENT

R. v. Heatley

2015 BCCA 350

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 350 R. v. Heatley

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Heatley,

2015 BCCA 350

Date: 20150805

Docket: CA41945

Between:

Regina

Respondent

And

Michael Heatley

Appellant

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Savage

On appeal from: Orders of the Supreme Court of British Columbia, dated

April 7, 2014 (conviction), and May 29, 2014 (sentence)

(R. v. Heatley, 2014 BCSC 601, 2014 BCSC 954,

New Westminster Docket No. X076623).

Counsel for the Appellant:

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M.J. Swartz

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

June 23, 2015

Place and Date of Judgment:

Vancouver, British Columbia

August 5, 2015

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Savage

Summary:

Appellant seeks to overturn trial judge's rulings on voir dres which admitted evidence of his confessions to seven robberies, and evidence of a search of his car purportedly incidental to arrest.

Appeal dismissed. Trial judge did not err in ruling confessions voluntary. Police interviewer had made it clear he could not 'make a deal' with appellant in return for leniency for appellant's girlfriend, who was arrested with him. While police had exploited appellant's feelings for the girlfriend, his will had not been 'overborne'. Oickle and Spencer discussed. While search of car by an officer who had familiarized herself with all the robberies in which appellant was a suspect (not just those for which he had been arrested) may have breached his Charter rights, the evidence was admissible under s. 24(2).

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] Mr. Heatley appeals his conviction on seven counts of robbery and seven counts of committing an indictable offence with his face masked. The charges arose out of robberies of various fast-food outlets (including various "Booster Juice" outlets) and stores in Langley and Surrey in the summer of 2011. The last occurred on the evening of September 1, 2011 when police stopped and arrested the appellant and his girlfriend, Ms. Napier, in their car. The police had followed the vehicle from a liquor store in Langley where a robbery had taken place. Earlier the same day, they had been conducting surveillance of the car and had spotted it near a Subway restaurant in Surrey. Mr. Heatley had emerged from the car and approached the restaurant. The police officer's attention was drawn away briefly - at which time the store was robbed. The appellant emerged a few minutes later and re-entered the car. It drove away.
- [2] After the arrest, a police constable was instructed to conduct a search of the vehicle incidental to the arrest. One of the two grounds of appeal is that the trial judge erred in law in finding that this warrantless search was truly incidental to the arrest, given that the constable took some time to familiarize herself with the appellant's entire "file", including surveillance videos, before commencing the search. She was then able to find and identify several items related to other robberies for which Mr. Heatley was a suspect, in addition to those for which he had been arrested on September 1.
- [3] The primary ground of appeal, however, relates to the voluntariness of certain inculpatory statements made by Mr. Heatley to police in the course of interviews conducted primarily by Sgt. McCauley over four days beginning in the early morning hours of September 2, 2011. These statements were the subject of a voir dire. For reasons indexed as 2014 BCSC 282, the trial judge found that they had been voluntary and were thus admissible. They formed an important part of the evidence against the appellant on each of the charges for which he was convicted at trial.
- [4] On appeal, the appellant submits that the trial judge "failed to correctly apply the law as it relates to inducements" or alternatively that he failed to provide any legal analysis as to why he found the confession to be voluntary despite what defence counsel characterized as "implied inducements".
- [5] Since counsel seem to be agreed that the two most relevant cases on the issue of voluntariness are *R v. Oickle* 2000 SCC 3 and *R. v. Spencer* 2007 SCC 11, I propose to turn to those cases before reviewing what took place between Sgt. McCauley and the appellant leading up to the latter's confession to all seven robberies.
- [6] I pause, however, to note the meaning of "inducement", which is of some import in this case. The Concise Oxford Dictionary (8th ed., 1990) defines the word to mean "(i) an attraction that leads one on; or (ii) a thing that induces." As I read *Oickle* and *Spencer*, the Court was using the term in the first sense, i.e., to refer to an attraction or benefit, and not in the second sense - a cause. If it were otherwise, anything leading to (inducing) the making of an inculpatory statement by an accused would ipso facto be an "inducement" for purposes of

the confessions rule. Thus, the term should in the present context be understood as referring to a benefit or other consideration of value to an accused, promised or held out in return for a confession - a quid pro quo offered expressly or impliedly by the authorities.

R. v. Oickle

- [7] Oickle was a Crown appeal from Nova Scotia. It involved statements made by the respondent after taking a polygraph test administered by police in a motel room. The respondent was advised of his rights to obtain legal advice and to leave at any time. The test was administered and the respondent was told he had failed it. He was reminded of his rights and then the police proceeded to question him. Eventually, he confessed to setting fire to his fiancée's car. He became emotionally distraught and gave a written statement in which he denied any involvement in several other fires that had taken place in Waterville, Nova Scotia. He was then arrested, warned of his rights, and taken to the police station, still distraught. After further questioning he said he was tired and wanted to go home. The police told him he was under arrest and could not go home.
- [8] The questioning continued until about 11 o'clock in the evening, at which time Mr. Oickle confessed to setting seven fires. Another written statement was taken, on which his Charter rights and the police warning were printed. He acknowledged these warnings. He was finally placed in a cell to sleep at 2:45 a.m. but was woken at 6 a.m. and asked if he would agree to a re-enactment. Again he was given Charter and secondary warnings and was told he could stop the re-enactment at any time. He was driven around Waterville to the scenes of the fires, where he described how he had set each of them. He was then charged with seven counts of arson.
- [9] The trial judge in Oickle found that the respondent's confessions had been voluntary: Mr. Oickle had understood the police warnings, had had an operating mind, and had been aware of the consequences of his actions. He had "appeared to be coherent, capable of understanding the questions that were put to him, and to be in complete and total control of his faculties." (Para. 11.) He had been aware that the results of the polygraph were inadmissible and again, appeared to be in full control of his faculties at the time of the re-enactment, notwithstanding lack of sleep.
- [10] The Nova Scotia Court of Appeal disagreed, finding that the respondent had not been aware the polygraph results were inadmissible and disagreeing that he had been "coherent and in control of his faculties" on the videotape of the re-enactment. The Court said the police had 'abused' their relationship with him, and that the cumulative effect of the police questioning, including their 'minimizing' the seriousness of the offences in their conversations with Mr. Oickle and advising him that confessing would allow him to get the help he needed, had been an 'improper inducement' to confess.

- [11] The Supreme Court of Canada, Arbour J. dissenting, restored the trial judge's finding of voluntariness. Iacobucci J. for the majority began by stating that the application of the appropriate legal test to determine whether a confession is voluntary is a question of fact, or mixed fact and law. (Para. 22.) He found that the Court of Appeal's disagreement with the trial judge regarding the weight to be given to evidence was not a basis on which a finding of voluntariness could properly have been reversed. On that basis alone, he said, the appeal had to be allowed. (Para. 22.)
- [12] Iacobucci J. went on, however, to describe the development of the "confessions rule", which he said has two main strands. The first was the rule in *Ibrahim v. The King* [1914] A.C. 599 (J.C.P.C.) that no statement made by an accused is admissible against him unless it is shown to have been made voluntarily, "in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." (At 609-10.) The second element, enunciated in *R. v. Hebert* [1990] 2 S.C.R. 151, entailed a broader approach that does not turn on violence, threats or promises by the authorities but on whether the "necessary mental element of deciding between alternatives is absent". (At para. 25 of Oickle.)
- [13] Since the enactment of the Charter, Iacobucci J. observed, various questions had arisen concerning the interaction of the common law rules with Charter protections. It had become clear that the Charter "represents a bare minimum below which the law must not fall" and that the common law confessions rule is not subsumed in the protections given by the Charter. (Para. 31.) He noted the goals of protecting the rights of an accused without unduly limiting society's need to investigate and solve crimes, as enunciated in *R. v. Precourt* (1976) 18 O.R. (2d) 714 (Ont. C.A.) at 721, and said this about the "contemporary confessions rule":

The common law confessions rule is well-suited to protect against false confessions. While its overriding concern is with voluntariness, this concept overlaps with reliability. A confession that is not voluntary will often (though not always) be unreliable. The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession. [At para. 47.]

- [14] After discussing various forms of false confessions, Iacobucci J. provided examples of the types of threats or promises that will normally raise a reasonable doubt as to the voluntariness of a confession - an explicit offer by police to procure lenient treatment in return for a confession; an offer of psychiatric assistance or counselling in exchange for a confession; a promise of a benefit to another person with whom the accused has a relationship "of such a nature" that would tend to induce him or her to make an untrue statement; and threats of outright violence or veiled threats, including threats that "It would be better to confess", where the circumstances reveal an implicit threat or promise. On the other hand, Iacobucci J. observed, telling an accused that "It would be better if you told the

truth" is not necessarily fatal to the voluntariness of an inculpatory statement; nor is the use of "moral or spiritual inducements", given that the inducement offered is not in the control of the police. (Para. 56.) Thus the majority agreed with the Honourable Fred Kaufman, writing in *The Admissibility of Confessions* (3rd ed., 1979), that "as a general rule, confessions which result from spiritual exhortations or appeals to conscience and morality, are admissible in evidence, whether urged by a person in authority or by someone else". (At 186, quoted at para. 56 of Oickle.)

[15] In summary, Iacobucci J. stated:

courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne. On this point I found the following passage from *R. v. Rennie* (1981), 74 Cr. App. R. 207 (C.A.), at p. 212, particularly apt:

Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if promoted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession.

The most important consideration in all cases is to look for a quid pro quo offer by interrogators, regardless of whether it comes in the form of a threat or a promise. [At para. 57; emphasis added.]

[16] He added, however, that the confessions rule is not limited to situations of promises or threats, endorsing the observation of Beetz J., for himself and Pratte J., in *Horvath v. The Queen* [1979] 2 S.C.R. 376 that:

the principle which inspires the rule remains a positive one; it is the principle of voluntariness. The principle always governs and may justify an extension of the rule to situations where involuntariness has been caused otherwise than by promises, threats, hope or fear, if it is felt that other causes are as coercive as promises or threats, hope or fear and serious enough to bring the principle into play. [At 424-5; emphasis added.]

[17] Here, then, the majority in Oickle clearly contemplated that an accused may be led to confess, and the confession may be involuntary, where it is 'coerced' by something other than promises ("inducements") or threats by the police. Thus the importance of a contextual inquiry in each case:

the analysis under the confessions rule must be a contextual one. In the past, courts have excluded confessions made as a result of relatively minor inducements. At the same time, the law ignored intolerable police conduct if it did not give rise to an "inducement" as it was understood by the narrow Ibrahim formulation. Both results are incorrect. Instead, a court should strive to understand the circumstances surrounding the confession and ask if it gives rise to a reasonable doubt as to the confession's voluntariness, taking into account all the aspects of the rule discussed above. Therefore a relatively minor inducement, such as a tissue to wipe one's nose and warmer clothes, may amount to an impermissible inducement if the suspect is deprived of sleep, heat, and clothes for several hours in the middle of the night during an interrogation: see Hoilett, *supra*. On the other hand, where the suspect is treated properly, it will take a stronger inducement to render the confession involuntary. If a trial court properly considers all the relevant circumstances, then a finding regarding voluntariness is essentially a factual one, and should only be overturned for "some palpable and overriding error which affected [the trial judge's] assessment of the facts": *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at p. 279 (quoting *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808). [At para. 71; emphasis by underlining added.]

R. v. Spencer

[18] The facts of *R. v. Spencer* were somewhat similar to those of the case at bar. The respondent was arrested for various robberies; his girlfriend was arrested for one of them. He was anxious to obtain leniency for her and offered to confess in exchange. The interviewing officer said he could not make a deal with him, as the decision whether to charge the girlfriend was for Crown counsel. The respondent then asked to speak to her. The officer told him:

Now what I am telling you, and I'll stress this again, is you will have an opportunity to talk to her. If at the end of this process, the end of our discussion I am satisfied you have been up front, you've cleaned your slate, I will give you that opportunity, I am promising you that as my word. And I have been honest with you from the get go here. But I can't do it now until some [of] this stuff is on the table [Emphasis added.]

and:

And at the end of this whole process, I guarantee you I'll let you talk to her if I'm satisfied that that everything has been on the table. Unfortunately I can't go down and let you talk to her because I'm concerned that that would taint everything that follows that you say to me.

The officer allowed Mr. Spencer to speak with his girlfriend after he had confessed to some of the robberies.

[19] There was no doubt the promise of a benefit had been held out to the respondent, but the trial judge (see 2003 BCSC 508) saw it as a "lesser inducement" (i.e., not as strong as an offer of leniency) analogous to the offer of psychiatric counselling discussed in Oickle. The trial judge phrased the question before him as:

whether the inducement, standing alone or in combination with other factors, is strong enough to raise a reasonable doubt about whether the free will of the accused was overborne. [At para. 30.]

[20] Ultimately, he ruled that in all the circumstances, Mr. Spencer's will had not been overborne. In his analysis:

Mr. Spencer continually attempts to extract a "deal" from Cst. Parker, a confession in exchange for a visit with his girlfriend, but Cst. Parker consistently tells him he cannot make such a deal. Some of the exchanges taken in isolation suggest the exchange of a confession for a visit but, when I look at the entirety of the interrogation, clearly Mr. Spencer is never under any illusions that such a deal has been struck. Rather, he acknowledges he is not getting anywhere with his strategy and ultimately is motivated to confess for other reasons.

Although withholding the accused's visit with his girlfriend until he offered, at the minimum, a partial confession was clearly an inducement, his free will was not "overborne" by that action. [At paras. 37-8; emphasis added.]

[21] A majority of this court (with Hall J.A. dissenting) reversed on appeal, ruling that the trial judge had taken into account irrelevant factors "when the only real question was the presence, or otherwise, of a quid pro quo". (See 2006 BCCA 81.) Chief Justice Finch for the majority emphasized Mr. Spencer's emotional fragility, observing that "the absence of weakness or pressure does not nullify the effects of an inducement." (Para. 47.) He continued:

The term "overborne" in Oickle is capable of the misinterpretation which may have occurred in this case. I think the trial judge understood it in the sense of domination, or breaking down resistance, and reasoned that, since the appellant was street smart and strong, his will could not be overcome. What is important is not the appellant's willpower, but his position that he would only confess to the robberies if he got some protection for Tanya in return.

I repeat that the risk of a false confession is not allayed because an accused is stalwart if there is a strong motivation to confess in the quid pro quo. Here, the police had no other evidence that the appellant committed 16 of the robberies. The intensity of the appellant's feelings for Tanya, evident in the transcript, would provide a powerful motivation to say whatever was needed, true or false, to get Tanya lenient treatment. [At paras. 49-50; emphasis added.]

Thus in the majority's view, if there was a "quid pro quo" (as there was in Spencer) that was the end of the matter: it was not necessary to consider whether the accused's will had been overborne.

[22] Again, the Supreme Court of Canada disagreed, Fish and Abella JJ. dissenting. Whilst acknowledging that, as stated in Oickle, the existence of a quid pro quo is "the most important consideration" when an inducement is offered by a person in authority, Deschamps J. for the majority explained:

while a quid pro quo is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement. [At para. 15; emphasis added.]

The majority continued:

what occupies "centre stage" is not the quid pro quo, but voluntariness - it is the overarching subject of the inquiry, and this should not be lost in the analysis. As discussed above, while a quid pro quo may establish the existence of a threat or promise, it is the strength of the alleged inducement that must be considered in the overall contextual inquiry into voluntariness.

In my view, the trial judge made no error of law in concluding that no offer of leniency was made in respect of Ms. Harrison and that the withholding of a visit to her until at least a partial confession was made was an inducement that was not strong enough to render the accused's statements inadmissible. It was a relevant factor that the accused had not "lost control of the interview to the point where he and Cst. Parker [were] no longer playing on a level field" (voir dire, at para. 35). In Oickle, at para. 87, Iacobucci J. explicitly recognized that "[t]he absence of oppression is important not only in its own right, but also because it affects the overall voluntariness analysis."

It was also relevant to the particularities of the respondent that, according to the trial judge, he was aggressive and a "mature and savvy participant", and that he unsuccessfully attempted many times to secure "deals" with the police. While none of these factors are determinative, it was not an error for the trial judge to consider them in his contextual analysis. [At paras. 19-21; emphasis added.]

[23] I note that the majority here was relying on "inducement" as the foundation on which a finding of involuntariness would be based, rather than carrying out the broader inquiry suggested in Horvath, supra. The focus was on the strength of the "inducement" and its effect on the particular accused - was it "strong enough to render [his] statements inadmissible"? If this is not simply a tautological question, it must mean that the issue comes down to one of fact - did the inducement effectively deprive this accused in these circumstances of a real choice? If so, the danger of a false or unreliable statement means it must be excluded.

[24] Keeping in mind that the question of voluntariness is to be decided "in the overall contextual analysis", including the strength of any threat or promise, the conditions under which the statement was given, and the personality and experience of the suspect, I turn to the case at bar.

Factual Background

Voluntariness

[25] The trial judge began his reasons on the voir dire by describing the "context", including the times and places of the four conversations between Mr. Heatley and Sgt. McCauley. Those that took place in the interview room were recorded and videotaped; on other occasions - for example when Mr. Heatley was escorted to and from cells or taken for a smoke break - a digital recorder was used. The trial judge observed:

With the exception of the expression of understandable frustration with the accused on one occasion later in the interviews, the discussions took place in a cordial, respectful atmosphere. Sgt. McCauley ensured that the accused was comfortable, and was given food when hungry and drinks when thirsty. He provided the accused with his prescribed methadone, but ensured that the accused was suffering no ill effects from the medication or possible withdrawal. The Sergeant employed all the usual techniques of attempting to bond with the accused, minimizing the offences and appealing to his morality. The theme presented to the accused was that police already had a very strong case against the accused for the last two robberies, whether he chose to talk or not.

The accused revealed himself throughout to be very familiar with the criminal justice system, including his right to silence. Whenever the accused stated that he did not wish to say more, that choice was respected. [At paras. 5-6.]

[26] At least initially, the appellant showed himself to be a fairly strong-willed person who could resist questioning from various angles. In response to Sgt. McCauley's early inquiries about Ms. Napier's role and whether Mr. Heatley had been "led astray" by her, the appellant replied, "Natasha [Ms. Napier] doesn't make me do anything. It's, like I'm my own person. I make my own decisions, right?" He denied that she had gone into any of the stores that had been robbed. The sergeant responded that she had been seen driving the car when Mr. Heatley had carried out the robberies. Mr. Heatley responded that Ms. Napier "wasn't involved," and said he did not want to say more. The sergeant tried moral suasion, telling the appellant he was "at the fork in the roads" and that one fork was taking responsibility and "turnin' [his] life around". He elicited no response. The sergeant spoke in general terms about the items found in Ms. Napier's car and other evidence the police had against the appellant. The sergeant received little response to this, or to his request that the appellant "add colour" to his attempts to describe what had happened. Mr. Heatley said he "wasn't saying anything else."

[27] Sgt. McCauley then turned to the subject of Ms. Napier more specifically. After what the trial judge described as a "long, inoffensive monologue", he said that if the appellant were to tell him "she had no idea" that robberies were being carried out at the stores she drove the appellant to, he would "take that at face value and if, if I can prove that with evidence then I am happy to do that, okay, 100 percent." As the sergeant probed, repeating that he "just

wanted the truth", Mr. Heatley continued to deny Ms. Napier's involvement. In a passage that the appellant relies on in particular as constituting an inducement, the officer told him:

So if you want to shed some light so that I can piece this together and when I piece it together I find out oop, yep, she didn't know anything. No problem, buddy, I will myself let her out. But I'm not makin any special deals here. I'm just, I wanna get to the truth. [Emphasis added.]

This did not elicit any inculpatory statement: the appellant's only response was that he was "done talking for now".

[28] After the officer had described some of the evidence police had assembled, however, Mr. Heatley asked whether his girlfriend would be released if he were to 'cop to everything'. Sgt. McCauley replied:

That's not how it works though, I've already told you that. I don't want you to tell me anything that's not true, I don't want you to tell me something cause you want to do it cause I can't promise you that she gets to walk, I can't promise you that she doesn't get charged with this, I can't give you any deals or any promises what so ever. She will be treated as fairly as I'm treating you based on the evidence. So like I said if you provide evidence to me that, that allows me to see that she does not deserve to be in jail and does not deserve charges then by all means I will forward that on and I'll take that into account. [Emphasis added.]

At the end of the interview, when Mr. Heatley asked to be kept posted on Ms. Napier's situation, the sergeant said he would not do so, because it was "none of [the appellant's] business", and added:

I've been so accommodating to you and I feel you're being really disrespectful right now by you know continuing to you know take a mile and I'm giving you inches after inches after inches that I don't have to do. So I've made a lot of accommodations, I'm not asking for a hero medal, but just stop asking when I ask when I give you two things you ask for four more every time. It's a little bit frustrating. Have a good night. I'll talk to you at your bail hearing. [Emphasis added.]

[29] The transcripts of the long conversations that ensued later on September 2 and on September 5 occupy almost two appeal books. They reflect Mr. Heatley's progression from someone who was not interested in talking and not responsive to moral suasion, to a person who was very concerned about the welfare of his girlfriend and ultimately anxious to put all the offences behind him. The change began when Ms. Napier and Mr. Heatley were permitted to speak to each other very briefly. After Sgt. McCauley had urged the appellant to 'do the right thing' by Ms. Napier, he asked the appellant to "shed some light" on some of the things Ms. Napier had told the police about her "level of involvement." The appellant asked what she had told the police and the sergeant said he could not disclose that. He explained:

Q. here's the thing. I can tell ya what she's saying and you can say yeah, ditto, and what does that give to credibility? Nothing. Well, I pledged to her, I pledged to her that if she tells me the truth and I can find facts in what she's saying that corroborate what she's saying, you know what corroborate means, like confirm to be true, either through investigation or, you know, part of that

investigation's talking to you, then I'm here to get the truth, right. And I do believe she's, she's quite innocent in this; however, you know, is she a hundred percent innocent? I don't think so, but she's, she's not to the same level as you are, that's for sure. But to be honest, anybody in her shoes is gonna tell me that, right. So the ball's kind of in your court, right. You are done. Do you wanna see the video of yourself or do you care?

A. Whatever. [Emphasis added.]

[30] The sergeant then showed the appellant some video footage of the liquor store robbery and returned to the topic of Ms. Napier. He played some "snippets" of Ms. Napier's interview with police in which she spoke of her love for the appellant and about his getting her "hooked on drugs". Sgt. McCauley told Mr. Heatley his girlfriend was "bawling her eyes out" because the appellant had got her "hooked on dope." The appellant, Sgt. McCauley said, was not "doing her a service" by not talking but, the officer was quick to add, he could not "make a deal". He suggested, not for the first time, that the appellant had caused Ms. Napier's life to "fall apart" and that he, Mr. Heatley, should "man up and take responsibility" for it. The following passage is typical:

In this second robbery with the knife, please tell me you wouldn't have hurt someone with it. Please tell me you didn't tell her you were bringin' a knife in it and upping the ante for whatever reason. You've fallen but you can get up. Take a leap of faith. By telling the truth will actually make you feel better. By telling the truth will actually give you some relief. By telling the truth will prove to your girlfriend Natasha that you're turning over a new leaf. Take the leap of faith. How'd ya bring the money back without her knowing about it?

[31] Finally, the appellant said he just wanted to see Ms. Napier "before I go to jail." The officer responded that regardless of whether Mr. Heatley 'talked', a brief visit would be allowed. The appellant said he needed a smoke before he began talking. Again the officer said he would give him a smoke break, "regardless".

[32] The appellant was taken to see Ms. Napier. He stood outside her cell. She had been told he would not "open up" to police and that she could speak to him very briefly, but not in private. She told Mr. Heatley "I don't wanna be here anymore. You need to tell the truth. It's not fair that I have to be here." She said she had told the police everything she knew. At this point Sgt. McCauley warned her not to give any details because then "his version [would] mean nothing." As the appellant was led back to his cell, Ms. Napier said she felt "so stressed out right now" "You need to tell them." The appellant shouted back, "I am giving it right now."

[33] Back in his cell, the appellant proceeded to provide details of the September 1 robberies and his role in them. Although given an opportunity to stop there, he went on to describe how and why he had carried out some of the May 2011 offences. When asked whether Ms. Napier had been the driver for any of those robberies, he replied, "I think I'm done for now". He said he did not want a bail hearing but would consent to a remand. He asked if he could give Ms. Napier a hug, and was told he could only have a quick visit with her, again from outside

her cell. He took this opportunity to tell her he loved her and was led away, crying.

- [34] Three days later, Mr. Heatley was told that Ms. Napier had been released and was under a bail condition not to have contact with him. He confirmed for the record that no one had promised him anything or threatened him with anything since the previous interview. He was told that police were still looking into some other robberies and that there was "some pretty good evidence" that tied Mr. Heatley and Ms. Napier "in the same way [as] the other ones".
- [35] The appellant was then introduced to another officer, Cst. Faulkner from Port Moody. After the usual introductory questions and after confirming he did not want to speak to a lawyer, he was asked if he would "talk about" the robbery of a "Juice Booster" in Port Moody. Sgt. McCauley spoke at some length about the appellant's situation and the drug habit that had led him and Ms. Napier into difficulty. Mr. Heatley was shown photos from surveillance videos of the Port Moody robbery. In response to questions about Ms. Napier's role, he said she had been unaware of the robberies: he had told Ms. Napier he was going to meet a buddy and then "same thing as last time I just had everything in the truck ready to go, and suited up and went and did it and came back, threw everything back in the trunk and away we went." He described various details of the robbery and getaway and finally said he was "good for today" - i.e., did not want to discuss the next robbery on the sergeant's agenda - one in Chilliwack.
- [36] After Cst. Faulkner had left, Sgt. McCauley asked Mr. Heatley what had made him decide to talk about the Port Moody robbery. The appellant agreed he had wanted "closure" and added, "It makes sense that I don't wanna be dealing with this ten years down the road, whenever it comes up." (This had been suggested a few times by Sgt. McCauley earlier in their interviews.) The appellant asked for the officer's "opinion" on his girlfriend's legal situation and was told that Crown counsel had approved two charges against her for the September 1 robberies in light of her role in driving the getaway car. Eventually, the appellant was returned to his cell.
- [37] On the morning of September 6, Sgt. McCauley returned and asked Mr. Heatley what he wanted to "talk about this time". He answered "About the whole Chilliwack thing I guess." He then described his robbery of a Subway store in Chilliwack, again remaining firm that Ms. Napier had been unaware he had robbed the store. As the trial judge noted at para. 37 of his reasons in the voir dire, other statements followed without any suggestion of any new or different techniques being employed by the officer. Mr. Heatley also prepared and provided letters of apology to some of the victims of his crimes.

Voir Dire Reasons

[38] The trial judge's reasons on the voir dire were very brief. He referred to the law governing the voluntariness of statements to persons in authority, citing Oickle and Spencer, *supra*. He noted that the determination of voluntariness entails a contextual analysis based on all the relevant circumstances, and then listed the following factors relevant to that inquiry in the case at bar:

1. The interview was conducted in circumstances of quiet courtesy, respect and restraint.
2. The accused revealed himself to be mature, strong-willed and very experienced with the criminal justice system, including great familiarity with his right to silence and how to exercise it.
3. When the accused chose to exercise his right to silence, that choice was accepted and respected.
4. The accused was very concerned about the plight of his girlfriend, who had been arrested as a party to the two robberies as the driver of the vehicle used to transport the accused to and from the scene of the robberies. He repeatedly raised that issue and often tried to create a quid pro quo by bargaining a confession for the release of his girlfriend.
5. All such offers were clearly and firmly rejected at every turn. The Sergeant made it very clear throughout that there would be no promises and no deals.
6. What the Sergeant did promise was to investigate all the evidence, including any statement the accused chose to make, and determine if his statement that Ms. Napier had no knowledge of the offences could be corroborated. The results would be passed on to the investigative team and, ultimately, the Crown, for determination of what charges, if any, would proceed against Ms. Napier.
7. Though the accused did not testify, the only reasonable inference is that he was motivated by a desire to assist his girlfriend in avoiding further incarceration and/or criminal charges. He expressed his love for her and his guilt for having taken her to this low point in her life. The Sergeant did nothing improper in exploiting that motive without misleading him in any way as to how the investigation might unfold.
8. It is very clear that the will of the accused was not overborne by the Sergeant. That is apparent from a view of all the video and audio recorded statements.

I accept the Crown submission that the circumstances of this case fall well within "the goalposts set by R v. Spencer". I find all of the accused's statements to be voluntary and admissible at trial. [At paras. 41-2; emphasis added.]

Accordingly, the confessions were admitted.

[39] I note that the trial judge made no express finding as to the existence or non-existence of any "inducement", in the sense of a promise or quid pro quo, by police, other than the sergeant's "promise" to pass on anything he was told to investigators. Rather, the judge addressed the broader issue of whether the accused's will had been overborne. He answered this in the negative, notwithstanding the 'exploitation' by Sgt. McCauley of Mr. Heatley's obvious concern for, and regret regarding, Ms. Napier.

Search of the Vehicle

[40] The trial judge also gave reasons, indexed as 2014 BCSC 283, as to the admissibility of the results of the search of (Ms. Napier's) vehicle following Mr. Heatley's arrest. The car had various items of clothing and other personal effects that suggested the appellant and Ms. Napier had been living in it.

[41] The judge noted that when Cst. Engracio had been instructed to carry out the search, she had had no knowledge of the circumstances of any of the alleged offences. She was told by her superior, Cpl. Stewart, to familiarize herself "with the details such as the clothing worn and items used by the suspect." Cpl. Stewart had ordered that the vehicle be towed to the detachment for purposes of the search, which the trial judge agreed was a reasonable step. That finding is not challenged by the defence on appeal.

[42] The car arrived at the detachment about an hour after the arrest. Cst. Engracio then familiarized herself not only with the circumstances of the two robberies that had taken place on September 1, but with the file information pertaining to the five other robberies in which the accused was a suspect. (It is common ground that the police did not have grounds on which to arrest him at this point.) This 'familiarization' took about 1 1/2 hours. The search yielded some items consistent with clothing used in the September 1 robberies and evidence related to the other robberies in which Mr. Heatley was suspected, including a hat and a pair of gardening gloves. Cst. Engracio purported to seize the latter items under the "plain view" doctrine.

[43] Defence counsel contended in the voir dire that the delay in carrying out the search was unreasonable. The trial judge rejected this argument. In his words:

It was entirely reasonable for Cst. Engracio to familiarize herself with file information which would assist her in conducting a focused search for only those items relevant to the two robberies for which the accused was under arrest. It was also reasonable to familiarize herself with the robberies in which the accused was a suspect. The time consumed by that process was minimal, totalling only approximately an hour and a half from the time of towing to the time of the search.

Relying only on the information provided by dispatch on the radio to conduct an earlier search would not have been reasonable. As Cst. Engracio testified, that information can be inadequate and contain errors.

There is no unfair prejudice to the accused. The accused and the driver were under arrest and deprived of the use of the vehicle in any event. [At paras. 15-7.]

[44] The appellant also submitted that the constable's search had not been reasonably incidental to the arrest. Citing *R. v Caslake* [1998] 1 S.C.R. 51, the trial judge rejected this argument, reasoning that:

It was a thorough and reasonable search. She seized only items reasonably believed to be relevant to the robberies. She is entitled to seize items relevant to other crimes that come into view during the search, whether those items are illicit drugs, prohibited weapons or relevant to earlier robberies in which the accused is a suspect: *R. v. Nolet*, 2010 SCC 24 at para. 44; *R. v. Dreyer*, 2008 BCCA 89 at paras. 18-21. As an example of how focused her search was, she did not seize another bag that appeared identical to the bag used in the last two robberies because it appeared that bag had not recently been used. [At para. 20; emphasis added.]

In the result, the trial judge ruled that the Crown had met its burden of proving beyond a reasonable doubt that the accused's rights under s. 8 of the Charter had not been violated. The results of the search were admitted into evidence.

The Conviction of the Appellant (2014 BCSC 601)

[45] Mr. Heatley's trial took place over 11 days in March 2014. On each of the offences, his confession was an important part of the evidence, but there was also other evidence which the trial judge reviewed in some detail. Ultimately, the appellant was convicted of all 14 charges. No error in law or fact is asserted on appeal other than the admission of Mr. Heatley's confessions to the police and the results of the search of the vehicle.

On Appeal

[46] Mr. Heatley's argument on voluntariness in this court is fairly discrete. He submits that the trial judge "overapplied" *Spencer*, wrongly interpreting it to mean that provided the police officer tells an accused he or she is "not making a deal", no confession will be found to be involuntary. Here, the defence contends that Sgt. McCauley was obviously aware of the appellant's anxiety that Ms. Napier be released, and exploited that anxiety by telling the appellant that if he provided details that could corroborate her innocence, then he, Sgt. McCauley, would see if he could 'piece together' that information with other information the police had. (This was quickly followed by the warning that the officer could not 'make a deal'.) Counsel for Mr. Heatley notes in particular the following passage, which I again reproduce, from one of Sgt. McCauley's "monologues":

So that's where I'm at. No deals. Right now we have her parkin the car on a dead end street, you going to rob the Subway, that's what we have. And then we have you robbing the Liquor Store in Aldergrove. And then shortly thereafter you guys are arrested together in the same vehicle again. So it doesn't take a genius to figure out that she drove you to the other one, that's all, right. So if you want to shed some light so that I can piece this together and when I piece it together I find

out oop, yep, she didn't know anything. No problem, buddy, I will myself let her out. But I'm not makin any special deals here, I'm just, I wanna get to the truth. [Emphasis added.]

and later in the same conversation:

Q. Well, how do you think you can do that for her, how do you think you're gonna help her? And do you think by not takin' ownership of it and staying solid so to speak, do ya think that provides her something of benefit, is that what you're thinkin'? It makes me think, to be honest, that she did have full involvement because if I'm tellin you, if you, if you're telling me she didn't do it and you want her to be free, I'm telling you that the way to assist me in, in proving her innocence is to gimme information that I can corroborate and I can look to and I can kinda work at, work backwards I guess really at, at provin this, but you're not prepared to give that up when you're still caught redhanded. Like I could see, I could see if you thought that you could skate on this then yeah, maybe you figure okay, I'll, mum's the word and it'll all good but you know you're caught and you're still not willing to provide any details that could potentially make her free if she didn't do anything and that tells me that there isn't anything, any details and that details will only harm things for her, which again is noble I guess but just cause [unintelligible] it's bizarre [unintelligible]. And all I care about's the truth and like I said to be honest. [Emphasis added.]

Mr. Heatley reacted to these comments with some skepticism, replying that if the police truly had everything they needed to convict him, he would not be there talking to them.

[47] As we have seen, when the appellant asked if Ms. Napier was going to be released, the sergeant told him she was denying participating in the robberies but that this statement was of little value because "Anyone in her shoes is going to tell me that." The following conversation then occurred:

Q. If your goal is to do her a service and I'm not saying you talk about this and she gets off free, not even close so don't for a second think that's what I'm, I'm tryin to make a deal or anything.

A. I want her to get off free now.

Q. Well, I can't promise you anything. I can promise you like I promised her that I'm gonna investigate this to the fullest and with every piece of evidence, it's gonna be weighed against other pieces of evidence and it's gonna be put into the total package and we're gonna send it to full, frank and fair disclosure. That's all I'm asking. So I don't, I'm not worried about you telling me that you did it 'cause I know you did it but if you want to tell me that she didn't do it, you can't just say she didn't do it and, without providing details for me because I don't have anything to, to corroborate to other things, right? You have not, you haven't given me anything to believe that you're even credible. [Emphasis added.]

Other conversations of the same type took place in subsequent interviews, leading up to the "interactions" between the two suspects on the evening of September 2 described earlier in these reasons. As we have also seen, soon thereafter, the appellant confessed to both of the September 1 robberies, and then to others, but still denied any involvement on Ms. Napier's part.

- [48] The appellant submits that in the passages I have quoted and others, Sgt. McCauley was impliedly offering a potential benefit - "favourable treatment" for Ms. Napier - as an "inducement" for Mr. Heatley to provide a confession "of a particular kind" - one that police could "corroborate" what they already knew. Counsel notes, correctly, that a benefit to a third party is capable of constituting an inducement that can raise a doubt as to voluntariness: see *R. v. Jackson* (1977) 34 C.C.C. (2d) 35 at 38; *Oickle* at para. 51; *Spencer* at para. 35. Counsel notes as well that the fact the potential benefit offered as an inducement is "true" (presumably referring to the sergeant's "promise" to pass along any information to investigators) does not necessarily make the accused's statement admissible. On this point, Mr. Bauman cited *R. v. Cairney* 2009 ABQB 123, where an accused was induced to confess when he was told that "Murder does not have to be murder if there are extenuating circumstances". In contrast to the "lesser inducement" in *Spencer*, this was found to be an inducement of a nature and kind strong enough to make the resulting confession inadmissible. (Other factors reinforced this conclusion.)
- [49] The appellant seeks to make a distinction in this case similar to that made in *Cairney*, on the basis that in contrast to what occurred in *Spencer*, Mr. Heatley's obvious concern to have Ms. Napier released from jail was "of a nature and kind strong enough" to raise a reasonable doubt that his confessions were voluntary.
- [50] In response, the Crown contends that although Sgt. McCauley and Mr. Heatley frequently discussed Ms. Napier, the appellant cannot point to any offer, express or implied, of immunity or leniency for her. Instead, the officer repeatedly told the appellant that any information he provided would be investigated and that whether or not Ms. Napier was charged or imprisoned would depend on the outcome of that investigation. Further, Mr. Heatley confirmed several times that no promise or threat had been made by police. The Crown submits that the context was not one of an interrogator trying to extract a confession by offering favourable treatment in return for the accused's girlfriend, but one in which an experienced, strong-willed accused repeatedly raised the issue of his girlfriend and tried to create a quid pro quo by bargaining a confession for her release.
- [51] The Crown naturally emphasizes the many occasions on which Sgt. McCauley said he could not "make a deal" regarding Ms. Napier, beyond passing along whatever Mr. Heatley might tell him. For example, the officer's statement that if the investigation proved Ms. Napier was not involved in the robberies, he would "let her out" himself was followed by a warning that Mr. Heatley should not falsely confess simply to help someone out. Mr. Heatley replied that he was "done talking for now." As well, the Crown notes, Sgt. McCauley told Mr. Heatley that "If the truth gets her in more trouble, then you know, at the end of the day I think you are both better off having dealt with the truth".
- [52] As I mentioned earlier, the trial judge did not make any express finding as to whether an implied threat or promise was made by Sgt. McCauley. If it were necessary for us to do so, I would not accede to the defence suggestion that Sgt. McCauley impliedly offered leniency or anything similar in return for a confession by the appellant. The repeated statement that if

Mr. Heatley would provide information about Ms. Napier's role, such information would be considered as part of the investigation, was not an inducement (in the sense of an advantage or 'something attractive') to confess in a particular way. If anything, it was a way of deflecting the appellant's attempts to strike a deal. The police would be bound to consider any information provided by Mr. Heatley in any event. Nor could the "promise" have been understood as an inducement. Sgt. McCauley repeated so many times that he was not 'making a deal' that the appellant simply could not have thought, or even hoped, that if he were to confess, Ms. Napier would not be charged or would be treated more leniently in return.

- [53] This is not to deny, however, that the police exploited Mr. Heatley's feelings of concern and even guilt about Ms. Napier in their attempts to persuade him to "take responsibility" for his actions. These efforts seem to have succeeded: right after the appellant was allowed to talk to his girlfriend, he made admissions regarding the September 1 robberies, and ultimately, did "man up" to all seven. At the end, he explained he had decided to 'talk' because he did not want any of them to be hanging over his head in the distant future. (There was also considerable evidence against him.) He continued to deny that Ms. Napier played any role in the crimes.
- [54] This brings us to the broader aspect of voluntariness - namely, whether the appellant's will was overborne by this combination of appeals to Mr. Heatley's better nature - the appeal by his girlfriend to "tell the truth" so she could get out, and the appeal by the sergeant to take responsibility for the sorry state she was in as a cocaine addict in jail. The trial judge answered this question in the negative, stating it was "very clear" the appellant's will had not been overborne. According to Oickle, this was a finding of fact.
- [55] I am not persuaded that the trial judge erred in so finding and indeed, I agree with him. An appeal to one's better nature will, as the Court observed at para. 56 of Oickle, seldom call voluntariness into question, even where an "inducement" existed, because it does not lie in the control of the police (and one might add, it is unlikely to be a false confession.) There was no circumstance in this case that takes Mr. Heatley's statements outside this general rule: he was physically comfortable at all times; he was questioned respectfully and generally with apparent sympathy; he was permitted to see Ms. Napier, albeit briefly; and he was given two days to think matters over. In the interviews, the police constantly reinforced the fact that they could not make a deal. The appellant's confessions began only after Ms. Napier begged him to "tell the truth"; they continued after her release. On the latter charges, it was the realization that it would be in his interest to unburden himself in respect of all of the robberies, that led him to confess.
- [56] Accepting the trial judge's finding of fact, I conclude that as in Spencer, the police interviews in this case did not cross the line between proper investigative techniques and improper inducement; that no threat or promise was held out as a quid pro quo for his statements; and that although the police used Mr. Heatley's relationship with his girlfriend in applying moral suasion, the exploitation was not of such a nature that his will was overborne. The

evidence supports the conclusion that like the respondent in Spencer, Mr. Heatley decided voluntarily to 'clean his slate'.

[57] I would not accede to Mr. Heatley's appeal on the issue of voluntariness.

Search of Vehicle 'Incidental to Arrest'

[58] As to the second ground of appeal, the appellant submits that the search of the vehicle in which he and Ms. Napier were arrested was not authorized by law and breached his rights under s. 8 of the Charter. It will be recalled that Cst. Engracio familiarized herself not only with the two robberies for which Mr. Heatley had been arrested, but with the five other robberies for which he was a suspect. On carrying out the search, she found items relevant to the September 1 robberies, and items relevant to the other offences. It is to the admissibility of the latter items that the defence objects.

[59] Counsel for the appellant submits, correctly, that a warrantless search is presumptively unreasonable. It is clear that a search incidental to arrest is permitted by law, but the search must be contained within the boundaries set by law. It is also clear that automobiles may legitimately be the objects of searches incidental to arrest. Chief Justice Lamer made these points in *R. v. Caslake* [1998] 1 S.C.R. 51:

Since search incident to arrest is a common-law power, there are no readily ascertainable limits on its scope. It is therefore the courts' responsibility to set boundaries which allow the state to pursue its legitimate interests, while vigorously protecting individuals' right to privacy. The scope of search incident to arrest can refer to many different aspects of the search. It can refer to the items seized during the search. In *Stillman*, Cory J. for a majority of this Court held, at para. 42, that bodily samples could not be taken as incident to arrest, as a search so invasive is an "affront to human dignity". It can also refer to the place to be searched. The appellant argues that the power of search incident to arrest does not extend to automobiles. I would reject this position. Automobiles are legitimately the objects of search incident to arrest, as they attract no heightened expectation of privacy that would justify an exemption from the usual common law principles referred to above. [At para. 15.]

Caslake also illustrates that some delay between the arrest and the search is permissible: see paras. 16 and 24; see also *R. v. Asp* 2011 BCCA 433 at para. 32.

[60] The Court in *Caslake* addressed the scope of a warrantless search incidental to arrest, noting that there are both objective and subjective elements that must be met by the Crown. Chief Justice Lamer explained:

As *L'Heureux-Dubé J.* stated in *Cloutier*, the three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others, and the discovery of evidence which can be used at the arrestee's trial. The restriction that the search must be "truly incidental" to the arrest means that the police must be attempting to achieve some valid purpose connected to the arrest. Whether such an objective exists will depend on what the police were looking for and why. There are both

subjective and objective aspects to this issue. In my view, the police must have one of the purposes for a valid search incident to arrest in mind when the search is conducted. Further, the officer's belief that this purpose will be served by the search must be a reasonable one. [At para. 19; emphasis added.]

In Caslake itself, the subjective standard was not met because the officer testified that the reason for his search was not to discover evidence relevant to the offence for which the accused had been arrested, but to "comply with an RCMP policy requiring that the contents of an impounded car be inventoried. This is not within the bounds of the legitimate purposes of search incident to arrest." (Para. 26.)

[61] In the case at bar, the trial judge rejected the appellant's submission that Cst. Engracio had been told or at least impliedly directed not to look at any files pertaining to Mr. Heatley that did not relate to the September 1 robberies. In the trial judge's words, "It was Cst. Engracio's search to conduct." (Para. 19.) He then went on to find that the search had been reasonable, stating:

It was a thorough and reasonable search. She seized only items reasonably believed to be relevant to the robberies. She is entitled to seize items relevant to other crimes that come into view during the search, whether those items are illicit drugs, prohibited weapons or relevant to earlier robberies in which the accused is a suspect: *R. v. Nolet*, 2010 SCC 24 at para. 44; *R. v. Dreyer*, 2008 BCCA 89 at paras. 18-21. As an example of how focused her search was, she did not seize another bag that appeared identical to the bag used in the last two robberies because it appeared that bag had not recently been used. [Voir dire reasons at para. 20.]

[62] Here the judge seems to have found that the items relevant to the 'other' robberies were "in plain view", but he did not elaborate beyond citing *Nolet* and *Dreyer*. Nor did he address the subjective aspect of the search. The Crown argues that that even if the constable's examination of the 'other' files evinced an additional purpose not directly related to the arrest, such an additional purpose would not invalidate the search. On this point, the Crown referred us to *R. v. Annett* (1984) 17 C.C.C. (3d) 332 (Ont. C.A.), *lve. to app. dismiss'd*, (1985) 17 C.C.C. (3d) 322n, which involved the search of a car in which the police saw an open pack of beer on the floor. The registered owner of the car had outstanding drug charges and the police suspected they might find drugs or stolen property if they were to search the vehicle. After maintaining surveillance for some time, they saw the appellant and another man get into the car. The police identified themselves to the two men and said they wished to conduct a search under the authority of the Liquor Control Act of Ontario. One of the officers testified that when he opened the trunk he was looking for liquor, but that narcotics were also "in the back of his mind". (At 333.) He found a large quantity of cocaine in the trunk inside the pocket of a parka belonging to the appellant.

[63] The trial judge in *Annett* found the search to be reasonable and the Court of Appeal upheld this ruling. Mr. Justice Martin stated for the Court:

In our view, the finding of the trial judge that the search was made pursuant to the provisions of s. 48 [of the Liquor Control Act] and was reasonable is a finding which he was entitled to make and it is supported by the evidence. The lawful search was not converted into an unlawful or an unreasonable search because the officers, in addition, have the expectation that the search might also uncover drugs. [At 335; emphasis added.]

[64] In 2006, in *R. v. Capara*, 144 C.R.R. (2d) 287, Annett was said by the Ontario Court of Appeal to stand for the proposition that "So long as one of the purposes for searching the vehicle was proper as an incident of his arrest, the search itself was lawful." (At para. 8.) However, that principle was not adopted in the more recent decision of the Supreme Court of Canada in *R. v. Nolet* 2010 SCC 24. In that case, a truck was pulled over by RCMP undertaking a "spot check" under the Highways and Transportation Act. The fuel sticker attached to the truck had expired. The officer asked to inspect the trailer to the truck and the driver agreed. It was empty. The officer then told the driver that he would be inspecting the inside of the tractor, without seeking the driver's consent. The officer found a duffel bag containing approximately \$115,000 bundled in small denominations, packaging typical of drug transactions. The officer placed the accused under arrest for possession of proceeds of crime. Further inspection yielded a large cache of cannabis. No search warrant was obtained at any point in this series of inspections.

[65] The Supreme Court upheld the decision of the Saskatchewan Court of Appeal that as each step of the interaction occurred, the police had stayed within their authority (although the Court did find that a subsequent "inventory" search carried out the day after the arrest was invalid, citing *Caslake*.) In the course of its reasons, the Supreme Court rejected the "predominant purpose" test that had been applied by the trial judge, and distinguished Annett. In Mr. Justice Binnie's analysis:

Police power, whether conferred by statute or at common law, is abused when it is exercised in a manner that violates the Charter rights of an accused. This is a better framework of analysis, in my opinion, than the "predominant purpose" test applied here by the trial judge. If the Charter is violated, it makes little difference, I think, that the police had in mind multiple purposes. A valid regulatory purpose, whether predominant or not, would not sanitize or excuse a Charter violation.

This position is consistent with what the Court said about Annett in *R. v. Law*, 2002 SCC 10, [2002] 1 S.C.R. 227:

The distinguishing feature of Annett, however, is that the full scope of the officers' search was authorized by statute; thus, the only issue was whether their hidden intentions rendered the search unreasonable. [Emphasis added; para. 24.]

Law involved a theft investigation. The police recovered a stolen security safe, and decided to look at the contents for the totally unrelated purpose of investigating potential tax evasion by the complainant in the theft case. We held that the evidence obtained from the safe was properly excluded in the resulting tax prosecution. Of interest for present purposes, however, is the distinction noted by the Court between police powers and Charter compliance.

I agree with Wilkinson J.A. [in the Court of Appeal for Saskatchewan] that the question is not "determining which purpose is predominate or subordinate" (para. 85). As long as there is a continuing regulatory purpose on which to ground the exercise of the regulatory power, the issue is whether the officer's search of the duffle bag infringed the reasonable expectations of privacy of the appellants. I do not think that it did, having regard to the totality of the circumstances as they had progressed to the time of that search. [At paras. 39-41; emphasis added.]

[66] The Crown contends that here, as in Nolet, Cst. Engracio's search per se was justified: she was looking for clothing and other items related to the robberies that had occurred on September 1, 2011. For this purpose, she had to go through the entire car in any event. According to the Crown, it could hardly be said that she was using her search powers incidental to arrest as a "pretext" to look for evidence of other crimes.

[67] The absence of specific findings of fact on the "plain view" doctrine and the appellant's privacy interests makes it difficult for us on appeal to assess with confidence whether the search was legal. I would therefore prefer to decide this ground of appeal on the basis that even if the search was not entirely incidental to the arrest, the evidence could be properly admitted under s. 24(2) of the Charter. It could hardly be said that once the police were entitled to search the car for items relating to the September 1 robberies, the appellant continued to have a high expectation of privacy in respect of the items relating to the 'other' robberies. There was a strong societal interest in admitting such items, since they constituted reliable and non-conscriptive evidence linking Mr. Heatley to several crimes. It would have been an easy matter for the police to obtain a warrant, and they were not found to have been acting other than bona fide. Finally, the admissibility of these items would not in my view bring the administration of justice into disrepute.

[68] I conclude that the trial judge did not err in admitting the items discovered by Cst. Engracio, despite what might have been a technical breach of Mr. Heatley's right to be free from unreasonable search under s. 8 of the Charter.

Disposition

[69] In the result, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Savage"

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