

CANADA / JUDGMENT

R. v. Labbe

2002 BCSC 996

COURT

Supreme Court of British Columbia

DECIDED

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2002BCSC0996

Citation:

Regina v. Labbe

Date: 20020705

2002 BCSC 996

Docket:

105548D

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

REGINA

plaintiff

AND:

james robert labbe

defendant

RULING ON VOIR DIRE

BY tHE

HONOURABLE mr. JUSTICE warren

Counsel for the Plaintiff Crown

Scott Van Alstine

Counsel for the Defendant

David N. Lyon and

Claire M. Tollefson

Date and Place of Trial:

April 8-12, 2002

Victoria, BC

Introduction

- [1] The Crown seeks to enter into evidence at trial the four statements the accused made while in custody following his arrest for the murder of Kristal Martin on June 18, 1999. The defence opposes the introduction of the evidence on the grounds that the Crown has failed to establish beyond a reasonable doubt that the statements were voluntary and, because some critical evidence has not been retained, the accused is not able to make full answer and defence.
- [2] On the voir dire the Crown called eight witnesses. Because all of the circumstances surrounding the making of the statements should be enquired into [R. v. Oickle (2000), 147 C.C.C. (3d) 321; 2000 SCC 38], I intend to briefly review the evidence of each insofar as it touches on matters of significance.

The Evidence

- [3] Constables Campbell and Featherstone, at roughly 05:30, arrived at an apartment where they found the accused in a state of drunkenness of such a degree that they arrested him for his own safety. He appeared to understand that they were police and what was said to him, although he was extremely intoxicated and needed assistance walking and was not unresponsive. At the time, Campbell noticed "darkness between the fingers of the hand of the accused." When he was arrested for his own safety the accused gave a false name. At the jail Campbell searched him and found a bankcard in the name of the victim which he cut up and threw away. He described the accused as calm, then agitated and then calm again. He was put in the cell at around 06:15. He described the accused's answers as consistent with the questions although his speech was slurred and his eyelids were droopy. There was a strong odour of alcohol about him.
- [4] Detective Chow, along with Constable Sauer, seized the accused's clothing at 10:00. Both were in uniform and found the accused asleep on the cell bunk. He had to be called twice before he was roused and he was unsteady in his walk. When asked, he removed his clothing and was given a paper suit and returned to his cell. Chow described the accused as being under the influence of alcohol, unsteady and swaying. Chow said that throughout his voice was calm and he made no threats, promises or inducements. He said there were security videos in many areas of the jail but the videotape is not continuous and there are

gaps. He agreed that when there are complaints about police the tapes are preserved.

- [5] Constable Sauer described the accused's demeanour as docile and passive. He said he was moderately drunk, unsteady and with an odour of alcohol. He said there were no threats, promises or inducements offered or made to the accused. He had been trained in the use of the Taser, a device used as a less lethal option in dealing with violent or suicidal people. He said that helmet and shackles can be used on those inmates who are likely to harm themselves. He denied re-attending the accused's cell later that day and either using restraints or threatening to use the Taser.
- [6] Constable Bruchetta was qualified to administer the DataMaster breath/alcohol machine. He met with Ayers and the accused at 14:20. It is not in dispute that the accused had volunteered to give breath samples. The first sample taken at 14:26 showed a blood/alcohol reading of 140 mg. The accused then went out of the room and sat down with Constable Ayers, the arresting officer. He gave the second sample at 14:48 and the reading this time was 130 mg. Constable Bruchetta described the accused as having bloodshot eyes, with slow and slurred speech, some frothing at the mouth and a mild odour of alcohol. He said the accused seemed to understand him when he gave him instructions. He did not recall the accused crying or being too upset. He knew that Ayers and the accused were speaking while he set up the machine for the second test but he paid no attention to what was said.
- [7] Constable Bell went with Ayers to the accused's cell at 12:30 hours. Labbe was in a deep sleep and was difficult to waken but after several minutes he sat up. He said the accused appeared to be very groggy and he had a strong odour of Chinese cooking wine. Ayers arrested the accused for the murder of Kristal Martin, cautioned him and told him of his right to speak to a lawyer. The accused did not respond when asked to repeat the words so Ayers repeated the same words and again asked the accused to repeat it. Bell said the accused said he understood he was under arrest for murder and that he wanted to speak with his lawyer. He described the accused as slow in his speech, calm and groggy. He said that the accused looked sleepy and glassy-eyed. The accused asked who the police officers were and they reintroduced themselves and, at the accused's request, Ayers gave him his card and wrote Bell's name on it. He said the accused walked without assistance, slowly and with a shuffling gait, to an interview room where he spoke by telephone with his lawyer. He described the accused as looking sad or depressed. He was left with his lawyer for about 10 minutes and when returned to his cell he appeared to be upset and on the verge of crying. Bell said the police voices were normal and calm and the accused showed no hesitation in speaking. Bell, as well, said there were no threats, promises or inducements offered to the accused.
- [8] William Somerville was the jailer on duty when the accused was brought in at 06:00 on June 18, 1999, just as his shift started. He locked up all of the accused's clothing except for the jeans, shirt and socks. When Ayers called at 08:30 asking for the name of the next-of-kin of Martin, Somerville told him her boyfriend, the accused, was in custody. Somerville knew both Martin and the accused from previous visits. Somerville gave the bankcard to Ayers. He testified that he checked the accused about every half-hour and he appeared to be sleeping.

He related how Bruchetta, Ayers and the accused went down to the BTA room and that a person in for SIPP was not given any food for safety reasons.

- [9] Somerville testified that some time that day, about 10 or 15 feet from the cell, as Somerville, the accused and Ayers were walking to the elevator, the accused said to him: "She asked me to do it. You know she did." Somerville said he had not been speaking to the accused until then and told the accused he did not want to hear any more of "it" and to talk to the members of the police. His log showed that sometime between 13:00 and 15:00 the accused was charged with murder, placed on a suicide watch and all of his property seized. His log shows that at 15:03 he saw the accused hitting the video housing and sprinkler head and that at 15:07 Ayers went in and calmed down the accused temporarily. At 15:40 he logged Ayers taking the accused to the second floor interview room. He testified that he did not recall the accused being in a helmet or shackles, items that he usually supplies. He described the accused as mellow, until he started hitting the devices. He was responsive and could be understood. He said the security videos only produced a fair image and they lacked sound. He saw no one use a Taser on the accused.
- [10] In cross-examination he said the accused was taken to the DataMaster room before he hit the sprinkler heads as noted at 15:03 and the accused made the statements to him as Somerville was taking Ayers and the accused to the elevator for the trip to the second floor interview room. He agreed that the words spoken by the accused were important and should have been written down in his first report to the police. At the end of his shift he did write them down in a second report to Ayers and put it in Ayers' box. This second written report has disappeared.
- [11] Corporal Ayers attended the cells at 08:30 to look at the clothing of the accused and, noticing blood, he put the items in a sealed bag. At approximately 09:50 he instructed Bell to turn off the water in the accused's cell and to seize the clothing he was wearing. Ayers' first personal dealings with the accused started at 12:30 and he was with him off and on until approximately 16:30 or 17:00. He testified that he made contemporaneous notes until after the accused gave his first breath sample and they were speaking outside the DataMaster room. Thereafter, his notes were not made until completion of the videotaped statement and the accused had been returned to his cell.
- [12] At 12:30 he and Bell went to the cell and after some effort wakened the accused and charged him with the murder of Ms. Martin. Ayers testified that he informed the accused of his right to speak with counsel and that he need say nothing but whatever he said may be used as evidence. He testified that he read these words to the accused from a card. He said the accused then said he wanted to call a lawyer. When Ayers asked the accused to repeat what had been read to him, the accused said that he understood, that he was under arrest and he had the right to call a lawyer and that he wanted to call a lawyer. The accused asked for and was given Ayers' card and, as Bell did not have a card, Ayers wrote Bell's name on his. Ayers and Bell were in the cell for approximately 5 minutes. Ayers testified that the accused smelled heavily of alcohol but his speech was understandable and his responses were

normal. Bell and Ayers then escorted the accused to an interview room where Ayers dialled the lawyer's telephone number and then left the accused to speak with Mr. Lyon. It appears that Mr. Lyon expressed a wish to come to the jail and speak with his client but that was delayed.

- [13] At 12:50, Ayers spoke with the accused who asked for his lawyer and Ayers explained there was a delay. The accused then said: "I'm no murderer." Ayers said he could not speak with him until after Labbe had seen his lawyer.
- [14] At 12:55 Ayers again spoke with the accused who asked for water and again Ayers said he could not talk with the accused until after he had seen his lawyer.
- [15] At 13:01 the accused again asked for his lawyer and Ayers said the room was not ready yet and when the accused asked why he was wearing the paper suit Ayers told the accused his clothes had been seized as evidence. The accused asked again for his lawyer and when the accused asked if he was armed, Ayers showed Labbe his empty holster. It appears that Ayers spoke with the accused's counsel at 13:20 and explained that the delay was to allow the forensics unit to arrive.
- [16] At 13:25 Ayers' notes indicate he let the forensic team into the cell and they were there for three to five minutes. There was no significant conversation noted. At approximately 13:30, after the forensic unit had left, Ayers took Labbe up to the interview room where he was left with his lawyer for about half an hour. The accused was returned to his cell at 14:00 and fifteen minutes later Ayers said he asked the accused to give a breath sample saying he had no obligation to do so but his lawyer had said he would co-operate. He said the accused seemed to understand and they went to the DataMaster room accompanied by Somerville and Bruchetta. Ayers described some brief exchange between Somerville and the accused and also between the accused and Ayers, part of which was that when the accused said he was not to talk to Ayers, Ayers replied to the effect that the lawyer was looking after his best interests. Labbe then went in for the first breath sample and when he returned he spoke again with Ayers.
- [17] Ayers' evidence of that conversation, as noted later in his book, was that the accused embarked on a lengthy conversation during which he made several inculpatory statements including that he knew he would get life for what he had done; the penalty in his society for what he had done would be death; the victim told him to do it; that he did it out of love; and that the victim wanted to be with the two men she had sent "there". This was followed by further repetitions of the same kind. Ayers had stopped taking contemporaneous notes early in this conversation because the accused stopped talking. Shortly after making those statements the accused went in to give the second breath sample and then Ayers and the accused spoke for about five or ten minutes - again there are no contemporaneous notes of this conversation - before Ayers escorted the accused back to his cell at approximately 15:00. Ayers described the accused as appearing drained. He said the accused became more emotional but was calmed and Ayers left only to be called back by Somerville ten minutes

later because the accused was acting up.

- [18] When Ayers returned to the cell with Somerville he saw the accused hitting his head on the walls and screaming and again Ayers calmed him down. His notes indicated that he went back to his desk but was called down again within fifteen or twenty minutes by Somerville - he said this was about 15:50 - because the accused was again acting out. When he arrived he saw that the accused was in a helmet and shackles and very emotional. Ayers calmed him by telling him he would remove the shackles and helmet if he calmed down. When the accused calmed down the devices were removed and Ayers returned to his desk to arrange for the taped interview, returning to the cells at 16:00 with Somerville to take the accused to the elevator. From there Ayers escorted the accused to the interview room where Ayers and Sergeant Barry Bruce interviewed him. The first part of the interview was twenty to thirty minutes in length and then Ayers and Bruce left because Mr. Labbe accepted the offer to write something to the victim's family. The tape of the interview shows that Bruce and Ayers invited the accused to write his thoughts for the victim's family on the basis "it would get to the hands of the people who you feel should get it ." When the accused said that it would just be used against him, Sergeant Bruce replied he could "get it to the family". When the two officers returned, the accused gave the writing to Bruce asking, "You promise it doesn't go anywhere else?" Bruce avoided the question but promised to express what was in the letter to the family. Shortly after, the accused was removed from the interview room, fingerprinted, photographed and returned to his cell.
- [19] Throughout his dealings with the accused, Ayers said he used a calm voice and manner and that there were no threats or promises nor was the accused offered any inducements or hopes of advantage. In his cross-examination, Ayers denied that there was any confusion in his mind between the conversation outside the DataMaster room and the taped interview, although he acknowledged that his notes were made with the assistance of the videotape. He agreed there were a number of inconsistencies in his evidence when compared with the evidence he gave at the preliminary hearing and at the first trial.
- [20] In reference to the missing tapes from the security cameras, Ayers testified that in June of 1999 he believed it had been Sergeant Chow and Constable Bell who had applied the restraints and it was not until sometime around November or December 1999 that he learned they had not. By then it was too late to preserve the videos of the events of June 18, 1999. He agreed that the tapes may have some evidentiary value but it did not occur to him to preserve the tapes on this occasion.
- [21] Sergeant Barry Bruce assisted Ayers in the interview. He arrived at the room first and then Ayers arrived with the accused. He said that near the end of the interview he and Ayers left because the accused wanted to write something. They were gone fifteen or twenty minutes and when they returned the accused gave the writing - Ex. E on this voir dire- to Bruce. Thereafter Bruce had no further dealings with the accused. He testified that when the accused made a reference to 50,000 volts he thought it was a reference to the electric chair. He described the accused as clearly having had a fair amount of alcohol and having mood

swings, although he appeared to understand questions asked of him and his answers were appropriate. He said there were no threats, promises inducements or hope of advantage offered the accused during his dealings. He explained what he meant when he said to the accused that "we need to understand and maybe we can do something for you" as a reference to the accused feeling better in terms of his own feelings because he was obviously feeling remorse.

[22] The accused did not testify on the voir dire.

Submissions

Crown

- [23] The Crown says that all of the statements made by the accused between approximately 12:30 and 16:00 including the letter, should be admitted. The evidence shows that the statement to Somerville by the accused on the way to the elevator was spontaneous, as was the statement made to Ayers between the first and second breath sample. The taped statement taken in the interview room was voluntary and made without threat, inducement or promise of advantage. The letter written to the family was voluntarily given and not obtained by trickery and the Crown is entitled to use the letter as evidence even if the accused believed it would not be used for that purpose.
- [24] The Crown says that the accused, although drunk when first arrested, had an opportunity to sleep between 06:00 hours and 12:30. The evidence shows the police were patient and calm in their dealings with the accused throughout and the accused was left essentially alone for six and a half hours until 12:30 when he was read his rights and cautioned. He understood them enough to say he wanted to call his lawyer and to ask for the cards of Ayers and Bell. He spoke with his lawyer on the telephone and later in person before he gave the first breath sample and made the first statement outside the DataMaster room. That the accused was aware of his rights was demonstrated when he said to Ayers that his lawyer had told him not to speak. There was also evidence that he knew of the consequences of a conviction: that his lawyer told him he could get life in prison. All of this shows that the accused had an operating mind.
- [25] As for the use of the helmet and shackles, the Crown says that the evidence demonstrates that they were applied for the safety of the accused and not to coerce a statement from him. The videotape of the interview of the accused shows that he was not in any way cowed by the earlier use of the helmet and shackles as he was at times aggressive and grandiose in his attitude and at other times he toyed with the police. This is not at all the demeanour of one who has been threatened or cowed by the previous use of the helmet or shackles. Further, the accused did not complain of any misconduct or treatment and even acknowledged that the helmet and shackles were to prevent him from injuring himself. Finally, at the end of the taped portion of the interview he agreed that there was nothing to complain of and even volunteered that the police had not even done the 'good cop/bad cop' routine.

- [26] As for the reference by the accused to 50,000 volts, that reference was after he had related hitting the victim. In all, the statement shown on the videotape is consistent with what he said to Somerville and to Ayers outside the breathalyser room.
- [27] Accordingly, the Crown argues that the statement made to Bruce and Ayers in the interview room was made voluntarily. The accused knew that the purpose of the interview was to obtain evidence about the death of Martin and the reference by Bruce to the accused feeling better was not an inducement because there is no quid pro quo. Later in the interview the accused said he knew he was going to jail and this clearly demonstrated that what the defence terms an "offer" by Bruce meant nothing to the accused. Simply because the accused may have exercised a lack of judgement in speaking to the authorities does not vitiate his voluntary attitude. The two spontaneous statements - one to Somerville and the other to Ayers - followed by the videotaped interview were made without rigorous prompting and after he had seen and spoken with his lawyer.
- [28] Mr. Van Alstine submitted that any variations between the version of events given by the police witnesses is consistent with the truth being told, for if there were many consistencies it may be an indication the police had met together to concoct their stories. The police throughout acted with courtesy and fairness to the accused. One example of the fairness of the police conduct was when Ayers told the accused not to talk before he had seen his lawyer and Ayers actually discouraged Mr. Labbe from speaking until after that had happened. There was also the evidence of Mr. Somerville, who testified that he told the accused he did not want to hear what he was saying.
- [29] The Crown submits that the Court should examine the entire context surrounding the confession and ask whether there is a reasonable doubt that the resulting confession was involuntary: *R. v. Oickle*, supra, at para. 54. The confessions issue is really one which is concerned with voluntariness, because a predominant concern is that involuntary confessions are more likely to be unreliable and improper interrogation techniques frequently lead to miscarriages of justice: *Oickle*, supra at para. 32. The trier of fact should look at all of the surrounding circumstance to determine if there were any threats or promises, any oppression, whether the confession was the product of an operating mind and whether there was police trickery. In the case at Bar, the Crown argues that there is no evidence of threats or promises, there was no oppression, the statements were clearly the product of an operating mind and there was no trickery.
- [30] The Crown submits that the test is whether the evidence raises a reasonable doubt that the accused's will was overborne by any words or conduct of the police, and here there is no evidence that it was: *R. v. Carpenter* (2001), 151 C.C.C. (3d) 205; 2001 BCCA 31, where Customs officers warned someone who had ingested a large quantity of drugs in an attempt to smuggle them into Canada. There, the officer told the accused he would be a lot better off if he told them he had swallowed them; that he could be in physical danger. At para. 67, Finch J.A. (as he then was) held that the officers were not threatening the accused but informing him of an outcome that was beyond their control; there was no quid pro quo

offer.

- [31] With reference to the fact that there was evidence the accused was under the influence of alcohol, the Crown says that he was not in such a condition that he could not make a voluntary confession. He had been in custody since 06:00 and spent most of the time sleeping with only brief interruptions until he was taken for the breath samples. The evidence supports the Crown's submission that he demonstrated knowledge of the consequences of making the statements: *R. v. Hartridge*, [1967] 1 C.C.C. 346 (Sask. C.A.). The proper approach to a consideration of the admissibility of a statement made when an accused is under the influence of alcohol is to be found in *R. v. Richard* (1980), 56 C.C.C. (2d) 129 (B.C.C.A.) where, at p. 133, Nemetz C.J.B.C. used a three part test in cases of self induced drunkenness. The Crown must first show the statement was made voluntarily within the meaning of *Horvath v. the Queen* (1979), 44 C.C.C. (2d) 385 (S.C.C.) (that is, without oppression or inducement). It should then be determined whether the accused is found to be so devoid of rationality and understanding that his uttered words cannot be said to be his own. Finally, if admitted, the reliability is to be weighed by the trier of fact. As Nemetz C.J.B.C. noted at p. 134:

In cases of self-induced intoxication, however, the issue is usually one of trustworthiness rather than one of coercion - an issue to be decided by the trier of facts.

- [32] Indeed, the accused need only have a limited cognitive capacity to understand what he is saying and in determining that question the test is whether the accused had an operating mind. It does not require an inquiry into whether the accused is capable of making a good or wise choice or one that is in his interest: *R. v. Whittle* (1994), 92 C.C.C. (3d) 11 at 30 (S.C.C.).
- [33] Finally, the Crown submits that given the evidence presented, the Crown has proved beyond a reasonable doubt that the statements made by the accused were voluntarily made. The Crown is not obliged to call every person who had any contact with the accused during the period of time leading up to the making of the statement: *R. v. Garfield* (1974), 21 C.C.C. (2d) 449 (Man. C.A.) and *R. v. Socobasin* (1996), 110 C.C.C. (3d) 535 (N.S.C.A.). In the absence of any evidence from the accused that he had been threatened or that promises were made to him, there is no basis for finding that the Crown has not discharged the burden upon it of proving beyond a reasonable doubt that the statements were made voluntarily.

Defence

- [34] Relying principally on *R. v. Botfield* (1973), 28 C.C.C. (2d) 472 (B.C.C.A.) and *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493 (Ont. C.A.) counsel for Mr. Labbe argued that the Crown has failed to meet its obligation to call reliable evidence of all the circumstances surrounding the taking of the various statements. In order for the Court to be satisfied of the appropriate interaction between the police and the accused there should be a reasonable explanation for the failure of the Crown to call the individuals in authority who placed the restraints on the accused and "threatened" him with a Taser. Further, the Court should be

satisfied that the record-keeping of Corporal Ayers is a "sufficient substitute for an audio or videotape record." The defence argues that there is no reasonable explanation for the failure to call the responsible individuals. No record was kept even though Somerville said there should be, none of the witnesses produced had any recollection of being present and there was no record of the identity of the persons in authority who did it. This failure should be considered against the evidence of Ayers, who said it was important for there to be a complete record. Ayers had that responsibility and he was not able to provide any explanation for this failure. He had assumed, wrongly, that it was Chow and Sauer, but he did not put this assumption on the record. Thus, by the time he went to check the video tape was lost and no one had taken any steps to preserve it, even though it is standard practice to preserve such a tape as evidence where there is a complaint about police conduct.

Conclusion

[35] On a careful consideration of all of the evidence and the law, particularly as set out in *R. v. Oickle*, supra, *R. v. Botfield*, supra, and *R. v. Wert* (1979), 12 C.R. (3d) 254 on the issue of voluntariness and *R. v. La* (1997), 116 C.C.C. (3d) 97 S.C.C. and *R. v. Tammie*, [2001] B.C.J. No. 1949 (Q.L.); 2001 BCSC 1219 on the s. 7 Charter breach issue, as well as the very helpful submissions of counsel, I am satisfied that the evidence of the three statements made by the accused as well as the letter written by him at the suggestion of the police are admissible.

Voluntariness

[36] The test of voluntariness is that set out in *R. v. Oickle*, supra. A confession will not be admissible if it is made in circumstances that raise a reasonable danger as to voluntariness: para. 68. In the circumstances here I am satisfied there were no threats or promises of a kind that would lead me to be at all concerned that the statements made by Labbe were at all involuntary. Rather, I am satisfied that the statements were made without any fear of threat or hope of advantage. I can find no indication of any quid pro quo, which is the most important consideration. There is no evidence that the restraints used briefly on the accused while he was in the cell were for a purpose other than his own protection. The evidence shows that the police acted courteously toward the accused throughout. When he was given the opportunity to write a letter to Ms. Martin's family in the absence of the two police officers, Mr. Labbe gave no indication in his writing of any concerns about his well being or treatment although he had been left alone for a significant period of time.

[37] The words of Sergeant Bruce that the police needed to understand so they could follow through "and maybe do something that could benefit" were not strong enough, when considered either alone or with all other factors, to leave a reasonable doubt in my mind that the will of Labbe was overborne: *R. v. Oickle* at para. 57. Nor do I find that the existing conditions created such oppressive circumstances that Labbe was induced to make a false confession. Throughout it is abundantly clear that the accused knew what he was saying and that he was saying it to persons in authority. In other words, his statements were the result

of an operating mind.

- [38] With reference to the use by the Crown of the letter written to the family of Ms. Martin, it is well settled law that the authorities may, and frequently do, resort to tricks and deceit in obtaining evidence for use during a criminal prosecution. Unless the conduct is such as to "shock the community" it will not be excluded. Here, while implying that the letter the accused wrote would go to the family, the police were evasive but did not expressly mislead the accused. In any event, it is clear from the wording in the letter that the accused was alert to the fact the police may read and use the letter. This conduct is not such as would shock the community: *R. v. Oickle*, supra; see also *R. v. Riley*, [2001] B.C.J. No. 1618 (Q.L.); 2001 BCSC 1169.

Section 7 - Lost Evidence

- [39] With reference to the alleged breach of Mr. Labbe's right to make full answer and defence because of the Crown's failure to preserve the evidence, namely, the second report written by Somerville and the surveillance tapes, the proper approach to a determination of that issue is set out in *R. v. La*, supra, where at para. 21 Sopinka J. stated:

In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

- [40] Here, the accused says that the Crown's failure to preserve the video tapes from the security cameras in the cell area and the second statement recording the words that the accused uttered to Somerville deprives him of that right. In *R. v. B.(F.C.)* (2000), 142 C.C.C. (3d) 540 N.S.C.A., per Roscoe J.A. [referred to by counsel's reference to the decision of MacKenzie J. in *R. v. Tammie*, supra], the Court summarized the approach to take in cases where evidence has been lost or destroyed as follows at pp. 547-548:

- (1) The Crown has an obligation to disclose all relevant information in its possession.
- (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
- (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
- (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.

- (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
- (6) If the Crown does not establish that the [evidence] was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
- (7) In addition to the s. 7 breach of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.
- (8) In either case, a s. 7 breach because of a failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases set out in O'Connor.
- (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make full answer and defence that it impairs the right to a fair trial. In this case, a stay may be the appropriate remedy.
- (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.
- [41] In the case at Bar, the Crown endeavoured to disclose all relevant evidence. The significance of what the defence believed may be relevant, the tapes from the surveillance cameras, was not apparent until after the tapes had been recycled. There is no evidence that the Crown was informed in a timely manner of the defence view that the tapes may be important and there is no evidence that the defence asked that the tapes be preserved. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future: *R. v. La*, supra. In my view, this meets the considerations raised in 3, 4, 5, 6 and 7 of *R. v. B.(F.C.)* above. Further, this is not one of those rare cases meeting the criteria in *R. v. O'Connor*, (1995), 103 C.C.C. (3d) 1 (S.C.C.) and, in any event, the defence is not asking for a stay; rather, it asks to exclude any evidence relating to confessions made by the accused.
- [42] In order to properly assess whether the lost evidence is so prejudicial to the right to make full answer and defence, there should be some indication from the evidence adduced at the voir dire to support that argument. Here, I am asked to infer such prejudice from the fact the surveillance tapes and the written report of Somerville are lost.
- [43] Mr. Somerville was produced by the Crown and cross-examined. While he agreed that what the accused said was important and should have been recorded in his first report, he said it was included in his second, lost, report. On my view of the evidence, the reliability of his evidence of what was said by the accused and whether it was inconsistent with what may have been contained in the missing report was not attacked in cross-examination. I cannot

infer from the evidence that the material in the lost report is so significant that its loss is so prejudicial to the accused's right to make full answer and defence that it impairs the right to a fair trial.

"T.P. Warren, J."

The Honourable Mr. Justice T.P. Warren

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