

CANADA / JUDGMENT

R. v. Pritchard

2002 BCSC 459

COURT

Supreme Court of British Columbia

DECIDED

3 April 2002

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2002BCSC0459

Citation:

R. v. Pritchard

Date: 20020403

2002 BCSC 459

Docket:

C09998S

Registry: PRINCE GEORGE

IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

DAVID MOSTYN PRITCHARD

RULING ON editing VOIR DIRE

OF THE

HONOURABLE MR. JUSTICE PRESTON

THIS COURT ORDERS THAT ALL EVIDENCE TAKEN AND SUBMISSIONS MADE IN THIS PROCEEDING AT A TIME WHEN THE JURY IS NOT PRESENT SHALL NOT BE PUBLISHED IN ANY NEWSPAPER OR BROADCAST UNTIL THE JURY HAS RENDERED ITS VERDICT. THIS ORDER IS MADE PURSUANT TO THE INHERENT JURISDICTION OF THIS COURT.

Counsel for the Crown:

B.P. Caffaro

and M.E. Fulmer

Counsel for the Defendant:

S.D.M. Wagstaffe

and D.P. Kennedy, Q.C.

Dates and Places of Hearings:

2000

Smithers

2001

Prince George

2001

Prince George

2002

Prince George

Oct. 23-27

Oct. 30-31

Nov. 1-3

Nov. 6-9

2000

Prince George

Nov. 20-24

Nov. 27-28

Dec. 4, 6, 8

Dec. 11-15

Jan. 2-5, 8

Jan. 22-26

Apr. 2-6

Apr. 9-10

Apr. 17-20

Apr. 26-27, 30

May 1, 7-11

May 14-17

May 22-23, 25

May 28-30

Sept. 10-14,

Sept. 18, 20

Sept. 24-28

Oct. 1-5

Oct. 9-12

Oct. 15-18

Oct. 22-26

Oct. 29-31

Nov. 19

Feb 4-7

Feb 12-15

Feb 18-22

Feb 25-28

Mar 4-6

[1] The accused, David Pritchard, is charged with first degree murder. The Crown wishes to tender at trial a number of statements that Mr. Pritchard made to police officers and a number of recordings of conversations he had with others. Those conversations were electronically recorded pursuant to authorizations obtained by the Crown to intercept communications.

[2] In addition to objecting to the admissibility of many of these statements on other grounds, the defence has indicated that it will seek to have most of the statements edited if they are otherwise ruled admissible.

- [3] Because of the magnitude of the editing task, the Crown and defence have made submissions with respect to editing in the course of a series of voir dres before trial. Any decision at this stage of the trial can only be provisional, and may be revisited during the trial before the evidence is placed before the jury. At that time, final decisions concerning relevance and the weighing of probative value and prejudicial effect can be made.
- [4] The Crown's theory in this case is that Mr. Pritchard elected at an early stage, and against the advice of his counsel, to engage in frequent interchanges with the police. Most of these interchanges, the Crown says, took the form of a "cat and mouse" game that Mr. Pritchard played with Officer Paulson, the investigating officer. The object of the "game" from Mr. Pritchard's point of view was to obtain information about the progress of the police investigation. Officer Paulson, on the other hand, was attempting to obtain information from Mr. Pritchard that he could use to further his investigation into the murder with which Mr. Pritchard is now charged.
- [5] The victim of the murder is Mrs. Pirkko Skolos. Mrs. Skolos was the wife of a rancher, Miles Skolos, who owned a ranch outside of Topley, British Columbia. Topley is located near Burns Lake, between Prince George and Smithers, in central northern British Columbia. On the 23rd or 24th of November 1995, Mrs. Skolos disappeared. Mr. Skolos was in Vancouver attending the funeral of his brother. Mrs. Skolos was alone at the ranch. Mr. Skolos was a drug dealer who dealt in large quantities of marijuana at the wholesale level and distributed it through a number of dealers in central British Columbia.
- [6] In the early morning hours of November 24th, Mr. Pritchard arrived in Prince George with the marijuana that had been stolen from the Skolos farm. He has since been convicted of possession and trafficking of that marijuana.
- [7] The case that the Crown intended to proceed with in January, 2000, when the matter was first set for trial, was based on a large body of conventional circumstantial evidence and some evidence obtained through wiretap authorizations. Just before the trial commenced in January, 2000, Mr. Pritchard and his lawyers commenced negotiations with the Crown that resulted in a limited immunity agreement ("the Agreement").
- [8] Generally, under the terms of the Agreement, Mr. Pritchard was to co-operate with the police and provide them with a full statement concerning his involvement in the disappearance of Mrs. Skolos. Presumably, if that explanation satisfied the Crown that he was not the person who murdered Mrs. Skolos, appropriate charges would be laid and the matter would be at an end as far as Mr. Pritchard was concerned. The agreement provided for the eventuality that Mr. Pritchard complied with the Agreement but the Crown did not accept his statement. In that event, presumably because Mr. Pritchard would have somewhat compromised himself in the course of giving the police a statement, the Crown was to be barred from proceeding with a first degree murder charge and would limit itself to proceeding on a charge of second degree murder or a lesser charge.

- [9] In accordance with the Agreement, Mr. Pritchard gave a statement to the police on January 19, 2000, which I will attempt to summarize for the purpose of providing some background to the editing process.
- [10] Mr. Pritchard described himself as a career criminal, active in drug trafficking, enforcement of payment of drug debts and the theft from others of quantities of drugs (commonly referred to as "drug rip-offs"). He associated with Mr. Bill Wall, a friend who dealt in marijuana. In the course of that friendship, Mr. Pritchard learned from Mr. Wall that Mr. Skolos dealt in large quantities of marijuana. The two of them planned to invade the Skolos home after a shipment of marijuana was delivered and steal the marijuana and any money they could find on the farm. Mr. Wall, whose brother sold marijuana purchased from Mr. Skolos, was to obtain information concerning the time of delivery of the marijuana. That information was essential in order that they could determine the timing of the "rip-off".
- [11] The planning for the robbery took place over a period of many months. Various methods of accomplishing the robbery were examined and discarded. Finally, a plan was agreed upon.
- [12] The plan was that Wall and Pritchard would go to the Skolos farm late at night. They would pull their vehicle up in the yard with the headlights facing toward the door of the residence. They would stand behind the headlights where they could not be seen by a person coming to the door of the Skolos's home. They would be masked by balaclavas and would be armed. When someone from the house came to the door Pritchard would tell them, disguising his voice, that there had been an accident on the highway and they needed to use a telephone. They were confident that this would lead to an invitation to come into the house. They would run from behind the headlights, enter the house and tie up the occupants. Once they had the occupants immobilized they would extract information from them concerning the location of the marijuana and money.
- [13] After the plan was developed, a period of time went by while Mr. Wall awaited news of the arrival of the marijuana shipment.
- [14] During that period, Mr. Wall unexpectedly changed the plan to a scheme in which he and his 22-year-old nephew, Mr. Enns, would carry out the robbery and deliver the marijuana to Mr. Pritchard at the 7-11 Store in nearby Burns Lake where he was to wait for them. Mr. Pritchard was then to sell the marijuana. The financial split was to be unchanged. Mr. Wall was to pay Mr. Enns' remuneration from his share. Mr. Pritchard was surprised by this but welcomed an opportunity to obtain an unchanged share in the proceeds without having to incur the risk of involvement in the robbery.

- [15] On the evening of November 23rd, 1995, Mr. Pritchard, by chance, met Mr. Wall at the Prince George Hospital. Mr. Pritchard was visiting his wife who had just given birth to a baby son. Mr. Wall told Mr. Pritchard that the marijuana had arrived and the planned robbery was to proceed that night. They had a brief meeting in the parking lot of a restaurant in Prince George. Mr. Wall drove east toward the Skolos ranch. Some time later, Mr. Pritchard drove to the 7-11 Store in Burns Lake to wait for Mr. Wall.
- [16] Some time after Mr. Pritchard arrived at the store Mr. Wall arrived in his pickup truck. He was in a state of high agitation. He told Mr. Pritchard that the robbery had gone badly wrong and that he had accidentally shot Mrs. Skolos. After accidentally shooting her he intentionally shot her a number of times. He had her body in the cab of his pickup truck and the marijuana in the back of his pickup truck. Mr. Pritchard was concerned that Mr. Wall was "losing it" and would draw the attention of the authorities. He elected to take charge of the situation to prevent that occurring.
- [17] Mr. Pritchard suggested that they drive back to Prince George in their separate pickup trucks and deal with matters there. Mr. Pritchard's job on the way to Prince George was to draw to himself any unwanted police attention in order to prevent discovery of the marijuana and the body.
- [18] They stopped on a number of occasions on the way to discuss matters.
- [19] Mr. Pritchard formulated a plan for disposing of the body on the way back. He had a pre-dug grave outside of Prince George for the purpose of burying a local criminal, but the grave had not yet been used for that purpose.
- [20] Mr. Pritchard and Mr. Wall drove to Mr. Pritchard's home just north of Prince George. They transferred Mrs. Skolos's body to Mr. Pritchard's pickup truck and placed the marijuana in an out-building associated with the residence. Mr. Wall then went home. Mr. Pritchard drove to the location of the grave a short distance to the east of Prince George, placed Mrs. Skolos's body in the grave, and covered it up with dirt. He then drove around the Prince George area and disposed of masks, etc., that might contain evidence which would tie either Mr. Wall or Mr. Pritchard to Mrs. Skolos.
- [21] Mr. Pritchard then proceeded to sell the marijuana.
- [22] The above version of events was given to the police in a six-hour video-recorded statement made by Mr. Pritchard on January 19, 2000.
- [23] The Crown, on the basis of subsequent investigation, has concluded that the version of events given by Mr. Pritchard is false. It is the Crown's theory that Mr. Pritchard played the "cat and mouse" game and obtained the disclosure that the Crown was required to make in the course of the criminal process and, using that, constructed a version of events that threads through the various items of hard evidence in a way that avoids contradiction with it. The Crown points to, among other things, the refusal of Mr. Pritchard to identify persons who could be interviewed to provide independent verification of Mr. Pritchard's version of

events, the inherent improbability of Mr. Pritchard's version of events, the behaviour of Mr. Pritchard in conversations and statements preceding the January 19 statement, and the timing of the statement.

- [24] Mr. Wall denies any participation in, or advance knowledge of, the theft of marijuana from the Skolos farm.
- [25] The Crown wishes to display the interaction between Mr. Pritchard and the police, and the relationship between Mr. Pritchard and Mr. Wall, to the trier of fact at trial. The Crown submits that in order to do so, it must place before the jury a large body of evidence of post-offence conduct concerning the interchanges between Mr. Pritchard and the police, and between Mr. Pritchard and others, over the course of the many years since Mrs. Skolos's disappearance. It is the Crown's position that this evidence, if properly viewed by the jury, will provide proof that the alibi given by Mr. Pritchard is fabricated and that the jury are entitled to draw the inference that he concocted it to mislead them because he is guilty. It is also the position of the Crown that the conversations should not be extensively edited because to do so would destroy nuances of the interchanges between Mr. Pritchard and the police and between Mr. Pritchard and others.
- [26] The defence wishes to have the statements and conversations extensively edited because, in the defence submission, they contain numerous instances of character evidence, opinion evidence, and hearsay evidence, and are either not probative or their probative value is outweighed by their prejudicial effect.

ANALYSIS

- [27] Different considerations apply to the editing of Mr. Pritchard's long video-recorded statement to the police on January 19, 2000 than to the earlier conversations. The Crown intends to place the January 19 statement before the jury and it is on that basis that the editing process on this voir dire has proceeded. The principal issue the jury will have to consider is the inherent probability of Mr. Pritchard's version of events. They will have to assess, in light of Mr. Pritchard's self-confessed criminality and experience, the likelihood of his version of Bill Wall "taking over" the robbery of the marijuana from the Skolos farm. They will have to accomplish this on the basis of their assessment of Mr. Pritchard and Mr. Wall. Because of that, the relative criminal experience of the two is relevant to their task.
- [28] The facts of this case are unusual if not unique. The statement that Mr. Pritchard made to the police on January 19, 2000 is of central significance. A reading or viewing of the statement as a whole makes it indisputably clear that the persuasive process used by Mr. Pritchard to convince the police of the truth of his version of what happened on the Skolos farm was to put before the police a very large body of testimonial evidence about his criminality and wrongdoing in order that the extent of his truthfulness about this would weigh in the balance when they came to decide whether he was telling the truth about the central events surrounding Mrs. Skolos's disappearance.

- [29] I am reluctant to disturb the statement Mr. Pritchard gave to the police because to do so by editing out disclosures by Mr. Pritchard of his wrongdoing and criminality is to undermine the very persuasive fabric of his statement. The jury is entitled to know what Mr. Pritchard said to the police upon the first opportunity that he took to place his version of events before them. Essentially his January 19, 2000 statement is exculpatory with respect to the charge of murder. Essentially, he says: "Bill Wall killed Pirkko Skolos -- not me -- I was not there". Whether the jury believes Mr. Pritchard's alibi or whether they conclude that Mr. Pritchard fabricated his version of events to conceal his guilt will be one of the major issues at trial. It may be the most important issue at trial.
- [30] Mr. Pritchard makes no secret of the fact that he planned the robbery of the marijuana and was prepared to carry it out. He told the police that on January 19, 2000. That will be before the jury. There will be no doubt in the jury's mind that he is the sort of man who would carry out the armed robbery of Mrs. Skolos. He also told the police that he had an unused grave at his disposal for Mrs. Skolos's body. Accordingly, the prejudice stemming from evidence that would disclose that he is the type of person that would commit the armed robbery of Mrs. Skolos does not weigh as heavily in the editing process as it otherwise would.
- [31] I was helpfully referred to a number of authorities dealing with the balancing of probative value and prejudicial effect.
- [32] The rule of evidence governing the exclusion of evidence on the basis that it is more prejudicial than probative in these circumstances is set out in *R. v. Morris*, [1983] 2 S.C.R. 190 and *R. v. Lepage*, [1995] 1 S.C.R. 654. The rule requires:
1. that the evidence be shown by the Crown to be relevant to some issue at trial before the court will embark on an enquiry;
 2. that relevant evidence not be excluded solely because it incidentally imports otherwise inadmissible hearsay, opinion, or evidence of bad character;
 3. that relevant evidence only be excluded when the prejudicial effect of the incidentally imported inadmissible component outweighs the probative value of the relevant evidence and cannot be redressed by limiting instructions to the jury.
- [33] The evidence must be relevant to an issue in the case but not necessarily to an element of the offence. In this regard, the Crown referred me to *S.G.G. v. The Queen*, [1997] 2 S.C.R. 716, 116 C.C.C. (3d) 193 at pp. 217 and 218, where Mr. Justice Cory, speaking for the majority on this point, said:

Evidence which incidentally demonstrates bad character can also be directly relevant to a key element of the Crown's theory of the case, such as motive, opportunity or means: see *R. v. Davison* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.); *Hinchey*, supra, at para. 135. Evidence of motive, for example is always relevant in that it makes it more likely that the accused committed the crime, although it is not an essential element of criminal responsibility: *Lewis v. The Queen*, [1979] 2 S.C.R. 821, 47 C.C.C. (2d) 24, 98 D.L.R. (3d) 111.

[34] In this case, the Crown says that the evidence which incidentally discloses Mr. Pritchard's criminality is relevant on the following basis:

1. it permits the jury to assess, on the basis of the nature of the interplay and the "game" between Mr. Pritchard and the police and others, whether the Crown's contention is correct: that Mr. Pritchard embarked on a long process of "interrogating" the police and others in order to fabricate an exculpatory version of events and that, only when the process of disclosure was complete on the eve of trial, disclosed his alibi to the police;
2. it permits the jury to assess the inherent probability of Mr. Pritchard's version of events. It is the Crown's contention that, among other improbabilities in Mr. Pritchard's version of events, it is unlikely that Mr. Pritchard, the career criminal, would step aside for Bill Wall, the amateur, at the crucial moment and leave the robbery in his hands. With respect to this issue, the Crown contends that Mr. Pritchard's criminality is directly relevant; and
3. it permits the jury to assess the likelihood of Mr. Pritchard's version of events being untrue or fabricated on the basis of comparing it to statements that he made, or conversations in which he engaged, on other occasions pre-dating his January 19 statement.

[35] The Crown is tendering Mr. Pritchard's six-hour statement to the R.C.M.P. made January 19, 2000 as an admission of culpability for many of the events that surrounded the death of Pirkko Skolos. It will be the Crown's position before the jury that while many of the admissions contained in the statement are true, the exculpatory portion of the statement, which can be summarized as the "Bill Wall did it -- I was not there" portion, is false, was concocted by Mr. Pritchard for the purpose of deceiving the police and the jury, and may be used by the jury as the foundation for an inference of guilt.

[36] The body of law relating to the use to which a jury may put a false alibi advanced by the accused is set out in a number of recent cases: *R. v. Davison*, *Derosie* and *MacArthur* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.), leave to appeal refused, [1974] 1 S.C.R. viii; *R. v. Mahoney* (1979), 50 C.C.C. (2d) 380 (Ont. C.A.) aff'd. [1982] 1 S.C.R. 834; *R. v. Carey* (1996), 113 C.C.C. (3d) 74 (Que. C.A.); *R. v. Witter* (1996), 105 C.C.C. (3d) 44 (Ont. C.A.); *R. v. Tessier* (1997), 113 C.C.C. (3d) 538 (B.C.C.A.); *R. v. Bowers* (1997), 90 B.C.A.C. 233 (C.A.); *R. v. Campbell* (1997), 122 C.C.C. (3d) 44 (B.C.C.A.) aff'd. [1998] 3 S.C.R. 533, 130 C.C.C. (3d) 223. These cases establish the proposition that a jury may only be invited to draw an inference of guilt from a false alibi advanced by the accused if they have found that the alibi was fabricated by the accused. In making this finding they are to rely only on evidence that establishes fabrication. The nature of the evidence upon which they are entitled to rely to establish

fabrication has been variously described as:

- "...extrinsic evidence of fabrication or where the appellant has given different versions of his whereabouts, one of which must be concocted." (Brooke J.A. in Mahoney, p. 389);
- "...evidence from which a reasonable jury could infer that the alibi was deliberately fabricated and that the accused was a party to that fabrication." (Doherty J.A. in Witter, p. 53);
- "...some evidence from which a reasonable jury could infer that the alibi was deliberately fabricated" (Proulx J.A. in Carey, p. 85);
- "...independent or extrinsic evidence from which an inference could be drawn that the alibi was fabricated" (Rowles J.A. in Tessier, p. 554);
- "...actual extraneous evidence of fabrication or contrivance." (McEachern C.J.B.C. in Tessier, p. 567);
- "...a solid evidentiary base of fabrication ... [to] be found independently of the other evidence of the proof of the crime." (Ryan J.A. in Tessier, p. 556);
- "... clear independent evidence of falsity" (Hall J.A. in Campbell, p. 58);
- "...independent proof that his alibi was the product of concoction." (Cumming J.A. in Bowers, para. 13).

[37] The genesis of the above-mentioned line of cases is Davison. In that case Martin J.A. said (p. 430):

The learned trial judge did not, in my opinion, in the passages in the charge referred to above, make clear to the jury the distinction between proof that the alibi advanced is false in the sense of being concocted and the mere rejection by the jury of the evidence of alibi because they believe that evidence to be untruthful, although not proved to be false. Proof of the falsity of the alibi may constitute affirmative evidence of guilt. The mere rejection of the evidence of alibi because it is disbelieved is not affirmative evidence of guilt and has only the effect of removing it from consideration as a barrier to the acceptance of the case for the prosecution.

[38] The nature of the proof discussed by Martin J.A. in Davison was the subject of more extensive comment by Doherty J.A. in Witter (p. 53):

Before the consciousness of guilt inference is available there must be evidence from which a reasonable jury could infer that the alibi was deliberately fabricated and that the accused was a party to that fabrication. It is not enough that the alibi was found to be unworthy of belief or that the force of the evidence implicating the accused in the crime is so compelling as to demand the rejection of the alibi evidence. Mere rejection of alibi evidence as untruthful or unreliable does not constitute affirmative evidence of guilt; Davison, *supra*, at p. 430.

[39] Proulx J.A. deals with the same point in Carey as follows (p. 85):

Therefore, a proper instruction to the jury on this issue requires three things, (1) there must be some evidence from which a reasonable jury could infer that the alibi was fabricated, and if so (2) the jury should be told that a distinction has to be made between (i) proof that the alibi advanced is fabricated and (ii) mere rejection of an alibi because the jury does not believe it, and (3) that only if the jury concludes that the alibi has been deliberately fabricated by the accused can the jury draw an inference that he did so by reason of a consciousness of guilt.

- [40] The danger adverted to by Doherty and Proulx JJ.A. is described in later cases as an unsound "circular chain of reasoning". The proposition emerging from the cases is that if the jury has rejected the alibi advanced by the accused because they are satisfied by the evidence going to the proof of the elements of the crime that it cannot be true, they cannot employ their disbelief of the alibi as additional evidence of the accused's guilt. The vitality of the evidence going to the proof of the crime has been exhausted once it has been used to reject the alibi. There must be other evidence proving fabrication before an inference of guilt may be drawn.
- [41] However, because a jury could employ both evidence of fabrication and evidence going to the proof of the crime in deciding to disbelieve the alibi, it becomes difficult to frame a proper instruction. The court must not overly intrude upon the jury's reasoning, yet it must be made clear that the circular chain of reasoning must be avoided.
- [42] In order to frame a proper instruction, the nature of the evidence that is relevant to the proof of fabrication must be identified.
- [43] The case law suggests that the jury may consider evidence that the accused advanced other contradictory alibis (Mahoney); they may consider the improbability of the alibi (Ryan J.A. in Tessier); they may consider the evidence of others necessarily involved in the alibi such as persons whom the accused said were present with him or persons whom the accused said committed the crime in his absence (R. v. Harrison (2001), 156 C.C.C. (3d) 117, 2001 B.C.C.A. 272 at para. 39). The evidentiary categorization suggested by the cases is that identified by Ryan J.A. in Tessier: evidence of fabrication independent of the other evidence proving the crime. To put it another way: evidence relevant to the proof of fabrication of the alibi that is not relevant to the proof of the crime.
- [44] Even that formulation has its difficulties. For example, if the evidence of the accused's presence at the scene of the crime was so overwhelming that his statement that he was somewhere else at the time is simply absurd and the only rational conclusion from his maintenance of this absurd explanation is a desire to escape criminal responsibility, it is difficult to understand why a jury should be unable to properly reach the conclusion that the alibi was fabricated.
- [45] In Tessier, McEachern C.J.B.C. made the following observation (p. 566):

I find it exceedingly difficult to understand how it may logically be correct that fabrication can only be proved by direct evidence, and not by inference from believed, independent evidence, yet that is what the cases seem to suggest.

- [46] I have respectfully concluded that that observation of the learned Chief Justice relates to the use of evidence relevant to the commission of the offence as circumstantial evidence of fabrication, not to circumstantial evidence in the more general sense. The cases would not, in my view, prevent the jury from employing circumstantial evidence relevant to fabrication alone to prove fabrication.
- [47] The words of the learned Chief Justice imply a measure of scepticism about the conclusion, inherent in the cases, that it is necessarily circular reasoning to enlist the evidence going to the proof of the offence to conclude that the alibi, introduced as an issue by the accused, is fabricated. I share that scepticism. However, it is clear from the cases that the issue has been conclusively decided.
- [48] Tessier makes it clear that it is misdirection to give the jury a direction with respect to their ability to draw an inference of guilt from a finding of fabrication by the accused of an alibi unless, in the words of Chief Justice McEachern, there is "...actual, extraneous evidence of fabrication or contrivance".
- [49] The conversations and statements that the Crown is tendering on this editing voir dire provide circumstantial evidence directed to proving: (1) that the alibi is untrue; and (2) that it was fabricated. Some of that evidence may be relevant to both the issue of truth and the issue of fabrication. For example, statements by Mr. Pritchard in which he refers to other alibis inconsistent with the alibi advanced in the January 19 statement may both indicate that his present alibi is untrue and provide evidence of a pattern of refining the January 19 alibi. Other evidence may go only to one of the two purposes.
- [50] Both the truth of Mr. Pritchard's alibi and the question of whether it was fabricated will be issues at trial. In making the editing rulings at this stage I am assuming that the Crown will be permitted to lead evidence at trial that is relevant to either or both issues.
- [51] Mr. Wagstaffe forcefully submitted on behalf of Mr. Pritchard that only evidence going to prove fabrication could be said to be directed to an issue at trial. He argued that the issue of truthfulness of the January 19 statement was an issue "created" by the Crown by its determination to lead the January 19 statement in evidence. He contended that the Crown cannot lead the statement as part of its case and then seek to use the fact that the statement is in evidence as a foundation for leading evidence the sole relevance of which is to prove that the statement is false.
- [52] In the circumstances of this case, I have concluded that the Crown is entitled to take the position that parts of the January 19 statement are true and other parts false. That is the very heart of the Crown's theory of the case. The Crown will urge the jury to find that Mr. Pritchard, confronted with a closing ring of circumstantial evidence, fashioned a version of

events that attempted to admit all the inculpatory details that the Crown would likely be able to prove, but exculpated him on the one aspect of the case which was most dangerous to him by providing an alternate version carefully tailored to deflect the circumstantial evidence that placed him in jeopardy on the charge of murder. The evidence is capable of bearing that interpretation.

- [53] It is beyond dispute that much of the evidence that will be placed before the jury, on the basis I have outlined above, will be prejudicial. In determining whether its prejudicial effect outweighs its probative value, regard must be had to the ameliorating effect of cautions to the jury that they are not to use the evidence for an improper purpose. Courts have frequently expressed confidence in the ability of juries to act in accordance with instructions to them. I need only refer to Chief Justice Dickson's words in *Corbett v. The Queen*, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385 at pp. 400-401:

In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to law. We should regard with grave suspicion arguments which assert that depriving the jury of all relevant information is preferable to giving them everything, with a careful explanation as to any limitations on the use to which they may put that information. So long as the jury is given a clear instruction as to how it may and how it may not use evidence of prior convictions put to an accused on cross-examination, it can be argued that the risk of improper use is outweighed by the much more serious risk of error should the jury be forced to decide the issue in the dark.

- [54] One of the jury's tasks in this case will be to assess the motives, including the motives of the police, in connection with the events that form the subject matter of this trial. Issues of credibility will be paramount. Much of the evidence that will be placed before the jury will be contained in the statements that are the subject of this editing process. In the context of this case, the danger of distorting the meaning of the evidence placed before the jury by over-extensive editing is a real one.

THE CONVERSATIONS WHICH THE CROWN SEEKS TO ADMIT INTO EVIDENCE

1. July 17, 1996 interview of Mr. Pritchard by Officer Paulson

- [55] The first statement to which counsel addressed submissions with respect to editing was a statement made by Mr. Pritchard to Officer Bob Paulson in the Prince George Detachment of the R.C.M.P. on the July 17, 1996. The transcript of the statements runs to 123 pages. The defence objects to 52 portions of the statement and wishes to have them deleted from the transcripts and associated audio or videotapes. The Crown agrees with the defence position on three of the edits.
- [56] In order that the process of editing could be approached in an organized fashion, I instructed that transcripts of all of the statements and conversations that were at issue be placed in tabbed, indexed volumes and that the defence mark all of the portions which it sought to have excluded from evidence. In the course of that process, a numbering system was evolved which numbers the defence objections on a statement-by-statement basis. Numbers 1 to 55 have been assigned to the suggested edits of the July 17, 1996 statement. The defence later withdrew three of its objections leaving 52 to be considered.
- [57] I will deal with them sequentially.

Edit number 1 is to be taken out of the statement. That involves deleting the words "obviously you've had your conversations tape recorded before eh". It is not relevant to any issue in the case.

Edit number 2 is no longer in issue.

Edit number 3 is sought because Mr. Pritchard makes the statement "I mean I'm illegal kinda person and I got lots a reasons to be nervous about lots of things other than this you know". Mr. Pritchard throughout this and other statements speaks frequently about being involved in criminal acts. He makes no secret of the fact that he is a career criminal. The manner in which he dealt with Officer Paulson is relevant. The prejudice that might normally attach to Mr. Pritchard's admission of criminality is not sufficient to rule this portion of the exchange inadmissible because he discloses his criminality in the January 19, 2000 statement in a manner that is inextricably bound up with his exculpatory version of events. If the Crown decides that it will not place into evidence the January 19, 2000 statement, many of the provisional rulings that I make in the course of this judgment will have to be revisited. The defence application for edit number 3 is dismissed.

Edit numbers 4, 5 and 6 involve a category of edits that relate to the disclosure of a police investigation of the murder of one Eddie Horbas approximately three years before the disappearance of Mrs. Skolos. Mr. Pritchard was the prime police suspect in the Eddie Horbas murder. The dealings that he had with the R.C.M.P. in the course of the investigation of that murder have led to an antipathy toward the police on Mr. Pritchard's part. His status as a suspect in that murder gave him an air of "dangerousness" which coloured some of the dealings between him, Bill Wall and Abe Wall (Bill Wall's brother). The subject of Mr. Pritchard's involvement in the murder of Eddie Horbas comes up on a number of occasions during the course of the July 17, 1996 statement and in the course of later statements and conversations. I am satisfied that placing before the jury Mr. Pritchard's suspected involvement in a previous murder, close to the disappearance of Mrs. Skolos both in time, geographical area and subject matter (i.e. drugs),

would be very prejudicial. The evidence has some probative value concerning the relationship between Officer Paulson and Mr. Pritchard over the course of the statement and is part of the context of the "game" that was being played between the two of them. However, I am satisfied that the prejudicial affect of that evidence would outweigh its probative value. Additionally, it would invite the Horbas murder into this case as a factual sub-issue. References to the Horbas murder and the passages in which they occur should be deleted from the transcript and the video and audiotapes.

Accordingly, edits 4, 5 and 6 should be made. Edit 5 should begin with the statement by Mr. Pritchard on page 4 of the transcript, which begins with "You know why I'm involved in this shit? "

Edit number 7 should be made. It involves a reference to the Horbas murder.

Edit number 8 involves a passage that is illustrative of the interplay between Officer Paulson and Mr. Pritchard. The defence application for edit number 8 is dismissed.

Edit number 9 involves the Horbas murder and should be made.

Edit number 10 is one of a category of edits requested by the defence on the basis that what they amount to is either the expression of an opinion by officer Paulson about Mr. Pritchard's guilt or a "credentializing" of Officer Paulson and the police as honest and reliable. Mr. Wagstaffe, on Mr. Pritchard's behalf, contends that statements made by Officer Paulson that fall into these categories should be deleted from the statement. In my view they are illustrative of the interaction between Officer Paulson and Mr. Pritchard. They are an integral part of the pressure exerted by Paulson on Pritchard over the course of this statement. The jury is entitled to arrive at their conclusion about the nature of the police interrogation and Mr. Pritchard's response to it on the basis of the fullest appreciation of what took place. The defence application with respect to edit number 10 is dismissed.

Edit number 11 follows the same pattern as edit number 10. The defence application for edit 11 is dismissed.

Edit number 12 should be made. It refers to the Horbas murder.

Edit number 13 should be made. This short passage should be deleted. It refers to a criminal childhood and is not interconnected with the remainder of the statement.

Edit number 14 should not be made. This is an essential part of the interaction between Officer Paulson and Mr. Pritchard.

Edit number 15. This is objected to on the basis of "credentializing" (a term defence counsel used to describe Officer Paulson's interrogation technique when it employed references to, and explanations of, police bona fides) and a display of Mr. Pritchard's criminality. The defence application in this respect is dismissed.

Edit number 16. The application for this edit was withdrawn by the defence.

Edit number 17 should not be made. This portion of the transcript refers to Mr. Pritchard's criminality and his views about crimes against women. In my view this passage is essential to the jury's understanding of the interplay between Officer Paulson and Mr. Pritchard.

Edit number 18. This passage should be deleted. It refers to the murder of Mr. Horbas.

Edit numbers 19 and 20. These passages are objected to as "credentializing" on the part of Officer Paulson. They should remain. The defence application is dismissed.

Edit number 21 has been withdrawn by the defence.

Edit number 22 refers to the murder of Mr. Horbas. That portion of the statement should be deleted.

Edit number 23 refers to a statement in the midst of a long monologue by Mr. Pritchard. The words which the defence finds objectionable are "I mean that's . . . I've pulled guns on people." This exemplifies an aspect of Mr. Pritchard's participation in the conversation and is illustrative of his bravado and criminal boasting. It should not be deleted.

Edit number 24 refers to the Horbas murder and should be removed from the statement.

Edit number 25 is illustrative of the interaction between Officer Paulson and Mr. Pritchard. It should remain in the statement.

Edit number 26. This is illustrative of the interaction between Officer Paulson and Mr. Pritchard. It should remain in the statement.

Edit number 27. This refers to polygraph examinations in the context of this case and should be deleted from the statement. References to polygraph examinations in the course of this case have the potential for introducing unwanted factual sub-issues and an unmanageable body of inadmissible evidence into the case.

Edits number 28 and 29. They are illustrative of Mr. Pritchard's state of mind as he gives the statement and should not be deleted.

Edit number 30. This is a reference to the Horbas murder and should be deleted from the statement.

Edit number 31. This refers to a polygraph examination in this case and should be deleted.

Edit number 32. This is objected to on the basis of "credentializing". It should remain in the statement.

Edit number 33 is a long passage. The Crown suggests four deletions within the much longer deletion sought by the defence. I agree with the submissions of the Crown. Four passages should be deleted. The passage beginning on page 58 of the transcript with the words "Most of them bad . . ." to "Yeh. We have. I have heard and I . . ." should be deleted. Secondly, the passage following shortly after that which reads "You think they're gonna hear 'Well Dave's such a nice guy. He broke my leg in such a nice way.' You know 'he was so sorry about it after'". This should be

excised. Further down on page 58 the portion beginning with the words "When I first read about the leg breaking exercise OK? . . ." to " . . . immediately believe the first person I hear?" followed by the word "No" attributed to Mr. Pritchard on page 59 should all be excised. The words "But the same way that I didn't prejudge why it is that her leg got broke, is the same reason I didn't prejudge Dave Pritchard when he walked into this room today. OK" should be excised. This occurs in the middle of page 59.

Edit number 34 should be made as sought. It refers to serial killing. It is prejudicial. It does not add anything significant to the narrative flow of the statement.

Edit number 35 is an illustration of Mr. Pritchard's bravado. It should remain in the statement.

Edit number 36 should not be made. It is relevant as being illustrative of the interrogation of Pritchard by Paulson and of Paulson by Pritchard. The credentializing aspect of it may be adequately dealt with by instructions to the jury.

Edit number 37 is part of the interrogation. It is not objectionable.

Edit number 38 is part of the interrogation and the interaction between Paulson and Pritchard. It is not particularly prejudicial. The edit should not be made.

Edit number 39 should be made. It is an unnecessarily prejudicial comment by Mr. Pritchard relating to his assault on Kim McCarthy and incidentally his relationship with his common law wife Shannon; "So she starts swinging that ... you better give her a couple of fucking shots". It can be eliminated without affecting the flow of the conversation.

Edit number 40 is a series of boasts by Mr. Pritchard about being cold-blooded in response to a line of questioning embarked upon by Officer Paulson. It is an integral part of the interrogation and should remain in the statement.

Edits number 41, 42 and 43 refer to the Horbas murder and should be edited out of the statement.

Edit number 44 is part of the interchange between Paulson and Pritchard. Its slight possible prejudicial effect is not sufficient to exclude it.

Edit number 45 consists of the phrase "I've got crimes going on". This may be viewed as part of a pattern of disarming admissions by Mr. Pritchard. It is relevant. Its prejudicial effect does not outweigh its probative value. The phrase should remain.

Edit number 46 consists of boasting by Mr. Pritchard about his connections with the Hell's Angels and organized crime. It is strongly prejudicial and weakly probative. It should be removed from the statement.

Edit number 47 consists of the words "Although I'm fucking cold-blooded" in the middle of a statement by Mr. Pritchard in which he discusses the likelihood of him remaining silent if he knew who killed Pirkko Skolos. The relevance of the conversation outweighs its prejudicial effect.

Edit number 48 is a facetious comment about killing a man for a cigarette. There is no reason to edit it out of the statement.

Edit number 49 is a reference to the Horbas murder and should be taken out of the statement.

Edit number 50 is objected to by the defence because it contains an opinion by Officer Paulson about the truthfulness of Mr. Pritchard's "story". It is part of the interrogation of Pritchard by Paulson. It is relevant. The edit should not be made. The jury can be instructed that Officer Paulson's opinions are not to be taken to be evidence of their conclusions.

Edit number 51 concerns the relation by Mr. Pritchard of an incident in which an R.C.M.P. officer accused him of being a murderer in a public situation. Mr. Pritchard concludes by indicating that the officer was lucky that the Officer did not get the bones in his face broken. This statement has a limited connection with the interrogation and the interplay between Pritchard and Paulson but is clearly prejudicial. It should be taken out.

Edit number 52 contains a reference to killing two people. It is relevant to the understanding of a later statement but raises the Horbas murder. On balance it is more prejudicial than probative. It should be excised.

Edit number 53 is objected to by the defence because of the mention of the Bernardo case. Officer Paulson uses that case as an example of police being lulled by cooperation on the part of a suspect and assures Mr. Pritchard that he will not make the same mistake. It is part of the interrogation. Its probative value outweighs its prejudicial effect. It displays the pressure that was put on Mr. Pritchard by Officer Paulson.

Edit number 54 is another example of the interrogation techniques used by Officer Paulson. It is part of the flow of the interchange. It should remain.

Edit number 55 should be excised. The Crown and defence agree.

2. December 1, 1996 intercept at the Pritchard/Hardy residence - (Tab 2)

[58] This is a tape recording of a conversation between Shannon Hardy, Bill Wall and David Pritchard at the Pritchard/Hardy residence in Prince George on December 1, 1996. There are no defence applications to delete or edit this conversation.

3. December 12, 1996 three conversations at the Pritchard/Hardy residence (Tabs 3, 4 and 5)

[59] Tab 3 -- This is one of three conversations that took place on December 12, 1996 that should be considered together because of their proximity in time and the relevance of Mr. Pritchard's state of mind to the interpretation of the third and most contentious conversation.

[60] The defence seeks to have six portions of the tab 3 conversation excised. They are:

(1)

PRITCHARD: ... They come in here looking for any guns, all my guns, ammunition, bullets, explosives in the interest to protect Kimberly Ann McCarthy.

WALL: Really?

PRITCHARD: Yeah that's what it says right on the search warrant, that it is not desirable in the interest and safety of Kimberly Ann McCarthy and any other person that David Pritchard should have in his possession custody or control of firearms, all that bullshit.

(2)

WALL: I was thinking about that too.

PRITCHARD: Yeah, I told the cops today anyone comes fuckin around here they better have a bullet proof fucking belaclava on.

WALL: (Laughs)

(3)

PRITCHARD: ... I just came from my lawyers and that and the fucking shit hit the fan there and fuck.

WALL: Over what?

PRITCHARD: Oh fuck, over this and I just ...

(4)

PRITCHARD: Yeah, well I'm sure it ain't, I'm not suppose to comment on anything, about, that, my lawyer told me don't talk to anyone.

(5)

PRITCHARD: Let's go for a trip up West tonight.

WALL: Fuck I don't know, I don't know if I got a bullet proof vest or what.

PRITCHARD: (laughs)

WALL: Or belaclava (sic).

PRITCHARD: Bullet proof belaclava, I'm head shooting tonight buddy.

WALL: No.

PRITCHARD: Yeah fuck, Shannon's gonna be hunting up North, no, I shouldn't say that on the phone, I didn't mean that, that (sic) was just a joke, everything's closed.

(6)

WALL: And then, and then fucking uh, uh, what do you call those bullets they go right through fucking bullet proof vest eh?

PRITCHARD: What, armour piercing bullets.

WALL: Yeah.

PRITCHARD: Oh, yeah.

WALL: (laughs)

PRITCHARD: So, that's what I'm using, do you think I'm fucking stupid?

WALL: (laughs)

PRITCHARD: Those and those Winchester X bullets, they split in about five fucking pieces, if you hit a guy right you can take out two or three people behind them.

WALL: Fucking nuts, I got to go.

[61] The defence objects to portion (1), (2), (3) and (6) going before the jury because they reflect adversely on Mr. Pritchard's character and tend to raise the issue of him committing crimes against the police or Ms. McCarthy, or having a propensity to do so.

[62] The Crown submits that any potential prejudicial effect is lessened by Mr. Pritchard's self-confessed criminality and outweighed by the probative value of the statements. The Crown asserts that these portions of the statement highlight the pressure exerted upon Mr. Pritchard and its effect. They display Mr. Pritchard's crumbling self-control and spiralling bravado that culminate in a breakdown that is apparent in the last of the three conversations -- the conversation between Mr. Pritchard and Shannon Hardy shortly before 11:00 p.m. in their home (tab 5). I am satisfied that these four portions of the conversation should remain.

[63] The portions of conversation (4) and (5) should not go before the jury. The Crown did not contest the exclusion of (4) and I am concerned that the Crown will seek to have the jury draw more from portion (5) than they should.

[64] Tab 4 -- The defence seeks the exclusion of the entire conversation at tab 4. This was a brief telephone conversation between Officer Paulson and Mr. Pritchard. In it, this exchange takes place:

PRITCHARD: Ok, you guys have fucked with my kids and my, and, and now you've gotten to me eh?

PAULSON: This is from a guy who kills grandma's eh?

PRITCHARD: Yeah.

PAULSON: Yeah.

PRITCHARD: Yeah, you bet. I kill fuckin everyone don't I?

PAULSON: You do.

PRITCHARD: Oh yeah.

PAULSON: Yeah, a grandma, Dave.

PRITCHARD: Yeah?

PAULSON: Yeah.

PRITCHARD: Well the (sic) arrest me.

PAULSON: It's comin, Buddy.

PRITCHARD: Yeah.

PAULSON: We're comin for ya.

PRITCHARD: Yeah.

PAULSON: Get ready.

[65] This conversation, which took place at approximately 8:00 p.m., is relevant to Mr. Pritchard's emotional state at the time the next conversation takes place. It should not be excluded.

[66] Tab 5 -- The Crown's transcript of the conversation at tab 5, which took place approximately one hour later, is as follows:

PRITCHARD: (Whispers Indecipherably) 20:55:33 (Indecipherable) I need your help, I love you Shannon (Indecipherable).

HARDY: 20:56:08 (Indecipherable)

PRITCHARD: Ya I know but (indecipherable), But people don't understand it. You're a certain way, your like a certain way, you know, Fuckin I don't know what guys do that are different from everyone as opposed to fuckin me I don't know I can't . . . I fuckin turned bad, its me I guess. (Indecipherable) I'm sorry. (Indecipherable) (20:57:08) (Quiet) (20:57:30) You don't know what its like, (indecipherable) (Crying) I mean I shot two fuckin people.

HARDY: Why (indecipherable)?

PRITCHARD: I mean I just don't know fuck you just, fuck it, oh whatever I'm not wasting energy, let other people fuckin figure it out, it's too frustrating. (Indecipherable)

HARDY: (Indecipherable) such an early age

PRITCHARD: I don't know (Indecipherable), okay I don't know whats going to happen, I don't know whats gonna happen, okay I can't tell you anything other than that, cause I don't know, (Indecipherable), I'm tired man fuck I'm tired, they can wear you down (Indecipherable) fuckin serious man I don't know what the fuck I can change (blows nose) I sure as fuck ain't gonna change in 25 years. (Blows nose loud) (Indecipherable) Ahh fuck I don't know some days I'm stronger than others (Indecipherable).

- [67] Much of the conversation at tab 5 is inaudible. The audiotape in its final form was played repeatedly in the course of this voir dire. Officer Paulson testified that he listened to the conversation between Mr. Pritchard and Ms. Hardy as it took place. He said that he was able to make out the words: "I shot two fucking people" and "I am sure not going to change in 25 years". He was not able to make out any other portions of the conversation while listening to it. Later, however, he listened to the tapes and was able to construct the transcript that has been reproduced above.
- [68] I am satisfied that the two portions of conversation that Officer Paulson heard directly from the listening device stand on a different footing than the later reconstruction from listening to the tape. He may relate what he heard directly if it can be shown to have probative value that outweighs its prejudicial effect. The question of what is audible on the tape is a question that the jury is in as good a position to determine as Officer Paulson.
- [69] Accordingly, the issues with respect to the admissibility of all or part of the conversations at tab 5 are as follows:
1. Are the fragmentary conversations heard directly by Officer Paulson probative with respect to an issue in the case?
 2. Is their probative value outweighed by their prejudicial effect?
 3. Is the tape sufficiently audible that the jury may be given the transcript prepared by Officer Paulson for their assistance in listening to the tape?
 4. Is the tape sufficiently audible to be placed in evidence before the jury?
- [70] The question of the relevance of a fragmentary statement made by an accused person and overheard by a police officer was considered by the Alberta Court of Appeal in *R. v. Ferris* (1994), 27 C.R. (4th) 141; affirmed [1994] 3 S.C.R. 756. The accused in that case telephoned his father shortly after his arrest for murder and part of the conversation was inadvertently overheard by a police officer. The officer heard the accused say: "... I killed David ..." (the victim's name was David). No other part of the surrounding conversation was overheard by the officer. Conrad J.A. observed (para. 17):

The facts of this case are unique in that there exist no circumstances or context from which the true meaning of the words can be inferred.

She held that the trial judge should have excluded the evidence of the statement.

- [71] In upholding the decision of the Alberta Court of Appeal, Sopinka J., who delivered the brief reasons of the Court, said:

In our opinion, with respect to the evidence that the respondent was overheard to say "I killed David", if it had any relevance, by reason of the circumstances fully outlined by Conrad J.A., its meaning was so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the grounds its prejudicial effect overbore its probative value.

- [72] The same reasoning applies to the two fragmentary statements overheard by Officer Paulson: "I shot two fucking people" and "I am sure not going to change in 25 years". The first could only have relevance on the basis that the jury could infer that it was an admission that he shot Pirkko Skolos. There is no "circumstances or context" to permit the jury to make that inference without speculating. The same is true of the second fragmentary statement. It could not, without speculation, provide a foundation for the Crown's submission that it refers to the penalty for first degree murder and indicates a consciousness of guilt of that offence.
- [73] Accordingly, the evidence of Officer Paulson concerning the fragments of conversation he heard is not admissible independently of the tape recordings. The prejudicial effect of its admission would outweigh its probative value.
- [74] The admissibility of the tape recording of the conversation between Mr. Pritchard and Ms. Hardy raises the issues of audibility, relevance and the balancing of probative value and prejudicial effect.
- [75] The Crown intends to emphasize the two portions of conversation that Officer Paulson overheard by having the jury listen to the tape recording of the conversation assisted by the transcript.

The law

- [76] The most helpful and comprehensive review of the difficulties posed by inaudibility of portions of recordings of conversations to which I was referred is contained in the reasons for judgment of Hill J. of the Ontario Court of Justice (General Division) in *R. v. C.P.S.*, [1998] O.J. No. 2744. He was considering an application to admit the tape recording of a five-hour videotaped statement, many portions of which were inaudible, without the aid of a transcript. Most of the comments the learned judge makes are directed to issues concerning the transcript. However, on the issue of threshold audibility he adopted the statement of Seaton J. in *R. v. Durocher*, [1973] 3 W.W.R. 1 (B.C.S.C.) p. 3:

I could reject a recording of this sort if its quality were so bad that it would not be evidence of a reliable sort ...

Seaton J. was dealing there with a poor quality recording of which the police had made a transcript.

- [77] Threshold reliability was also discussed by Vannini J. in *R. v. MacLean and MacLean* (No. 1) (1979), 49 C.C.C. (2d) 399 (Ont. Dist. J.C. Ct.). His comments take place in the context of a charge of participating in an immoral theatrical performance. The Crown tendered an audio recording of the relevant performance. Much of the audiotape was inaudible or unintelligible. Vannini J. observed (p. 402):

Although such audible words are interspersed over a 30-minute recording and do not appear to be coherent, it constitutes in my view some evidence upon which the trier of the facts can form a fair and reliable assessment of the substance of the recorded performance to the extent that given a proper warning the trier of fact would not be led into an interpretation unjustifiably adverse to the defendants. Further, upon a playing of the recording on the trial the trier of the facts may be able to discern more than was discernible to me on its playing on the voir dire. In other words, it may be of assistance to the trier of the facts in providing evidence on the issues in the case.

[78] The issue of audibility must be considered on two levels:

1. Threshold audibility. The conversation on the tape must be sufficiently audible that it can provide a meaningful foundation for the jury's consideration of the conversation that it purports to record. If the context of the two portions of the conversation which the Crown seeks to emphasize is to be provided by the tape recording alone, the contextual portion must also be sufficiently audible to provide an adequate foundation for the jury's consideration of those two portions.
2. Probative value versus prejudicial effect.

Threshold Audibility

[79] The inaudible portions of the tape recording of the tab 5 conversation exceed, in length, the audible portions. The transcript reproduced above, however, is substantially verifiable from repeated listening to the tape recording with the use of earphones. That, in my view, is sufficient to satisfy the requirements of threshold audibility.

Context

[80] The tape recording is sufficiently audible to provide a context for the two portions of the conversation that the Crown seeks to emphasize. Mr. Pritchard is clearly engaged in an emotional conversation with his common law wife. The conversation could clearly be found to be a reaction to the police investigation into the disappearance of Mrs. Skolos. The tone and content of the conversation, in light of the preceding events of the day provide a contextual foundation upon which a jury could reasonably infer meaning to the two portions of conversation overheard by Officer Paulson and focussed on by the Crown in the recording.

[81] In the course of submissions, counsel expressed differences of opinion about some portions of the conversation that the transcript attempts to capture. That does not make the transcript inadmissible. There is sufficient audible conversation to provide a basis for the jury to draw rational conclusions about the accuracy of the transcript. The transcript will be useful to the jury in that process.

- [82] The audible conversation may well provide a useful foundation upon which the jury can measure Mr. Pritchard's later contention that, at the time the conversation took place, he was protecting Bill Wall, the real murderer, from exposure. The Crown submits that the audible conversation is inconsistent with Mr. Pritchard's January 19, 2000 version of events.
- [83] It will be necessary to provide a careful instruction to the jury concerning the use they can make of the evidence. The instruction could take the following form:

Warning -- intercepted conversation -- tab 5

You have heard the evidence of Officer Paulson that a conversation that took place at the residence shared by Mr. Pritchard and Ms. Hardy was intercepted and recorded.

You will now hear the recording of that conversation. The recording is of poor quality and much of it is indecipherable.

You will have the transcript of the conversation to assist you in determining what is said on the recording.

I want to make it very clear that it is the recording that is the evidence, not the transcript. You should listen very carefully to the recording and critically examine the transcript. You may well conclude that what was said is different than what appears in the transcript. If so, you should rely on what you conclude was said on the recording -- not on the transcript. If the transcript records words that you cannot make out you should disregard the words on the transcript. You should be conscious of the fact that you may be persuaded by the transcript to conclude that you hear words that you cannot really make out. You must not fall into that trap. Only the words that you can hear on the recording can be evidence that you may take into account. What I have said about the words on the transcript applies as well to the identification of the speakers on the transcript. Obviously, you do not have a familiarity with the voices on the tape and will have to rely on what Officer Paulson says about identification of the voices but you should not simply accept his evidence uncritically. Listen carefully to the tapes and determine whether he has been accurate in his attribution of the words.

There will be many words that you cannot make out. You must not speculate on what those words were from other evidence in the case. If the words are missing, they just remain that -- they are missing words.

You must decide whether the words that you do make out constitute a complete sentence or a complete expression. If you decide that the conversation is incomplete and is potentially capable of more than one meaning, you should disregard it. It would be dangerous for you to give meaning to incomplete conversations. There is a great danger that you could give meaning to a phrase bracketed by unintelligible sounds that could give the phrase other meanings. You must be conscious of that danger when you determine what significance you attach to the recording.

After the recording has been played

I want to give you a specific warning about the words "I mean I shot two fuckin people". Those words appear on the transcript. You may or may not have heard them on the recording. If you did, you may be tempted to draw from them an inference that Mr. Pritchard is admitting to the Skolos killing. That would be a dangerous and improper inference and because the recording is so indistinct in so many crucial parts, it is an inference that you must not draw. This recording is not relevant to that issue. The issues upon which you should consider the recordings are: (1) the truthfulness of Mr. Pritchard's statement to the police on January 19, 2000 and (2) whether Mr. Pritchard's version of events given on January 19, 2000 was fabricated.

4. December 12, 1996 conversation at the Pritchard/Hardy residence (Tab 6)

[84] This is a conversation between Mr. Pritchard, Mr. Wall and Ms. Hardy at 10:10 p.m.

Edit number 1 should be made to take out a statement made by Bill Wall that he was not the person who killed Pirkko Skolos.

Edit number 2 is a statement by Ms. Hardy that she will shoot Mr. Skolos if he comes to the house. It should be deleted. It is prejudicial and not probative.

Edit number 3 concerns statements made by Mr. Wall about the police having to kill Mr. Pritchard. Mr. Pritchard's participation in the conversation is inaudible. This portion of the conversation should be removed. Its probative value is greatly weakened by the inaudibility of Pritchard's participation. Its prejudicial effect outweighs its probative value.

Edit number 4 concerns a statement by Mr. Pritchard "They knock on the door here, I'm goin for my rifle". This statement should be removed.

Edit number 5 relates to the Horbas murder. It should be taken out. Ms. Hardy's statement preceding Mr. Wall's mention of the Horbas murder should remain.

5. December 10, 1996 conversation at the Pritchard/Hardy residence (Tab 7)

[85] This conversation predates the preceding four conversations by two days. It commenced at 10:33 p.m. The relevance that the Crown attributes to the conversation is that it may indicate that Mr. Pritchard is engaged in gathering information about the police knowledge of his behaviour. The Crown also asserts that the conversation is inconsistent with Mr. Pritchard's January 19, 2000 version of events.

Edit number 1 relates to a statement by Ms. Hardy "They haven't got fuckin close, they have got anything close". It indicates the nature of her participation in the conversation. It is not prejudicial to Mr. Pritchard. It should remain.

Edit number 2 relates to a comment by Ms. Hardy that she wanted to kill Ms. McCarthy. This is part of the tone of the conversation. It is not prejudicial to Mr. Pritchard. It should remain.

Edit number 3 concerns a short conversation about money-laundering. This highlights Pritchard's criminality but is not necessary to an appreciation of the flow of the conversation. It should be removed.

Edit number 4 is a conversation about how many people the police say that Mr. Pritchard has killed (3). It is prejudicial and has little or no probative value. It should be removed.

Edit numbers 5 and 6 deal with trapping an individual who had "ratted" on Mr. Pritchard with a false story about a handgun. It deals with another crime. It should be taken out unless the Crown calls other evidence at trial that would give it relevance.

6. December 14, 1996 monitored conversation in the cell block of the Prince George R.C.M.P. Detachment (Tab 8)

[86] Part of this conversation deals with Mr. Pritchard's statement to Officer Paulson that he will kill every cop that comes near him if his children get hurt. It is not probative with respect to an issue in the case. It is prejudicial. That portion of the conversation should be removed.

7. March 19, 1998 statement taken from Mr. Pritchard by Officer Paulson and Sgt. Blair at the Matsqui Institution (Tab 9)

[87] The relevance that the Crown claims for this conversation is that it is necessary for the jury to evaluate the likelihood that Mr. Pritchard would say the things that he said in this statement if the version of events he provided to the R.C.M.P. on January 19, 2000 was true and not fabricated.

Edit numbers 1 and 2 consist of statements made by Officer Paulson about the gravity with which police make decisions to lay charges and the definition of first degree murder. Although it forms part of the background against which the statement is taken it amounts to Officer Paulson setting out the law and R.C.M.P. procedure. The defence strongly objects to it being placed before the jury. It is weakly probative and may be prejudicial. These portions should be excised.

Edit number 3 concerns sparring between Officer Paulson and Mr. Pritchard. It should remain.

Edit number 4 concerns the Horbas murder. It should be removed.

Edit number 5 deals with Mr. Pritchard's explanation of the conversation between him and Ms. Hardy (Tab 5). That conversation has already been ruled admissible. This portion of the statement should not be excised.

Edit number 6 is simply part of the interrogation. It should remain.

Edit number 7 concerns a statement by Sgt. Blair concerning the safety of Mr. Pritchard's children during a period when he was, in the words of Sgt. Blair "losing it". It has no probative value. It may be prejudicial. One of the tasks of the jury will be to assess Mr. Pritchard's state of mind at the time to which Sgt. Blair refers. It should be removed.

Edit numbers 8 and 9 display the nature of the exchange between Mr. Pritchard and the police officers during the course of the interrogation. Their probative value outweighs their prejudicial effect. They should remain.

8. April 17, 18 and 19, 1998 portions of conversation intercepted in the cell block of the Smithers R.C.M.P. Detachment during the time that Cpl. Rennick, in an undercover capacity, shared a cell with Mr. Pritchard (Tab 10)

[88] Parts of these conversations have been ruled to be inadmissible because they were induced by Cpl. Rennick or by Sgt. Blair. The Crown contends that various parts of the conversations will be relevant to the jury's determination about whether the January 19, 2000 version of events offered by Mr. Pritchard is untrue and fabricated.

Edit numbers 1 and 2 are to be excised. The Crown and defence agree.

Edit number 3 concerns the breaking of Ms. McCarthy's leg. This should be excised unless it is made relevant by other evidence at trial. One portion refers to Mr. Pritchard's belief that Cpl. Rennick is not a policeman. That should not be excised. Accordingly, the first five lines on p. 23 should remain.

Edit number 4 relates to statements by Mr. Pritchard that have a violent and racist overtone and are not rationally connected with the events of this case. They should be excised.

Edit number 5 consists of statements by Mr. Pritchard bragging about his fearlessness and violent abilities. These contrast with his stated fear of Mr. Wall and are therefore relevant. They should remain.

Edit number 6 consists of Mr. Pritchard discussing his analysis of his case. It has strong probative value that outweighs its prejudicial effect. It should remain.

Edit numbers 7 and 8 refer to the Horbas murder and a polygraph test. These portions should be excised. The edit should go farther than identified by the defence. It should include all of p. 50 and the first 12 lines of text on p. 51.

Edit numbers 9 to 13 consist of references to the Horbas murder and other crimes. These portions should be excised. Edit number 13 should consist of removing only the words: "(indec) they want me to plead guilty to two second degree murders, fuckin break."

Edit number 14 refers to an altercation between Mr. Pritchard and Ms. McCarthy. This should be excised. It may be made relevant by other evidence at trial.

Edit numbers 15 and 16 refer to the Horbas murder and should be excised.

Edit number 17 refers in part to the Horbas murder. The balance of that edit is to be made by consent.

GENERAL JURISDICTION TO EXCLUDE EVIDENCE

[89] I turn now to my general jurisdiction to exclude evidence on the basis that it will render the trial unfair: *Harrer v. The Queen* (1996), 101 C.C.C. (3d) 193 (S.C.C.). I am satisfied that the trial will not be rendered unfair by the Crown leading the body of evidence contained in the admissible portions of the statements to demonstrate Mr. Pritchard's participation in the Skolos robbery (the inculpatory parts of the January 19 statement). Similarly, the trial will not be rendered unfair by the Crown placing in evidence the conversations and statements generally as a foundation for the allegation that the exculpatory parts of the January 19 statement are fabricated. One view of that body of evidence could support the inferences sought by the Crown. The Crown is entitled to have it before the jury. For the reasons given earlier, I am satisfied that it would not be unfairly prejudicial to Mr. Pritchard to have the evidence before the jury.

"B.M. Preston, J."

The Honourable Mr. Justice B.M. Preston

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Prepared on 29 October 2026 · Esheria