In the Court of Appeal of Alberta

Citation: R. v. Grandinetti, 2003 ABCA 307

Date: 20031031
Docket: 0003-0179-A4
Registry: Edmonton

2003 ABCA 307 (CanLII)

Between:

Her Majesty the Queen

Respondent

- and -

Cory Howard Grandinetti

Appellant (Accused)

The Court:

The Honourable Mr. Justice Côté
The Honourable Madam Justice Conrad
The Honourable Madam Justice McFadyen

Reasons for Judgment Reserved of The Honourable Madam Justice McFadyen
Concurred in by The Honourable Mr. Justice Côté
Dissenting Reasons for Judgment of The Honourable Madam Justice Conrad

Appeal from the Conviction of
The Honourable Madam Justice E. M. Nash
Dated the 19th day of April, 2000
Sitting with a Jury
(Docket: 9803-2644-C5)

Reasons for Judgment of
The Honourable Madam Justice McFadyen

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I. INTRODUCTION

[1] Following a trial by judge and jury, the appellant was convicted of the first degree murder of his aunt, Connie Francis Grandinetti, whose body was found lying in a ditch. The victim had been shot in the back of the head at close range. The Crown's case was based on motive (the victim was causing trouble for the family and specifically, her ex-husband, Jeff Grandinetti, the appellant's uncle), opportunity (the appellant was the last person to see the victim alive), confessions made to three friends, and confessions to four undercover police officers. The appellant testified at trial and denied committing the offence. He also denied confessing to his friends, and explained his confessions to the undercover officers as lies.

[2] The grounds of appeal concern several *voir dire* rulings in which evidence, including confessions and inculpatory statements, was admitted or excluded. The appellant also relied on alleged abuse of process and *Charter* rights violations.

II. FACTS

[3] In July 1996, Connie Grandinetti hired a lawyer to enforce payment of child support from Jeff Grandinetti. On January 15, 1997, her lawyer applied to the court for arrears of $12,000 plus ongoing child support of $1,000 per month. The parties were unable to reach a settlement.

[4] At the end of February 1997, Jeff Grandinetti borrowed $10,000 from a friend. Jeff requested the money in cash and travelled from Edmonton to Calgary to collect the money. Jeff's friend obtained the money through his personal line of credit. There was no paper trail linking Jeff Grandinetti to the money.

[5] The appellant's ex-girlfriend testified that in March 1997 the appellant told her that Jeff Grandinetti wanted Connie killed. The appellant told his ex-girlfriend that Jeff had obtained the money and he, the appellant, was going to kill Connie with an overdose of heroin.

[6] The appellant took the bus from Edmonton to Calgary on April 4, 1997. He had two vials of pure heroin with him. The friend who dropped him off at the bus depot testified he saw the barrel of a gun in the appellant's duffle bag. The child support action between Jeff and Connie was scheduled to proceed on this date but was adjourned to April 18, 1997.

[7] On the evening of April 9, 1997, the appellant was still in Calgary. He borrowed his grandfather's truck, and told his grandfather he was going to visit his Aunt Diane. Instead, however, he picked up Connie in front of her apartment building at approximately 8:00 p.m. This was the last time Connie's sons saw her alive.

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[8] The body of Connie Grandinetti was found in a ditch outside Fort Saskatchewan on April 10, 1997 after being spotted by passing motorists. She had been shot twice in the back of the head at close range.

[9] Police had some circumstantial evidence linking the appellant to Connie Grandinetti's death and he became the principal suspect. In July 1997, the R.C.M.P. commenced an undercover operation in order to obtain additional evidence. A number of police officers posed as members of a criminal organization in an attempt to win the appellant's confidence. The main players in the undercover operation were Corporal Rennick (a.k.a. "Dan"), Constable Pearce (a.k.a. "Mac"), Constable Peter (a.k.a. "Todd"), Constable Johnston (a.k.a. "Zeus") and Constable Doran (a.k.a. "Woody"). Other police officers made cameo appearances during the five-month period of the undercover operation. Mac was the head of the criminal organization and the other members of the organization took their orders from him.

[10] The undercover officers obtained the appellant's trust and engaged him in various criminal activities, including money laundering, theft, receiving illegal firearms and drug dealing. The officers also encouraged the appellant to talk about the death of Connie Grandinetti and his role in her murder. They convinced him that in order to protect their organization from police interference, they needed to ensure that none of the members were under any kind of police investigation. To satisfy the officers that he was not going to be arrested for Connie Grandinetti's murder, the appellant confessed that he was involved and provided the officers with the details of the murder. He took them to the location where Connie Grandinetti was killed.

[11] The appellant was arrested and convicted of first degree murder after a jury trial. He appeals his conviction on a number of grounds. As noted above, the grounds of appeal mainly concern *voir dire* rulings in which the trial judge found the defence had failed to meet legal or evidentiary burdens. These rulings ultimately resulted in certain evidence, including confessions and inculpatory statements, being excluded or included, and concerned alleged abuse of process and *Charter* rights violations.

III. ANALYSIS

Admissibility of statements to undercover police officers

[12] Undercover police officers pretending to be members of a criminal organization successfully recruited the appellant to join their organization. On the pretext that they needed to ensure that none of the organization's members had ongoing problems with the authorities, the undercover police officers asked the appellant to disclose details of his participation in the murder of Connie Grandinetti. In an effort to persuade the appellant that their boss had the ability to steer the investigation into Connie's death away from the appellant, the undercover officers told the appellant that certain police officers, including the investigating officer in his case, were employed and controlled by the criminal organization. They convinced the appellant these police officers were

providing information to the criminal organization and assisting in the destruction of evidence. The appellant believed that Mac, the boss, had control over certain police officers and had sufficient control over police activities to ensure that witnesses disappeared, that physical evidence required by the prosecution disappeared and that sites used by the organization for transfer of contraband would not be under police surveillance.

[13] The learned trial judge held that "person in authority" does not include a person capable of controlling activities of corrupt police officers who would act illegally and thus influence the prosecution. She stated at A.B. 886, lines 30-41:

> In my view, not only the cases, but reason and common sense [dictate] that when the cases speak of a person in authority as one who is capable of controlling or influencing the course of the proceedings, it is from the perspective of someone who is involved in the investigation, the apprehension and prosecution of a criminal offense resulting in a conviction, an agent of the police or someone working in collaboration with the police. It does not include someone who seeks to sabotage the investigation or steer the investigation away from a suspect that the state was investigating.

[14] The appellant said that the learned trial judge erred in law in making this ruling and erred in not holding a full *voir dire* before deciding the "person in authority" issue.

[15] The Crown submitted that the learned trial judge correctly decided that in law, a person in authority is a person who is acting in furtherance of state interests, and does not include persons who control activities of corrupt police officers acting in the interests of a criminal organization and not in the interests of the prosecution. A *voir dire* was therefore unnecessary.

[16] I agree with the trial judge's statement of the law. The parties did not provide any authority which deals directly with the question and I have not been able to find any. However, the law relating to admissibility of confessions is based on an accused's subjective belief that the prosecution of his case may be affected by the giving of a statement. The question is whether an accused reasonably believes that he is speaking to someone who is acting on behalf of the state and who has authority to affect his prosecution. His belief that the person to whom he is speaking has control over individual corrupt police officers who, on the instructions of a criminal organization, may act contrary to their duty in sabotaging an investigation, does not satisfy the definition of "person in authority".

[17] The connection to state interests is at the very foundation of the law relating to admissibility of confessions. Such a connection does not exist in the latter scenario where the police do not control the recipient of the statement. Rather, the recipient holds out that he has power to control the actions of certain police officers. In the absence of some evidence the appellant believed he was confessing

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to a person in authority, the trial judge was under no obligation to hold a *voir dire* on the issue of voluntariness.

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Person in authority

[18] The leading authority on the admissibility of confessions to persons in authority is ***R. v. Hodgson***, [1998] 2 S.C.R. 449. Cory J., writing for the majority, conducted an extensive and complete review of the law relating to the admissibility of confessions. It is therefore unnecessary to go behind this decision.

[19] In ***Hodgson***, Cory J. held that the factor which determined admissibility of a statement to a person in authority was that of voluntariness, defined as a statement made without "fear of prejudice or hope of advantage". The prejudice or advantage refers to the conduct of the prosecution by state authorities. At para. 24, Cory J. emphasized that the voluntariness rule targets the prosecutorial authority of the state undertaken *on behalf of the state*.

> For this reason, the person in authority requirement is properly seen as an integral component of the confessions rule. The emphasis on voluntariness has two main effects: it both avoids the unfairness of a conviction based on a confession that might be unreliable, and has a deterrent effect on the use of coercive tactics. This deterrent effect is properly focused upon the prosecutorial authority of the state, not the personal authority of private individuals. ... In other words, it is the fear of reprisal or hope of leniency that persons in authority may hold out and **which is associated with their official status** that may render a statement involuntary. The rule is generally not concerned with conversations between private citizens that might indicate guilt, as these conversations would not be influenced or affected by the coercive power of the state. This limitation is appropriate since most criminal investigations are undertaken by the state, and it is then that an accused is most vulnerable to state coercion. (emphasis added)

[20] The Supreme Court of Canada was invited in ***Hodgson*** to eliminate the "person in authority" requirement and subject all statements to the voluntariness rule, including those made to private citizens. The Supreme Court declined to do so (at para. 29).

[21] At para. 32, Cory J. further discussed the definition of "person in authority" and again emphasized the relevance which attaches to the accused's belief as to the status of the person to whom he was speaking. Although a "person in authority" typically refers to persons formally involved in the arrest, detention, examination or prosecution of the accused, it may also take on a broader meaning. Cory J. adopted the definition set out by McIntyre J.A. (as he then was) in ***R. v. Berger*** (1975), 27 C.C.C. (2d) 357 at 385-86 (B.C.C.A.):

> The law is settled that a person in authority is a person concerned with the prosecution who, in the opinion of the accused, can influence the course of the prosecution. The test to be applied in deciding whether statements made to persons connected in such a way with the prosecution are voluntary is subjective. In other words what did the accused think? Whom did he think he was talking to? ... Was he under the impression that the failure to speak to this person, because of his power to influence the prosecution, would result in prejudice or did he think that a statement would draw some benefit or reward? If his mind was free of such impressions the person receiving this statement would not be considered a person in authority and the statement would be admissible. (***Hodgson*** at para. 33)

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[22] Mere authority over an accused is not sufficient to establish that the receiver was a person in authority. Rather, the accused must believe that the receiver is allied with the state authorities and has the authority to influence the investigation or prosecution against the accused: ***Hodgson*** at paras. 34-35; ***R. v. Rothman***, [1981] 1 S.C.R. 640 at 664.

[23] In discussing the need to hold a *voir dire*, Cory J. again emphasized the requirement for state interest.

> Specifically, the trial judge must be satisfied that if the accused had been aware of the connection between the receiver of the statement and the authorities, the accused could reasonably believe the receiver was acting as an agent of the police or prosecuting authorities or as part of the prosecution team and was therefore capable of influencing the prosecution against him or her. If the evidence establishes this sort of connection, the trial judge should inquire whether the defence is prepared to discharge its evidential burden on the person in authority issue or whether it waives a *voir dire* on this issue. Thus, evidence of close association with the authorities might provide an entry to the *voir dire* procedure but the inquiry on the *voir dire* will still focus on an analysis to determine whether the receiver of the statement, assessed from the point of view of the accused, is a person in authority and ultimately whether the statement was made voluntarily. (***Hodgson*** at para. 46)

[24] The key question is whether the appellant believed that the recipients were acting as agents of the police and under their control. He clearly did not. Rather, the appellant believed that he was dealing with members of a criminal organization, which he voluntarily joined, who might be able to assist him through their control of corrupt police officers acting outside their lawful duties. At no time did he suggest that he believed the members of the organization were acting on behalf of the police and could influence the prosecution as agents of the police.

Requirement for a *voir dire*

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[25] The test set out by Cory J. for holding a *voir dire* must be distinguished from the test applicable on the *voir dire* proper. The former is assessed by an appellate court's objective review of the evidence on the record to determine whether something should have triggered the trial judge's obligation to conduct an inquiry. The latter requires the trial judge "to undertake an examination of the reasonable belief of the accused and the circumstances surrounding the making of the statement to determine both whether the receiver is a person in authority and whether the statement was made voluntarily": *Ibid.* at para. 41. If there is no evidence going to the "person in authority" issue, the obligation to hold a *voir dire* is not triggered.

Did the trial judge err in declining to hold a *voir dire*?

[26] The trial judge correctly decided that the evidence presented was insufficient to require the holding of a *voir dire* because the definition of "person in authority" does not include those who act under the control of a criminal organization. The extended definition applies only to persons who act as agents of the Crown and on its behalf. The learned trial judge correctly decided that the obligation to hold a *voir dire* was not triggered since, on the evidence presented by the appellant, the receivers of the statement could not be considered persons in authority.

Caution or warning to the jury

[27] Should the trial judge have cautioned the jury in accordance with the *obiter* comments of Cory J. in ***Hodgson***? This issue was not argued before this Court, nor was the necessity for such a caution or warning raised at trial. I do not find it necessary to decide whether in some circumstances the trial judge should warn the jury that a statement to a person who is not a person in authority should be viewed with caution, because oppressive circumstances could affect the weight of the evidence. This issue goes beyond the confines of this appeal. Cory J. spoke of evidence of inhuman or degrading treatment or violence or threats of violence sufficient to give an air of reality to the argument that the statement may not be "the manifestation of the exercise of a free will to confess": *Ibid*. at para. 30. For reasons which are set out in detail in the analysis of the abuse of process issue which follows, there is no air of reality to such an allegation here.

Abuse of process

[28] At trial, the defence conceded that for the first five months of the undercover operation, there existed between the appellant and the undercover police officers a growing friendship and camaraderie. It was argued, however, that once the police realized their amicable approach was not working, they engaged in conduct and investigative techniques that violated the rights of the appellant and constituted an abuse of process. On this basis, the appellant sought a judicial stay of proceedings or an exclusion of the evidence elicited during the undercover operation.

[29] The evidence supports the submission that the nature of the relationship between the appellant and the undercover officers changed in early November 1997. The trial judge found that

the questioning became more heated, more aggressive and more persistent (A.B. 1177, lines 45-46). She concluded, however, that within the context of the relationship that the appellant had already established with the undercover officers and members of the criminal organization over the preceding five months, the conduct of the police was not oppressive or intimidating and did not constitute an abuse of process (A.B. 1177, line 47 to A.B. 1178, line 5).

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Test for abuse of process

[30] In ***R. v. O'Connor***, [1995] 4 S.C.R. 411, the Supreme Court confirmed that the common law doctrine of abuse of process has been subsumed by the rights protected by the *Charter*, but that the test for establishing such an abuse has remained the same. Citing the common law decisions in ***R. v. Jewitt***, [1985] 2 S.C.R. 128 and ***R. v. Young*** (1984), 40 C.R. (3d) 289 (Ont. C.A.), L'Heureux-Dubé J., for the majority, relied on the standard formulation of the test for abuse of process:

> ... there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive and vexatious proceedings.
>
> (***O'Connor*** at para. 59, emphasis in original)

[31] L'Heureux-Dubé J. also confirmed that while a stay of proceedings pursuant to the *Charter* will still only be granted in "the clearest of cases", there is an advantage of dovetailing the common law doctrine with *Charter* protection. Section 24(1) of the *Charter* allows the Court to grant a less drastic remedy where the "clearest of cases" threshold has not been met but where the accused is able to prove, on a balance of probabilities, that his *Charter* rights have been infringed by an abuse of process (*Ibid*. at paras. 68-69).

[32] Justice L'Heureux-Dubé noted that the common law doctrine of abuse of process has been applied in a variety of different circumstances involving state conduct and that a number of *Charter* guarantees may be engaged by the protection against abuse of process. She found that there is a residual category of conduct caught by s. 7 of the *Charter* which would be engaged in any circumstance "in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (*Ibid*. at para. 73).

[33] Most recently, in ***R. v. Regan***, [2002] 1 S.C.R. 297, the Supreme Court confirmed that ***O'Connor*** provided the seminal discussion of abuse of process. LeBel J., writing for the majority, went on to discuss some elements of abuse of process that the Supreme Court has highlighted since ***O'Connor***. First, citing ***Blencoe v. British Columbia (Human Rights Commission)***, [2000] 2 S.C.R. 307, he confirmed that "abuse of process has a necessary causal element: the abuse 'must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected'" (***Regan*** at para. 52). Second, relying on ***Canada (Minister of Citizenship and***

Immigration) v. Tobiass, [1997] 3 S.C.R. 391, LeBel J. confirmed that "a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future" (***Regan*** at para. 54).

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[34] While the Supreme Court of Canada has not examined the issue of abuse of process in the context of undercover police investigations, both the British Columbia and Manitoba Courts of Appeal have done so. In ***R. v. Unger*** (1993), 83 C.C.C. (3d) 228 (Man. C.A.), two accused were charged with first degree murder. As most of the evidence against Unger, one of the accused, was from a statement of his co-accused, the Crown stayed the charge and the police conducted an undercover operation aimed at gaining additional evidence. Like the present case, the police posed as members of a criminal organization. They told the accused they would consider allowing him to enter their ranks if they found him to be trustworthy. Over a period of time, the accused confessed to the killing, providing details of the crime. On appeal, the accused claimed that the police had employed "dirty tricks" in gaining the inculpatory statements. The Court rejected the argument, relying on the "community shock" test and making a distinction between "tricks" and "dirty tricks".

[35] The "community shock" test was first referred to by Lamer J., in concurring reasons, in ***Rothman***, *supra*. At 697, he stated:

> It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the [confessions] rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.

[36] The distinction between mere tricks and dirty tricks was addressed by Lamer J., for the majority, in ***R. v. Collins***, [1987] 1 S.C.R. 265. He held at 286-87 that voluntary statements should only be excluded when police resort to dirty tricks, those which shock the community. He concluded that the threshold is very high – higher than "that to be attained to bring the administration of justice into disrepute in the context of a violation of the *Charter*" (at 287).

[37] In ***Unger***, the Court went on to hold that courts should not be setting public policy on the parameters of undercover operations. In addition, at 249, the Court approved the trial judge's comments that the conduct of the undercover officers, while outside standard procedures, was necessary, given the lack of hard evidence and the need to investigate a very brutal crime.

> I find it difficult to accept that a reasonable dispassionate person, aware of the difficulties in the investigation of the case, would consider the undercover operation and use of tricks by the officers, as being unfair or so unacceptable, indecent, and

> outrageous, that the evidence that was derived from that operation, if admitted as evidence in the trial of the accused, could bring the administration of justice into disrepute.

[38] In ***R. v. Roberts*** (1997), 90 B.C.A.C. 213, the police suspected the accused of having murdered his wife and twin sons and having set their house on fire to destroy the evidence. The police commenced an undercover operation in which they posed as members of a criminal organization and befriended the accused by appealing to his desire to make quick money through criminal activity. During the course of the investigation, one of the undercover officers expressed concern that Roberts knew enough about his fictional criminal activity to 'put him away', while the officer knew very little about Roberts. To deal with the officer's concern, Roberts admitted having killed his wife and children and provided details about the murders.

[39] The defence argued at trial and on appeal that the investigation was an abuse of process and a violation of the accused's s. 7 *Charter* rights. Hall J.A., writing for the Court, dismissed the appeal. He quoted Scollin J. of the Manitoba Court of Queen's Bench in ***R. v. Skinner*** (1992), 84 Man. R. (2d) 223 at 231:

> The difference between the unpalatable and the inedible is generally a matter of personal taste. Absent "dirty tricks", the courts should not set themselves up as the arbiters of good taste or of the preferred methods of investigation. It is unrealistic to demand chivalry from those who must investigate what are often heinous offences against blameless victims. The law should not appear to materialize as a revolutionary rabbit from a judicial magician's hat. Both the common law and the ***Charter*** justly preserve the accused from coercion and endow him with specific rights which he may exercise at the time of his arrest and while he is in custody; but the courts should not be so indulgent as to preserve the accused from himself and his own untrammeled tongue, and should require realistic justification for suppressing facts from the jury which go to weight rather than to admissibility.
>
> (***Roberts*** at para. 14, emphasis added in ***Roberts***)

[40] The Court concluded that a reasonable, well-informed member of the community would not be shocked by the police conduct but rather would "unhesitatingly endorse it". In finding that there was no abuse of process or breach of s. 7 of the *Charter*, Hall J.A. stated at para. 15:

> In the case at bar, the police put on a good show, the appellant fell for it and "his own untrammeled tongue" did him in.

[41] In ***United States of America v. Burns*** (1997), 117 C.C.C. (3d) 454 (B.C.C.A.), (application for leave to appeal and for reconsideration dismissed, [1997] S.C.C.A. No. 515), the Court dismissed an appeal against a committal order pursuant to the *Extradition Act* for the two accused charged with

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three counts of aggravated first degree murder in Washington State. An undercover operation to assist the U.S. police was commenced in B.C., where the two accused resided. The police posed as members of a criminal organization, befriended the accused and offered them opportunities to make large amounts of money with the organization. Operating on the issue of trust between members of the group, the undercover officers were able to elicit statements and details that confirmed the accused had committed the murders. Citing ***Roberts*** and ***Unger***, the Court rejected the contention that the undercover operation was an abuse of process.

[42] The need to balance police "misconduct" or trickery with the interests of society in effective prosecution of criminals was referred to by the Ontario Court of Appeal in ***R. v. Jageshur*** (2002), 169 C.C.C. (3d) 225 at para. 19:

> The ultimate question is not legality, but whether the police conduct was sufficiently egregious so as to shock the conscience of the community and demand that the court not lend its process to a prosecution flowing from such conduct. This inquiry demands not only a qualitative assessment of the nature of the misconduct, but also a consideration of the societal interests served by allowing the prosecution to proceed despite the police misconduct: *R. v. O'Connor*, *supra*, at p. 38; *R. v. Shirose* [(1999), 133 C.C.C. (3d) 257 (S.C.C.)] at p. 285.

In ***Jageshur***, the Court held that a reverse sting operation, in which an undercover officer sold drugs to the accused, did not constitute an abuse of process.

Did the trial judge err in finding the police conduct did not constitute an abuse of process?

[43] The appellant testified that by the end of October 1997, he had established a friendship with the undercover officers. By that time, he was willing to do whatever the organization asked in order to make money. Although he became "concerned" when the aggressiveness increased, he did not indicate that he was afraid or that he felt threatened. He had no intention of leaving the organization because he wanted the money (A.B. 1161, lines 5-16).

[44] After reviewing the evidence, including video and audio tapes of the appellant interacting with several of the undercover officers, the trial judge found that the appellant's demeanour and responses during exchanges with the undercover officers, specifically Constable Doran and Constable Pearce, were inconsistent with the suggestion that he was intimidated or afraid (A.B. 1162, lines 3-7). The trial judge found, on the evidence, that the appellant was an able adversary even in the face of persistent, aggressive questioning and that there was no coercive, oppressive or threatening police conduct (A.B. 1162, lines 13-36; A.B. 1164, lines 25-29; A.B.1165, lines 11-15; A.B. 1168, lines 45-47; A.B. 1170, lines 5-8).

[45] The trial judge correctly stated the law relating to abuse of process and found on the evidence that the police conduct was not oppressive, intimidating or abusive. She borrowed from the words

of Hall J.A. in ***Roberts*** that "the police put on a good show" (at para. 15). She concluded that the appellant fell for it and "'his own untrammeled tongue' did him in" (Scollin J. in ***Skinner***, quoted in ***Roberts***.). Her analysis of the law and consideration of the evidence were careful and extensive. Her decision that the police conduct did not constitute an abuse of process or violate the accused's s. 7 *Charter* rights is beyond reproach.

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Right to silence

[46] The defence also argued that the appellant felt that he could not leave the organization if he wanted to and that he was caught in a "web of fear and oppression designed to overcome and which did overcome his will not to answer questions" concerning his involvement in the murder (Appellant's Factum at 11). The appellant claimed that the undercover officers convinced him that he could not walk away from the organization without risking death. The defence claimed the appellant was, as a result, a "psychological captive" and that "within that psychological captivity the police elicited statements" in violation of the appellant's s. 7 *Charter* right to silence (*Ibid*. at 14).

[47] The trial judge found that the right to silence did not arise because the appellant was not psychologically detained. The defence argued that in so finding, the trial judge erred in misapprehending the nature of the application and the evidence. The appellant claimed that the trial judge focussed too narrowly on the physical freedom that he enjoyed during the course of the investigation.

Psychological detention

[48] The Supreme Court of Canada has decided that a person may be detained although not under formal arrest: ***R. v. Therens***, [1985] 1 S.C.R. 613 and ***R. v. Thomsen***, [1988] 1 S.C.R. 640. The leading decision on psychological detention is Le Dain J.'s judgment in ***Therens***. He held at 642 that:

> In addition to the case of deprivation of liberty by physical constraint, there is in my opinion a detention within s. 10 of the *Charter* when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

[49] Justice Le Dain's reasoning is grounded in the fact that citizens do not generally regard compliance with a demand or direction by a police officer as truly voluntary. He held that even where there is a lack of statutory or common law authority for the demand or direction, most citizens are not aware of the precise limits of police authority. Reasonable people, therefore, are likely to err on the side of caution, assume lawful authority and comply with the demand.

> The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist. (***Therens*** at 644)

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[50] In ***Thomsen***, Le Dain J. again addressed the issue of psychological detention. At 649, he reiterated his reasoning in ***Therens*** that a psychological detention occurs "when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence ... . The necessary element of compulsion or coercion ... may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply. ... [It] is not confined to those of such duration as to make the effective use of *habeas corpus* possible."

[51] In this case, neither the police nor an agent of the state had assumed control over the appellant. As admitted by the appellant, he did not believe the undercover officers were police officers. In addition, as discussed above, the undercover officers were not agents of the state *vis-à-vis* the appellant. There was also no criminal liability for the appellant's refusal to comply. As far as the appellant was concerned, the undercover agents were members of a criminal organization. He could not be committing an offence by refusing to comply with their demands.

[52] The purpose of recognizing a psychological detention in ***Therens*** was to address the situation where a citizen feels compelled, even in the absence of a detention through formal arrest or physical restraint, to comply with demands made by a person in an official capacity. It is the response to a police officer or other state agent that is the critical factor. If the person does not have an official capacity, the element of psychological compulsion discussed in ***Therens*** and ***Thomsen*** is not present. The appellant's circumstances in dealing with the undercover officers do not bring him within the category of persons protected by this principle. The alleged psychological detention was properly dealt with under the rubric of abuse of process.

Pre-detention right to silence

[53] The right to silence does not arise in the circumstances of this case. In ***R. v. Hebert***, [1990] 2 S.C.R. 151 and ***R. v. Broyles***, [1991] 3 S.C.R. 595, the Supreme Court confirmed that s. 7 of the *Charter* includes a right to silence. In ***Hebert***, however, McLachlin J. (as she then was) made it clear that the right to silence only arises after detention. She emphasized the fact that the right to silence is aimed at controlling the superior power of the state *vis-à-vis* the individual who has been detained by the state. She stated at 184 that the right to silence does not apply to pre-detention undercover operations.

> ... it applies only after detention. Undercover operations prior to detention do not raise the same considerations. The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the *Charter* extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected.

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[54] This has been confirmed in subsequent cases involving similar facts to the present appeal. In ***R. v. Moore*** (1997), 94 B.C.A.C. 281, the police conducted an undercover operation in order to determine the accused's role in a homicide. An undercover officer approached the accused and convinced the accused he was a member of a criminal organization involved in drug trafficking. The officer and the accused met with a number of other undercover officers posing as members of the organization. The purpose of the meeting was to determine whether the accused ought to be admitted to the group. When the accused expressed reluctance to admit his involvement in the homicide, one of the officers told him that the confession was necessary to prove his trustworthiness. The accused claimed the circumstances were tantamount to a detention because of the alleged degree of control exercised by the police.

[55] In rejecting the accused's argument in ***Moore***, Proudfoot J.A., for the Court, held at para. 19 that:

> There is ample authority for the proposition that inculpatory statements made during an undercover operation prior to detention are not protected by s. 7 (Right to Silence). It is a legitimate investigative technique used by law enforcement agencies.

At para. 20, she also adopted the following submission of Crown counsel:

> Indeed, this court and other provincial appellate courts have recognized the importance of undercover techniques in the pursuit of legitimate law enforcement goals and have given the police considerable latitude in executing such strategies.

[56] In ***Unger***, the accused confessed to undercover officers during a similar undercover operation. He argued that the rationale in ***Hebert*** and ***Broyles*** was broad enough to cover a pre-detention situation. The Court rejected the submission, relying on ***Hebert*** to find that the *Charter* simply did not apply because the accused was not detained at the time he made the impugned statements.

Did the trial judge err in finding no s. 7 "right to silence" violation?

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[57] The trial judge dealt with the issue of the psychological detention. She found that the appellant "chose to become involved in the criminal organization and to participate in criminal activities with the members of the organization". She concluded that the appellant complied with their instructions and demands not "because he felt intimidated, afraid [or] psychologically detained, but because he wanted to ingratiate himself with the organization" (A.B. 1479, lines 15-24). The trial judge also found that the state did not exercise control over the appellant's movements nor did the appellant perceive that the state was exercising such control (*Ibid*. at lines 11-14). She found that there was no detention of the appellant in the circumstances, psychological or otherwise. Her findings are supported by the evidence.

[58] The notion of psychological detention established in ***Therens*** could not apply in these circumstances. There was no exercise of the required element of police or state control over the appellant. The right to silence is only triggered upon detention, and there was no detention. The trial judge did not err in finding that there was no violation of the appellant's right to silence contrary to s. 7 of the *Charter*.

Third Party evidence

[59] The defence argued that the trial judge should have admitted evidence respecting the possibility that a third party might be the killer. The evidence sought to be introduced concerned three circumstances: (1) an incident a year prior to the murder where the third party threatened the victim with a knife after committing a home invasion; (2) the victim agreed to testify against the third party on drug charges; (3) the victim and another inmate attempted to gather information proving the third party was a police informer. The defence submitted that this evidence disclosed a motive, disposition and opportunity and should have been admitted.

[60] The trial judge excluded the evidence because she found there was no admissible evidence tending to connect the third party with the murder (A.B. 2042, lines 13-19). She found that evidence of threats made more than a year before the murder was irrelevant and of no probative value (*Ibid*. at lines 20-23). Evidence about the motive and disposition of the third party was inadmissible because it was hearsay, irrelevant and its prejudicial effect would outweigh its probative value (*Ibid*. at lines 24-44). As there was no evidence connecting the third party with the murder, the evidence going to motive and disposition was not admissible.

Test for admission of third party evidence

[61] The test for the admission of evidence respecting the possibility of a third party killer is set out in ***R. v. McMillan*** (1975), 23 C.C.C. (2d) 160 (Ont. C.A.), aff'd [1977] 2 S.C.R. 824 and ***R. v. Williams*** (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. ref'd [1985] 1 S.C.R. xiv. Martin J.A., for the Court in ***Williams***, set out the test at 366:

> It is beyond question that a person charged with the commission of an offence may adduce evidence tending to show that a third person committed the crime. The disposition of a third person to commit the offence in question is probative and admissible provided that there is other evidence tending to connect the third person with the commission of the offence ... .When it is relevant the disposition of a third person to commit the crime must, of course, be proved by admissible evidence.
> . . .
>
> Where the disposition of a third person is sought to be proved by specific acts, those acts must be proved by admissible evidence and may not be proved by hearsay unless the hearsay evidence proffered falls under one of the exceptions to the rule excluding hearsay evidence.

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[62] Of course, hearsay evidence may also be admissible if it satisfies the requirements of necessity and reliability, as required by the principled approach established in ***R. v. Khan***, [1990] 2 S.C.R. 531 and confirmed in ***R. v. Smith***, [1992] 2 S.C.R. 915 and ***R. v. Finta***, [1994] 1 S.C.R. 701.

Did the trial judge err in excluding the evidence respecting the alleged third party killer?

[63] The trial judge adopted the correct test in determining whether the evidence concerning the disposition of a third person to commit the crime was admissible. She correctly held, relying on ***McMillan*** and ***Williams***, *inter alia*, that such evidence was admissible provided "there is other admissible evidence tending to connect the third person with the commission of the offence" (A.B. 5009, lines 24-30; A.B. 5015, lines 11-38).

[64] The trial judge carefully reviewed and considered the evidence presented on the *voir dire*. She concluded that there was no evidence the third party had the opportunity to commit the murder and there was no evidence of motive (A.B. 5016, lines 19 to 37). The evidence called to establish the requisite connection of the third party was properly found to be speculative, inadmissible hearsay or not probative of the issues. In the absence of admissible evidence tending to connect the third party to the murder, the evidence of disposition sought to be admitted was correctly excluded.

Bad Character evidence

[65] During the course of the undercover operation, the appellant and the undercover officers engaged in various criminal enterprises and had discussions concerning the appellant's criminal history and proclivity. At trial, the defence sought to have certain portions of this evidence excluded as irrelevant and highly prejudicial and, for the admissible evidence, an appropriate limiting charge to the jury.

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[66] The trial judge found that the evidence of criminal conduct was relevant to understanding the investigation and the context within which the conversations with the undercover police officers occurred (A.B. 1722, lines 2-5). She held that although the appellant's willingness to participate in the criminal conduct constituted bad character evidence, it was necessary and relevant to understand the facts (*Ibid*. at lines 5-12). She also held that the evidence was necessary for an understanding of the relationship that had developed between the appellant and the undercover officers and the context in which the appellant confessed (*Ibid*. at lines 15-25). She concluded that its probative value outweighed any prejudicial effect (*Ibid*. at lines 25-26).

[67] However, the trial judge recognized that the jury should be cautioned about the appropriate and limited use to which this evidence could be put (*Ibid*. at lines 27-33). She did caution the jury, immediately before the testimony of the first undercover officer (A.B. 2546, lines 16-37), as well as during the jury charge (A.B. 5340, lines 15-23, lines 31-35).

[68] On appeal, the defence did not pursue the argument that the evidence should not have been admitted. Counsel submitted that the trial judge's caution was not sufficient, having regard to the nature of the evidence and the Crown's address to the jury.

Use of character evidence

[69] The law is clear that character evidence which shows *only* that the accused is the type of person likely to have committed the offence in question is inadmissible. The law is equally clear, however, that evidence of bad character of the accused may be admitted where it is relevant to an issue in the case: ***R. v. G. (S.G.)***, [1997] 2 S.C.R. 716. In ***G. (S.G.)***, Cory J., for the majority, held that "[e]vidence 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" (at para. 64). Such evidence is admissible "as long as its probative value outweighs its prejudicial effect" (at para. 65). It cannot, however, be used to determine guilt simply on the basis that the accused is the type of person to commit the crime (at para. 66). See also ***R. v. B. (F.F.)***, [1993] 1 S.C.R. 697 at 707-709.

[70] In ***G. (S.G.)***, Cory J. held that the trier of fact is entitled to consider bad character evidence in assessing the general credibility of witnesses, including the accused. He held at para. 72 that:

> Provided an appropriate direction is given, it does not materially increase the risk that the accused will be convicted on the basis of her disposition, rather than for committing the acts that are the subject of the charge.

[71] The Supreme Court of Canada expressed similar confidence in the ability of jurors to follow instructions in ***R. v. Corbett***, [1988] 1 S.C.R. 670 at 695. In ***R. v. W. (D.)***, [1991] 1 S.C.R. 742 at 761, Cory J., for the majority, expressed his confidence in the following manner:

> Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions.

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Was the trial judge's charge to the jury sufficient?

[72] Immediately before the testimony of the first undercover officer, the trial judge instructed the jury that the evidence they were about to hear was only part of the narrative. She made it clear that while the evidence would have some bearing on the character and disposition of the appellant, the jury was not to infer from the evidence that the appellant was a person likely to have committed the offence (A.B. 2546, lines 16-37). She repeated her clear instruction concerning the improper use of this evidence in her charge to the jury at the end of the trial.

> You must not, and I stress the word must not infer from this evidence of character and disposition alone that Cory Grandinetti was a person likely to have committed the offence of murder. In other words, you cannot use this evidence or consider this evidence for the purpose of proving that the accused is a person who by reason of his criminal character or propensity is likely to have committed the crime charged.
>
> ... cannot be used as a basis for determining that because of the evidence of bad character the accused is a person likely to have committed the murder of Connie Grandinetti. (A.B. 5340, lines 15-23, lines 32-35)

[73] The trial judge's clear limiting instructions and the timing of these instructions were sufficient to address the risk of the jury drawing the prohibited inference. Combined with the intelligence and competence of the jury and the fact that defence counsel did not take issue with the adequacy of the instruction at trial, there is no reason to interfere.

Were the Crown's references improper?

[74] Although Crown counsel referred to the "character evidence" in closing arguments, he did not invite the jury to infer the appellant's guilt from the fact that the appellant had participated in criminal conduct. Rather, the comments were made within the context of a discussion about motive and the appellant's credibility. They were not improper nor did the defence challenge them as such at the trial.

Expert opinion evidence

[75] At trial, the Crown called an expert witness in firearm and tool marks examination, with specialized training in gunshot residue. He testified that a hair found in the cab of the truck driven by the accused on the night Connie Grandinetti disappeared had gunshot residue on it. He did not conduct the scientific tests himself, however, but instead relied on tests conducted by another scientist to form his opinion. At trial, the defence claimed that because the expert's opinion was

based on hearsay evidence, it should be given no weight and the jury should be instructed accordingly. On appeal, the defence claimed the expert opinion was inadmissible.

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[76] The trial judge held that the opinion was admissible. Since it was based on hearsay, however, and the facts on which it was based were not proven in evidence, she instructed the jury to give the opinion no weight (A.B. 5335, line 44 to A.B. 5336, line 37).

Admissibility and weight of expert opinions

[77] The principles applying to the admission of expert evidence were established by the Supreme Court in ***R. v. Lavallee***, [1990] 1 S.C.R. 852. In that case, the adequacy of the trial judge's charge to the jury with respect to expert evidence was challenged. A psychiatrist had testified about battered woman syndrome. In formulating his opinion, he relied on various sources, including a series of interviews with the appellant and her mother. Since neither the appellant nor her mother testified at trial, the contents of their statements to the psychiatrist were hearsay.

[78] Wilson J. applied the decision on expert evidence in ***R. v. Abbey***, [1982] 2 S.C.R. 24. She distilled its ratio into the following four propositions:

> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.
>
> (***Lavallee*** at 893)

[79] Wilson J. confirmed at 895 that once there is some admissible evidence to establish the foundation for the expert's opinion, the jury is entitled to give it some weight. How much weight it will ultimately be given depends upon the extent to which the expert relies on facts not proved in evidence.

[80] It is clear from the foregoing principles that an expert opinion is admissible, if relevant, even if it is based entirely on hearsay. The expert's opinion is entitled to some weight once there is some admissible evidence to establish the foundation for it. The issue then becomes the weight to attach

to the opinion. If there is no admissible evidence to establish the foundation, it is not entitled to any weight, but the opinion itself is admissible.

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Did the trial judge err in admitting the expert opinion or in her instruction to the jury?

[81] As the Crown submitted on appeal, the manner in which the trial judge dealt with the opinion evidence of the firearms expert was in "perfect compliance" with the principles enunciated in ***Lavallee***. She did not err. In addition, the jury can be trusted to have followed the instruction not to give the opinion any weight.

Allowing the appellant to sit at counsel table

[82] Defence counsel applied to the trial judge to exercise her discretion to permit the appellant to sit with counsel during the trial. He argued that the prisoner's box created a prejudicial appearance and that he required the appellant's assistance during the trial.

[83] The trial judge declined to exercise her discretion. She held that the location of the appellant in the prisoner's dock would not prejudice his right to be presumed innocent since he would be identified throughout the trial as the accused person in any event (A.B. 1717, lines 17-25). She also held that defence counsel would have sufficient access to and assistance from the appellant during court adjournments and it was not, therefore, necessary for the appellant to be seated at the counsel table (*Ibid*. at lines 26-35). In addition, she advised that court would adjourn, if necessary, for defence counsel to consult with the appellant (A.B. 1718, lines 3-5).

Discretion of trial judge

[84] In ***R. v. Faid*** (1981), 61 C.C.C. (2d) 28 (Alta. C.A.), rev'd on other grounds, [1983] 1 S.C.R. 265, this Court held that the seating location of an accused during a trial is a matter solely in the discretion of the trial judge. It was also held that unless the trial judge's exercise of discretion manifestly precluded the accused from making full answer and defence to the charge, that discretion cannot be interfered with (at 40).

Did the trial judge's exercise of discretion prejudice the accused?

[85] The appellant has not established any basis on which it can be concluded he was deprived of a fair trial. The trial judge properly exercised her discretion.

IV. CONCLUSION

[86] The appeal is dismissed.

Appeal heard on October 1, 2002

Reasons filed at Edmonton, Alberta,
this 31st day of October, 2003

_____
McFadyen J.A.

I concur: _____
authorized to sign for: Côté J.A.

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Dissenting Reasons for Judgment of
The Honourable Madam Justice Conrad

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I. INTRODUCTION

[87] On April 10, 1997, Connie Grandinetti's body was found in a ditch outside Fort Saskatchewan. She had been shot twice in the head. After several months of undercover investigation by the police, Cory Grandinetti, the victim's nephew, was arrested and charged with first degree murder. He was convicted by a jury and now appeals his conviction.

II. DISPOSITION

[88] The appellant advances eight grounds of appeal. I would allow the appeal and direct a new trial on two of those grounds.

[89] In my view, the trial judge erred by finding that for purposes of the confessions rule an undercover police officer can never be a person in authority, unless the maker of a statement reasonably perceives that the officer can influence the course of the investigation or prosecution and is acting "to obtain the object of the state". The accused met the threshold burden of making the person in authority a live issue. As a result, a *voir dire* should have been ordered on the issue of voluntariness. I am also satisfied that the trial judge erred by excluding evidence capable of supporting an inference that a third party committed the crime. As I would order a new trial, it is unnecessary to deal with the remaining issues.

III. STANDARD OF REVIEW

[90] The trial judge characterized her decision on the "person in authority" issue as a matter of law. I agree. On that issue, therefore, the trial judge was required to be correct. On the issue of whether to admit the evidence regarding the third party, the trial judge was determining whether certain evidence was admissible and could go to the jury. Generally, the admissibility of evidence in a jury trial is a matter of law and the trial judge must come to the correct conclusion. In *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994), Kerans J.A. observed at 73:

> The concurrence [i.e., correctness] standard generally governs review of decisions both about the interpretation and the application of the rules about the hearing of evidence. I distinguish this, of course, from an assessment of that evidence in terms of its probative force ... .

Thus, on the legal issues involved in her analysis, the trial judge was required to be correct. On the discretionary issues on admissibility, her decisions are owed deference.

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IV. THE "PERSONS IN AUTHORITY" ISSUE

A. BACKGROUND

[91] The appellant was an early suspect in the investigation of Connie Grandinetti's death. There was, however, no physical evidence linking the appellant to the crime. As a result, the police developed a plan to secure admissions from him. Members of the investigating team invented an undercover scenario where several of them posed as members of a criminal organization and enlisted the appellant's help in conducting fake criminal activities. They held themselves out as members of an international crime syndicate from whom the appellant could make hundreds of thousands of dollars. This undercover operation went on for several months and the appellant was encouraged to participate in the syndicate's criminal activities.

[92] Throughout this time, the undercover officers encouraged the appellant to speak about the murder but he steadfastly refused to do so. As the investigation progressed, and the appellant continued to maintain his silence, the friendly tone of the operation changed and the conduct of the undercover officers became more aggressive and intimidating. The appellant said he became concerned he could not leave the organization alive. He testified that he inquired as to whether he could quit the organization and was told he would have to talk to "Mac", the alleged leader and 'heavy' in the undercover set-up criminal organization.

[93] To encourage the appellant to talk, the undercover officers went so far as to assure him that certain members of the police force were also members of their organization and, as a result, they could influence the investigation of his aunt's murder. They even suggested that Steve Marissink, a police officer actually involved in the investigation, fell within their area of influence. To fortify the claim that they could influence the prosecution, the undercover operators gave false examples of how they had previously influenced prosecutions for other members of the organization. They produced photographs implicating one of its members, Dan, in a murder and explained how Mac used his influence with the police to have the charges reduced to aggravated assault.

[94] Ultimately, the appellant made several inculpatory statements – captured by the police on either audio or video tape. This led to his arrest on a charge of first degree murder.

[95] At the beginning of the trial, counsel for the appellant advised the trial judge he would be arguing that any inculpatory statements were not voluntary because they were made to persons in authority and induced by threats or promises. He referred the court to ***R. v. Hodgson***, [1998] 2 S.C.R. 449, [1998] S.C.J. No. 66. In that case, the Supreme Court of Canada held that where the issue of voluntariness is raised, there is an initial burden on the defence to raise some evidence that the statements were made to a person in authority before the ultimate burden shifted to the Crown. Because the court in ***Hodgson*** did not recommend a procedure for dealing with this bifurcated obligation, defence counsel recommended a two-step process. First, the court should hold a *voir dire* where the obligation would be on the defence to introduce some evidence to show that the "persons

in authority" question was a live issue. If the defence was able to meet this evidentiary burden, a second *voir dire* should be held where the burden would shift to the Crown to prove beyond a reasonable doubt that the recipients of the statement were not persons in authority, or, failing this, that the statements were voluntary. The Crown agreed with this procedure. After hearing from counsel, the court proceeded with the first *voir dire.*

[96] The defence called three witnesses to fulfill its evidentiary obligation: Corporal Rennick, Constable Johnston and the appellant. The two police officers gave evidence dealing with the nature and extent of the undercover operation. They testified, among other things, that the criminal organization was purportedly run by Constable Pearce playing the role of "Mac". Corporal Rennick testified that he had posed as a criminal named "Dan", and that part of his role had been to convince the appellant that he had once been charged with murder but that the charge had been reduced to aggravated assault. This was because Mac had been able to retrieve the incriminating photos, and relocate a witness, through his connections in the police department.

[97] The appellant confirmed Constable Rennick's evidence in his own testimony. He testified on the *voir dire* that he had been convinced by this story, and also by other more obvious assurances from Mac, that if he admitted to his aunt's murder, he would be afforded the same treatment with respect to his aunt's murder investigation. The trial judge noted, in particular, at A.B. 876:

> Mr. Grandinetti testified that he discussed Connie Grandinetti with the other members of the organization because he "was afraid of them. They took their orders from Mac."
>
> Mr. Grandinetti testified that he understood on November 13th, 1997, when he discussed Connie Grandinetti with Constable Pearce, that he, Constable Pearce, was going to try and steer the investigation away from Mr. Grandinetti, that he could do for him what he had done for Corporal Rennick. He testified that it was his understanding that:
>
> > "He used his connections in the police who were also members of the organization to change the outcome of the – of the investigation and the case against Dan."
>
> Mr. Grandinetti testified that when Constable Pearce offered his help:
>
> > "Mac would use his members of the organization that were also members of the police department in Edmonton and use them to influence the case, to steer it away from myself."

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> Mr. Grandinetti testified that on December the 8th, 1997, when Constable Pearce offered to help him, he understood:
>
> > "That Mac was going to use his resources within the organization to steer the police away from me, take the heat off of me, as he worded it or something like that."
>
> And also:
>
> > "Mac is telling me that the organization is using a lot of its power or influence to try and solve the problem of Steve Marissink and the investigation into the death of Connie Grandinetti."

[98] Having called this evidence, the defence argued that the appellant believed the recipients of his statements could and would influence the prosecution in his favour, and that this was a reasonable conclusion. As a result, submitted the defence, it had met the burden of placing the "person in authority" question into issue, and it was necessary to enter a second *voir dire* where the Crown would have the obligation to prove beyond a reasonable doubt that the recipient was not a person of authority, or if he was, that the statement was voluntary. This was important to the defence as the onus would then lie on the Crown to call the officers involved in the undercover operation, providing the defence with an opportunity to cross-examine the police officers, an opportunity denied them on the first *voir dire*.

[99] The trial judge did not accept these submissions. In fact, she held she did not even have to decide if the evidence introduced by the defence was sufficient to satisfy its evidentiary burden on the first *voir dire*. She held, as a matter of law, that police officers, such as the undercover operators in the case before her, could never be seen as persons in authority. She summarized her conclusion on this issue at A.B. 886-87:

> On the evidence of Mr. Grandinetti, if there were police officers within the organization, they received their orders from Constable Pearce as head of the criminal organization. He had the power to instruct them to act outside the scope of their authority, the authority which had been accorded to them by the state. They were not acting within the parameters of their police power, but outside their police power. They were corrupt police officers who had [had] become members of a criminal organization, or, alternatively, they were members of a criminal organization who had infiltrated the police department. **Either way, they cannot be perceived as persons in authority. In my view, it is not enough that an accused reasonably**

> **believe that the person can influence the course of the investigation or the prosecution. It must be to obtain the object of the state and not the object of the criminal**. (emphasis added)

[100] She continued at A.B. 887:

> In view of my finding that the undercover police officers are not persons in authority, assuming, as Mr. Grandinetti testified, that there were police officers who had joined the criminal organization, it becomes unnecessary to consider the evidentiary burden on Mr. Grandinetti or whether he has discharged that burden.

B. THE APPELLANT'S POSITION

[101] The appellant makes two submissions concerning the trial judge's decision on the *voir dire*. First, he says the trial judge erred by misunderstanding the nature of the threshold application. According to the appellant, the trial judge actually determined the "person in authority" issue when her job was to assess the sufficiency of the evidence. Second, and in the alternative, the appellant submits the trial judge erred when she held the police officers were not persons in authority simply because the police involved were not acting in the interest of the state.

C. ANALYSIS

[102] The issue here deals with what is known as the "confessions rule". According to the rule, no out-of-court statement made by an accused to a person in authority can be admitted into evidence unless the Crown can prove the statement was made voluntarily: ***Erven v. The Queen***, [1979] 1 S.C.R. 926, adopted in ***Hodgson***, *supra*, at para. 12. The confessions rule has historically required that a statement made to a person in authority must be voluntary. While reliability of statements made under threats or inducements is questionable, the rule is broader than mere reliability and is rooted in concerns for fairness. As noted in ***Hodgson***, the confessions rule is concerned with voluntariness and not simply veracity and thus operates as a check on the abuse of state power.

[103] In ***Hodgson***, the Supreme Court discussed the reason for the rule and held that it was designed to ensure fairness and to act as a check on the abuse of state power. Cory J. held at para. 24:

> The emphasis on voluntariness has two main effects: it both avoids the unfairness of a conviction based on a confession that might be unreliable, and has a deterrent effect on the use of coercive tactics. This deterrent effect is properly focused upon the prosecutorial authority of the state, not the personal authority of private individuals. ... In other words, it is the fear of reprisal or hope of

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> leniency that persons in authority may hold out and which is associated with their official status that may render a statement involuntary. ...

[104] ***Hodgson*** remains a leading authority on the confessions rule, the policies supporting the rule, and the meaning of "persons in authority". In ***Hodgson***, the court was asked to do away with the "person in authority" requirement and craft a confessions rule based on voluntariness alone. The court was unanimous in refusing this request. It held that because one of the reasons for the confessions rule was to discourage coercive behaviour on the part of agents of the state, the "person in authority" requirement was integral to the rule.

[105] Members of the court differed, however, on the meaning of "persons in authority". A minority of the court, represented by L'Heureux-Dubé and Bastarache JJ., supported a narrow definition of "person in authority", with both an objective and subjective component. The majority, on the other hand, speaking through Cory J., opted for a more inclusive test and held that the determination should be subjective and based upon the accused's perception of the extent to which the recipient of the statement could influence the investigation or prosecution of the offence. Cory J. summarized the legal consensus animating this conclusion at para. 32:

> Thus, from its earliest inception in Canadian law, the question as to who should be considered as a person in authority depended on the extent to which the accused believed the person could influence or control the proceedings against him or her. The question is therefore approached from the viewpoint of the accused.

[106] He acknowledged, however, that an accused's subjective perception must be reasonably held and set out this limitation at para. 34:

> ... where the accused speaks out of fear of reprisal or hope of advantage because he reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her, then the receiver of the statement is properly considered a person in authority.

[107] I do not take this to mean that the accused must be satisfied that there is a formal relationship of principal and agent based strictly upon advancing the interests of the principal. Cory J. quickly went on to use other words to describe the relationship between a recipient and the state that could make someone a person in authority.

[108] At para. 34, for example, he spoke of a "relationship of agency or **close collaboration** between the receiver of the statement and the police or prosecution" (emphasis added). At para. 35,

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he spoke of the accused's belief that the "receiver was **allied** with the state authorities and could influence the investigation or prosecution against the accused" (emphasis added). At para. 45, when discussing the circumstances when a trial judge would be obliged to proceed to a *voir dire* on her own motion, he said that the receiver must be "**closely connected** to the authorities" (emphasis added). In para. 47, speaking on this same subject, he used the words "**acting in concert** with the police or prosecutorial authorities ..." (emphasis added). Finally, at para. 49, when dealing with the facts of the appeal before the court, Cory J. made the following inclusive statement:

> Indeed, anyone is capable of being a person in authority where a person becomes **sufficiently involved** with the arrest, detention, examination or prosecution of an accused, and the **accused believes that the person may influence the process against him or her**. (emphasis added)

[109] In my view, therefore, the test for persons in authority, found in ***Hodgson***, requires only that there be a sufficient relationship between the recipient of a statement and the investigating or prosecuting authorities, that an accused may reasonably infer that the recipient could affect the investigation or prosecution of the offence.

[110] I find further support from two decisions of this court. In ***R. v. McKenzie***, [1965] 3 C.C.C. 6 (Alta. S.C. (A.D.)), Johnson J.A. held at 28:

> A person in authority is one who, because of his position in relation to the prosecution, is able to influence the course of the proceedings.
> . . .
>
> The test is, I think, an objective one (*R. v. Godinho* (1911), 7 Cr. App. R. 12), subject, however, to this: **If one who has no power to control or influence the course of the proceedings by words or conduct, induces an accused to believe that he has such power, he may be held to be an agent of the prosecuting authority and, therefore, a person in authority**. (emphasis added)

[111] This court adopted an even broader test in ***R. v. Postman*** (1977), 3 A.R. 524 (Alta. S.C. (A.D.)), cited in ***Hodgson***. In ***Postman***, the court was asked to determine if a doctor, who received an inculpatory statement, could be a person in authority. Clement J.A., speaking for himself and Laycraft J.A., determined that the test was entirely subjective. At para. 66, he applied the following test to determine whether a doctor was a person in authority:

> In *Kaufman on the Admissibility of Confessions* (1974) 2nd edition, page 54, in reliance on the judgment in *R. v. Mentenko* (1951), 101

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> C.C.C. 312 and with support from other authority, it is stated that the law
>
> > ... is that **those who, by their actions or otherwise, cause the accused to believe that they possess some degree of authority, must be considered to fall within this legal term of art**. As a result, confessions induced or received by them should be subjected to the same stringent tests as those obtained by the police. (emphasis added)

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In the end, the test is subjective. Did the accused reasonably believe the recipient can affect the prosecution?

1. Application

[112] Turning to the trial judge's reasons, I do not think she misapprehended the nature of the threshold application. She was aware that her task on the *voir dire* was to determine if the appellant had met its evidentiary burden to introduce some evidence to show the undercover police officers, who received his statements, were persons in authority. In my view, however, she pre-empted the need to make this decision by finding, as a matter of law, that it is not enough that an accused reasonably believe that the recipient of the statement could influence the prosecution, but that it must be for an object of the state and not the criminal. She found that corrupt civilians, such as the undercover officers were pretending to be in this case, could never be persons in authority where the perceived purpose of their involvement with the state was to thwart, rather than promote, the course of justice.

[113] With the greatest respect to the learned trial judge, in my view she interpreted the meaning of "person in authority" too narrowly. The trial judge should have determined whether the accused believed that the recipient could influence the prosecution and whether that belief was reasonable. This test does not require that the maker of a statement believe that any prosecutorial inducement be for the good of the state. A maker of a statement must merely have a subjective belief, reasonably held, that the person to whom he is talking has a sufficient connection with the prosecution to affect the prosecution. The law does not require that an accused also make a qualitative analysis of whether any promise or inducement furthers the objects of the state. If it is a further qualification that, in fact, an actual relationship exists between the recipient and the prosecuting authorities, that fact is met here. The police are the recipients of the information.

[114] I am satisfied it was possible here to conclude that the undercover operators were persons in authority. They were police officers. The defence introduced **some** evidence to show a reasonable perception by the appellant that Mac, and the other undercover operators who were in receipt of his statements, were sufficiently connected to the forces investigating his aunt's murder to influence or

control the investigation. Here the appellant testified about his belief that Mac, as the head of the criminal organization, could control the police officers investigating his aunt's murder and steer the investigation away from him. He was told this repeatedly by the undercover officers. The reasonableness of this belief is confirmed by the evidence of Corporal Rennick who testified at length about the extent to which the undercover officers went to convince the appellant that this was so. As noted earlier, according to Corporal Rennick, the undercover officers took the unusual step of presenting the appellant with pictures of what was alleged to be a corpse – the remains of a man Dan was said to have murdered. The appellant was told that Mac had been able to suppress these pictures, and other evidence, with the result that a potential murder charge had been reduced to aggravated assault.

[115] It follows that if the trial judge had not defined "person in authority" so narrowly she would have found the appellant had met the evidentiary burden of providing some evidence to show a reasonable perception on his part that he was speaking to someone who could influence the prosecution. As a consequence, she should have held a second *voir dire* where the onus would have shifted to the Crown to prove, beyond a reasonable doubt, that the statements were not made to persons in authority or that the statements were voluntary.

[116] Nor was the failure to hold a second *voir dire* merely a technical error. As the appellant argues, on the second *voir dire* he would have been able to cross-examine the police witnesses he had been forced to call as witnesses for the defence on the first *voir dire*. In addition, the Crown would, in these circumstances, have been obliged to call the remaining police witnesses involved in obtaining the statements, and expose them to cross-examination. It is apparent, therefore, that evidence obtained in the second *voir dire* could have assisted the appellant in advancing his argument that the statements should be excluded. Given the paucity of real evidence connecting the appellant to the murder, the statements were vital to the prosecution's case. It is impossible to say what the outcome of the trial would have been had the error not been made. I conclude there must be a new trial.

[117] I find support for this conclusion in the very policy behind the voluntariness rule, namely, that of ensuring fairness in the criminal process. The confessions rule serves to discourage police officers from engaging in undesirable investigative techniques. A police officer cannot promise a prosecutorial favour in return for a statement. To allow an undercover operation to rely on its relationship with the police to obtain a statement would be to allow the police to do indirectly that which it cannot do directly.

[118] I accept that in the normal case police officers operating undercover are not considered persons in authority. But the reason for this is that the accused must believe there is a connection between the recipient of his statements and the prosecution. An accused who speaks to an undercover officer believes he is talking to a civilian. But where an undercover operation includes, as part of its ruse, an association with the police, and the suggested ability to influence the investigation and prosecution of the offence, it loses its protection from the confessions rule. Put

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another way, if undercover officers pretend to associate themselves with the police in such a way as to make it reasonable for an accused to believe that they can influence the prosecution, and an accused actually believes them, the officers can be persons in authority.

[119] It was suggested in argument that such a broad interpretation of the term "person in authority" would require the prosecution to prove voluntariness if real criminals, with no police association, receive statements on the basis of alleged association with the police department. This was an obvious concern of the trial judge, who said to defence counsel during argument:

> I mean, I guess that's the difficulty I'm having before I even hear the rest of your submission with respect to the definition of a person in authority. If one was to follow your argument to its logical conclusion, then arguably any member of an organized criminal – of a criminal organization who had infiltrated the police department is a person in authority. (A.B. 814, lines 5-13)

[120] This, however, is a different factual situation from the one before us. Here we have actual police officers going undercover to secure a statement from a suspect and escape the application of the confessions rule. At the same time, however, they wish to make use of the implied power and authority of the state to assist them in inducing the appellant to confess. The object of the confessions rule is to ensure that statements extracted by the police are reliable and that they have not been coerced by inappropriate state conduct. It makes sense, therefore, that the rule should apply to the police officers in this case.

[121] Although it was not argued, I also note that this case may well cry out for a warning to the jury about the utility of the evidence. As noted earlier, in ***Hodgson***, the Supreme Court was asked to do away with the "person in authority" requirement for confessions and adopt a simple voluntariness rule. The court decided to retain the "person in authority" requirement, but it imposed an obligation on the trial judge to warn the jury about the reliability of statements made to others under threat. Cory J. held at para. 30:

> ... I would suggest that in circumstances where a statement of the accused is obtained by a person who is not a person in authority by means of degrading treatment such as violence or threats of violence, a clear direction should be given to the jury as to the dangers of relying upon it. The direction might include words such as these: "A statement obtained as a result of inhuman or degrading treatment or the use of violence or threats of violence or threats of violence may not be the manifestation of the exercise of a free will to confess. Rather, it may result solely from the oppressive treatment or fear of such treatment. If it does, the statement may very well be either unreliable or untrue. Therefore, if you conclude that the statement

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> was obtained by such oppression very little if any weight should be attached to it."

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[122] Here, there was some evidence before the trial judge that certain of the appellant's inculpatory statements were induced by threats of violence and a warning should have been provided. Whether the accused was affected by these threats was an issue for the jury.

[123] In addition, the appellant was told that if he spoke candidly to the undercover police officers they would ensure the murder investigation was directed away from him. This assurance must also be seen in the context of another promise. The appellant had been told that if he was accepted as a member of the organization he would receive up to $250,000 for assisting in the promotion of its criminal activities (A.B. 872, lines 10-16).

[124] As the issue of reliability under the confessions rule has always focused on whether there are either threats or promises, a warning would also be desirable in a situation where there are promises of prosecutorial favour. Although a jury can hear a confession given to someone other than a person in authority, a warning would alert it to the potential frailty of a confession in response to a promise.

[125] In view of my decision on the substantive issue, however, and considering that the issue was not argued, it is unnecessary for me to decide whether the lack of a warning is fatal here.

V. THE THIRD PARTY EVIDENCE

[126] At different points during the trial, the defence sought to introduce evidence to show that a third party, Rick Papin ("Papin"), was more likely to have committed the murder than the accused. This effort culminated in a final *voir dire,* held near the end of the trial, in which the defence submitted there was evidence which, if believed, tended to show that Papin had the motive, disposition, and opportunity to kill Connie Grandinetti. The trial judge refused to allow any of this evidence to go to the jury. The appellant submits she erred in coming to this conclusion.

A. THE LAW REGARDING THIRD PARTY EVIDENCE

[127] It is settled law that the defence, in a criminal trial, is allowed to introduce evidence to show a third party is the more likely perpetrator of a crime. Such evidence must be relevant (***R. v. McMillan*** (1975), 23 C.C.C. (2d) 160 (Ont. C.A.), aff'd [1977] 2 S.C.R. 824). This means that the party introducing the evidence must show it is possible to infer a connection between the evidence and an issue at trial (***R. v. Cloutier,*** [1979] 2 S.C.R. 709 and ***R. v. Morris***, [1983] 2 S.C.R. 190).

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[128] Where a defendant seeks to rely on evidence of a third party's propensity towards violence, as evidence that the third party committed the offence, it must also demonstrate some further connection to the crime in order to show that the propensity evidence is relevant. Major J. summarized this principle in ***R. v. Arcangioli***, [1994] 1 S.C.R. 129, [1994] S.C.J. No. 5, at para. 28:

> ... evidence of a third party's bad character will not be admitted unless it is relevant. There would be no probative value in evidence that a third party had a propensity to commit the type of act in question if he was otherwise unconnected with the circumstances surrounding the charge, *R. v. McMillan, supra*, at p. 168 *per* Martin J.A. ...

[129] The question of admissibility of third party evidence is governed by one further proviso. Once it is shown that third party evidence is relevant, the court should be reluctant to exercise its discretion to exclude it because its probative value is outweighed by its prejudicial effect. Major J. held at para. 30 of ***Arcangioli***, *supra*:

> The proposition is unquestioned that evidence which is logically probative may be excluded where its probative value is slight but its prejudicial effect upon the fair trial of the accused is great. However, courts are reluctant to exclude evidence offered by an accused in his defence: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, *per* McLachlin J., at p. 611:
>
> > Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted.

B. THE EVIDENCE

[130] The third party evidence introduced by the defence can be summarized as follows:

1. Prior to March of 1996, the victim, Connie Grandinetti, ("Connie") had been involved in selling cocaine on Papin's

behalf. At some point during this period, Connie and Papin had been lovers.

2. In March of 1996, approximately one year before her murder, Connie stopped selling drugs for Papin and began to sell them on behalf of another supplier. She sold drugs to some of Papin's customers.

3. When Papin heard about this, he broke into Connie's apartment with an associate named Calvin Dominique ("Dominique"). While Dominique assaulted Connie's male companion, Papin held a knife to Connie's throat, called her a "rat" and told her to leave his customers alone. After threatening Connie with the knife for approximately two minutes, Papin used the knife to slash some furniture and then the two men left.

4. Connie and her male companion moved to another apartment the next day out of fear of Papin. Several people testified that in the ensuing days she had told them she was afraid of Papin.

5. Papin, who owned a gun, was known as a violent character who on several occasions, in the months prior to the murder, had threatened to kill his common-law wife.

6. Connie was arrested on January 7, 1997 by Constable Hartl, on charges stemming from a sale of cocaine in 1996. She had delivered cocaine on Papin's behalf to an undercover police officer.

7. Connie attempted to make a deal with the police. She agreed to inform on others whom she knew were selling drugs in exchange for a promise from the police that they would not press charges against her. In the end, she informed on other members of the drug underworld and was never charged.

8. Along with being a supplier of cocaine, Papin was also a police informer. He had been arrested for the home invasion relating to Connie but the police decided not to proceed with the charges.

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> 9. From January 1997 to March 1997, Papin was in the Edmonton Remand Centre facing drug charges. He was also facing assault charges relating to an attempt to strangle his common-law spouse, Elaine McGilvery.
>
> 10. A week prior to the murder, Dominique, Papin's friend and associate, was told by his cousin, Whitford, a prisoner serving time with Papin at the Edmonton Remand Centre, that Connie was compiling evidence to show that Papin was a police informer. Had Papin's associates, both inside and outside the Remand Centre, known he was a police informer, Papin's health and livelihood would have been threatened.
>
> 11. Papin was released from custody three days prior to the murder.
>
> 12. On the night of the murder, the appellant drove Connie to various hotels in Edmonton in search of someone who would supply her with cocaine. Connie told the appellant she was afraid of Papin. Around midnight, the appellant dropped her off at a bar.

C. ANALYSIS

[131] At trial, defence counsel submitted the third party evidence was relevant for the following reasons:

> [T]he evidence establishes motive, it establishes threats by this person against this victim, it establishes disposition, it establishes access to weapons, a propensity to use weapons, a propensity to manipulate in order to avoid legal responsibility. I submit ultimately that the evidence does establish opportunity, although we're prepared to call further evidence if the Court is concerned about that.
>
> (A.B. 4975, lines 46-47 to A.B. 4976, lines 1-7)

[132] The trial judge disagreed with these submissions. She found no evidence of motive or opportunity. She found the home invasion, and the accompanying threats, were irrelevant because these acts were too far removed in time and method from the murder. She found the evidence from various witnesses that Connie was afraid of Papin inadmissible because it was hearsay and unreliable. Finally, she found that the disposition evidence was inadmissible because there was no other evidence connecting Papin to the murder.

1. The Issue of Motive

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[133] The defence submitted it was possible to infer, from the evidence presented, that Papin had a motive to kill Connie Grandinetti. The defence pointed to the circumstances surrounding Connie's arrest, and Whitford's evidence that he told Dominique that Connie was preparing to expose Papin as a police informer, as two reasons why such an inference could be drawn.

[134] The trial judge concluded, however, that there was no evidence of motive because there was no direct evidence that Papin knew of Connie's arrest on drug charges or knew that she was compiling a dossier to show he was an informant. She held at A.B. 5016, lines 27-37:

> There is, in my view, no evidence of motive. There is no evidence that Rick Papin knew that Connie Grandinetti was arrested on January the 7th, 1997 and that this arrest was related to an incident in March 1996 when she middled the sale of cocaine to an undercover officer on behalf of Mr. Papin. There is no evidence that Rick Papin was told or that he knew that Connie Grandinetti was providing the paperwork to establish that he was an informant or that she was providing Constable Hartl with any information on drug trafficking.

[135] In my view, the trial judge imposed the wrong test. It was not necessary for the defence to show that Papin knew Connie had been arrested, or that she was providing paperwork to show he was an informant, in order for this evidence to be relevant. It was only necessary for the defence to show that it was possible to infer that Papin had a motive to kill Connie from the facts presented. To use a typical example, suppose a husband is accused of his wife's murder; evidence that there was a million-dollar life insurance policy taken out on her life would surely be admissible as evidence tending to prove motive. Whether it could be inferred that the husband was aware of the policy, and that he ultimately had motive, would be a question for the jury.

[136] Here, there was a great deal of evidence from which motive could be implied. First, there was evidence that Connie used to live with Papin and that for several years she helped him sell drugs. Some time in early 1996, however, she began to sell drugs to Papin's customers for someone else. Papin was angry enough about this turn of events that he broke into her home and threatened to kill her with a knife.

[137] Second, there was evidence that Connie was arrested on January 7th, 1997, on charges arising from a drug sale in 1996 when she had "middled" an eighth of a gram of cocaine to an undercover police officer for Papin. The evidence showed that, in order to escape criminal prosecution, she began giving incriminating information to the police about various members of the drug underworld. This was not hearsay because it was not introduced for the truth of its contents but, instead, to show the statements were made. It was circumstantial evidence from which a jury could infer that Papin had a reason to kill Connie, namely, to stop her from describing the nature and extent of his criminal affairs to the police.

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[138] The trial judge held there was no evidence that Papin knew of Connie's arrest. In my view, knowledge of that fact is not necessary to allow a jury to infer a motive from all of the circumstantial facts here. But even if I am wrong on this point, there was evidence from which knowledge could be imputed. There was evidence, for example, that Papin was a police informer. It was possible to infer that Papin learned of Connie's arrest and her decision to co-operate with the authorities, from the police. Similarly, there was evidence that Papin was part of the investigation that resulted in Connie's arrest. Thus, a jury could conclude that Papin would have known of the likelihood of her arrest because he would have been subject to arrest and/or interrogation himself. In my view, she erred in excluding evidence going to motive simply because there was no proof he actually knew.

[139] Finally, there was evidence suggesting that Connie was planning to tell other members of the criminal community that Papin was a police informer. This was information Papin would not have wanted his criminal associates in the drug underworld to know. Defence witness, Whitford, testified that just days before the murder he told Dominique of Connie's intention to release the information that Papin was an informer. Dominique was Papin's close friend, and the person who had assisted him in the home invasion. While there was no direct evidence to show Dominique told Papin what Whitford had told him, all of this evidence is still circumstantial evidence from which a jury could infer that Dominique communicated Connie's intention to Papin, and that he took action to prevent her from going through with her plan.

[140] In my view, therefore, it was possible for a jury to infer from this evidence that Papin had a motive to kill Connie and the trial judge was wrong to exclude it simply because there was no direct evidence that Papin was aware of all the surrounding facts.

2. The Issue of Opportunity

[141] The defence introduced evidence that Papin had been released from the custody of the Edmonton Remand Centre just three days before Connie Grandinetti's murder. According to the defence, this showed that Papin had the opportunity to kill Connie and provided support to the other circumstantial evidence connecting Papin to the killing. The trial judge held, however, that more was required to show opportunity than the mere fact Papin was at large. The defence needed to go further and show that he was in the vicinity of the crime when it was committed.

[142] I agree with the trial judge that usually evidence of opportunity will require more than a person's freedom from incarceration to be relevant. The general rules regarding the use of such evidence were set out by the Supreme Court of Canada in ***R. v. Yebes***, [1987] 2 S.C.R. 168, [1987] S.C.J. No. 51. McIntyre J. held at para. 26:

> It may then be concluded that where it is shown that a crime has been committed and the incriminating evidence against the accused is primarily evidence of opportunity, the guilt of the accused is not the only rational inference which can be drawn unless the accused had

> exclusive opportunity. In a case, however, where evidence of opportunity is accompanied by other inculpatory evidence, something less than exclusive opportunity may suffice. This was the view expressed by Lacourcière J.A. in *R. v. Monteleone* (1982), 67 C.C.C. (2d) 489 (Ont. C.A.), at p. 493, where he said:
>
> > It is not mandatory for the prosecution to prove that the respondent had the exclusive opportunity in a case where other inculpatory circumstances are proved.

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[143] In the present case, however, the defence was not relying on this evidence to show opportunity as the primary inculpatory evidence. The defence was relying on the timing of Papin's release, coming as it did just three days before the murder, to give credence to the theory that Papin found out that Connie was a threat to him and he decided to do something about it when he was released from jail. The probative value of the evidence was low, but in keeping with the Supreme Court's decision in ***Seaboyer***, as cited by Major J. in ***Arcangioli***, the evidence should have gone to the jury.

3. The Issue of the Home Invasion and the Threat with a Knife

[144] There was evidence that approximately a year before the murder Papin broke into Connie's house, threatened her with a knife and called her a "rat". The trial judge conceded this amounted to a threat but held, nonetheless, it had no probative value. She described it as disposition evidence and held there needed to be other evidence tending to connect Rick Papin with the murder of Connie Grandinetti in the "early morning hours of April 10th, 1997" (see A.B. 5016, lines 38-44). In addition, she said the threat occurred a year earlier and the circumstances were "dissimilar" from those of the "execution-style murder" (see *Ibid*. at lines 7-9).

[145] In my view, the learned trial judge erred in two ways in dealing with this evidence. First, she erred by treating this as just another piece of disposition evidence. Previous threats against a victim are admissible as evidence of motive because they show animus and hostility towards the victim. The applicable principle was described by Martin J.A. in ***R. v. Jackson*** (1980), 57 C.C.C. (2d) 154 (Ont. C.A.). He held at 167:

> Motive, in the sense of an emotion or feeling such as anger, fear, jealousy and desire, which are likely to lead to the doing of an act, is a relevant circumstance to prove the doing of an act as well as the intent with which an act is done. The relevant emotion may be evidenced by:
>
> (a) conduct or utterances expressing the emotion,

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> (b) external circumstances which have probative value to show the probable excitement of the relevant emotion, and
>
> (c) by its prior or subsequent existence (if sufficiently proximate): see *Wigmore on Evidence*, 3rd ed., vol. I, pp. 557-61; vol. II, pp. 328-9.
>
> **A previous threat to kill the victim is admissible to show animus or feelings of hostility**. Utterances, however, which cannot be regarded as other than the venting of feelings or temporary annoyance, and which on any reasonable view, are not capable of evidencing feelings of ill will constituting a motive for the murder of the deceased, are inadmissible: see *R. v. Barbour* (1938), 71 C.C.C. 1 at pp. 19-21, [1939] 1 D.L.R. 65, [1938] S.C.R. 465 at pp. 468-70; *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 at pp. 410-1, 29 C.R.N.S. 141. (emphasis added)

[146] The Court went on to say, at 168-69:

> Evidence of motive is a circumstance to be considered along with all the other circumstances. With deference, we think that the learned trial Judge too narrowly limited the probative value of the threats when he said in his reasons for admitting evidence of the threats, that evidence of threats may be admitted to rebut the theory of suicide or accident, but cannot be offered to show that because the accused had previously threatened the deceased, he was likely to have killed her (*per* Lord Atkinson in *R. v. Ball*, [1911] A.C. 47 at p. 68):
>
> > **Evidence of motive necessarily goes to prove the fact of the homicide by the accused as well as his "malice aforethought" inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not**. (emphasis added)

[147] Papin's actions amounted to more that just an expression of annoyance. By holding a knife to Connie's throat, Papin was threatening to kill her. It was a demonstration of hostility towards the eventual murder victim which would have been relevant and admissible if Papin had been the one accused of the murder. It is no less evidence of hostility toward the victim merely because it deals with a third party.

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[148] It follows that the evidence of the home invasion and the accompanying threats were evidence of hostility toward the particular victim, rather than disposition, and the trial judge erred by finding that it was necessary to connect it further to the murder to make it relevant. Moreover, the fact it was this victim is sufficient to make the connection.

[149] The trial judge's second error with respect to the home invasion was in finding that the evidence lacked relevance because the threats occurred a year prior to the murder. The issue of timing, however, affects the weight of the evidence rather than its admissibility. This was evidence of a threat against a murder victim. As such, it was relevant to the issue of who might have had cause to do the victim harm. In addition, it was also circumstantial evidence. It is the nature of such evidence that it often does not appear probative until seen alongside other pieces of circumstantial evidence. In *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999) the learned authors discussed the proper approach to circumstantial evidence at para. 2.77:

> Each piece of evidence need not alone lead to the conclusion sought to be proved. Pieces of evidence, each by itself insufficient, may however when combined, justify the inference that the facts exist. Accordingly, a trial judge must be careful not to exclude individual pieces of evidence if there is an undertaking that the evidence tendered is part of a larger combination. Whether or not there is a rational explanation for that evidence other than the guilt of the accused is a question for the jury.

[150] In excluding the threats, the learned trial judge relied, in part, on the decision of this court in ***Reference Re Regina v. Latta*** (1976), 30 C.C.C. (2d) 208 (Alta. S.C. (A.D.)). In that case, however, this court was asked to decide if evidence of previous threats from an unknown person was admissible evidence to show that someone else might have committed the crime at issue. This case is significantly different. The maker of the threats, and the circumstances under which the threats were made, are known. There is evidence of a past connection.

[151] In summary, the trial judge should have admitted the evidence of the home invasion and the accompanying threats.

4. The Propensity Evidence

[152] Much of the third party evidence dealt with Papin's bad character and his propensity for violent behaviour. There was evidence, for example, that he owned a gun and that he made frequent threats to kill his common-law wife. In fact, from January 1997 until three days before the murder he was in jail on assault charges stemming from an attempt to strangle his common-law wife in a bar. The trial judge refused to admit all this evidence, as well as the evidence concerning the home invasion, because she found it was not sufficiently related to the crime to be relevant. She held that:

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> The evidence of the home invasion, of the threats, of Mr. Papin's propensity to violence, of his access to weapons, of a willingness to manipulate the justice system, has no probative value unless there is some evidence tending to connect Rick Papin with the murder of Connie Grandinetti in the early morning hours of April 10th, 1997.
>
> I have concluded, after a careful review of the evidence on the voir dire, including the evidence of Mr. Grandinetti during the trial and during the previous voir dire on this issue, that there is no evidence tending to connect Rick Papin to the murder of Connie Grandinetti. Accordingly, the evidence of the home invasion, of the threats, and of the disposition of Rick Papin, his propensity for violence, is inadmissible on the basis that it has no probative value and, therefore, is not relevant to the issue that the jury must determine in this trial.
>
> (A.B. 5016, lines 38-47 to A.B. 5017, lines 1-9)

[153] I accept that for third party propensity evidence to be admissible the defence must show some further connection to the crime. In ***McMillan***, *supra*, Martin J.A. suggested this could be demonstrated by showing a personal connection between the third party and the victim, along with evidence of motive. He held, at 168 (C.C.C.):

> For example, if A is charged with murdering X, in the absence of some nexus with the alleged offence, evidence that B has a propensity or disposition for violence, by itself, is inadmissible to prove B is the murderer because standing alone it has no probative value with respect to the probability of B having committed the offence. **If, however, it is proved that A, B and X all lived in the same house when X was killed, and that B had a motive to kill X, then evidence that B had a propensity for violence, may have probative value on the issue whether B, and not A, killed X, and is accordingly admissible**. (emphasis added)

[154] Here, there was extensive evidence describing the close connection between the third party, Papin, and Connie Grandinetti. There was evidence that at one time they had lived together and been lovers. More importantly, there was evidence, supported by the observations of the police, that until approximately a year before the murder they had been business associates, working together selling drugs. They were not strangers.

[155] There was also evidence of motive. The evidence of the home invasion and the accompanying threats, was compelling evidence of a connection between the parties. In addition, there was evidence relating to Connie's arrest, and her alleged desire to disclose that Papin was a

police informant, which gave Papin a reason to kill Connie Grandinetti. In short, there was evidence that, if accepted by the jury, could tie Papin to the murder, and the propensity evidence was probative and admissible, therefore, on the issue of whether Papin, and not the appellant, killed Connie Grandinetti.

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5. The Hearsay Evidence

[156] Some of the third party evidence introduced by the defence consisted of hearsay statements made by Connie Grandinetti to others regarding her fear of Papin. The trial judge summarized this evidence, and her conclusion regarding its admissibility, at A.B. 5015, lines 27-38:

> Elaine McGilvery testified that Connie Grandinetti told her that she was afraid of Rick Papin. Constable Hartl testified that she told him that she was not afraid of him in February 1997. Mr. Whitford testified that he was told that Connie Grandinetti was afraid of Rick Papin. Cory Grandinetti testified that Connie Grandinetti told him that she was afraid of Rick Papin. The statements meet the test of necessity as Connie Grandinetti is dead. The statements, however, do not meet the test of reliability and are, therefore, inadmissible hearsay evidence.

[157] This is the sum of the trial judge's reasoning on the subject of reliability. The need to make such an inquiry arises from the decision of the Supreme Court in ***R. v. Khan*** (1990), 59 C.C.C. (3d) 92, [1990] S.C.J. No. 81, where the court developed the modern rule regarding the admission of hearsay evidence. Provided the out-of-court statements are indeed hearsay, the party seeking admission of such statements must demonstrate that they are necessary and reliable. The Supreme Court discussed the meaning of reliability in ***R. v. Hawkins***, [1996] 3 S.C.R. 1043, (1996) 111 C.C.C. (3d) 129, [1996] S.C.J. No. 117 at para. 75:

> The criterion of reliability is concerned with threshold reliability, not ultimate reliability. The function of the trial judge is limited to determining whether the particular hearsay statement exhibits sufficient indicia of reliability so as to afford the trier of fact a satisfactory basis for evaluating the truth of the statement. More specifically, the judge must identify the specific hearsay dangers raised by the statement, and then determine whether the facts surrounding the utterance of the statement offer sufficient circumstantial guarantees of trustworthiness to compensate for those dangers. The ultimate reliability of the statement, and the weight to be attached to it, remain determinations for the trier of fact.

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[158] In my view, it is not necessary to deal with the admissibility of the hearsay statements at this time. The trial judge did not explain why she found the statements unreliable and so it is difficult to make a proper assessment of her reasons for excluding them. There was, however, sufficient admissible third party evidence, even without the hearsay statements, that it was possible for a jury to infer that someone other than the appellant killed Connie Grandinetti. As the defence only needed to raise a reasonable doubt on the issue of identity, it is difficult to know what a properly instructed jury would have done with the third party evidence, and it is necessary to have a new trial. The admissibility of the hearsay statements can be revisited at that time.

D. CONCLUSION

[159] There is a connection between the proposed evidence and identity. It was possible for a jury to infer from the evidence that Papin had a motive to kill Connie Grandinetti. This gave probative value to the remaining evidence of propensity and bad character. There is no telling whether this evidence would have raised a reasonable doubt in the minds of a properly instructed jury.

[160] No one piece of evidence alone is sufficient to establish a connection between Papin and the murder. But it is important to look at the larger picture, and consider all the seemingly small pieces of the puzzle. In my view, the trial judge erred by looking at the individual pieces, and discarding them without looking at the totality of the circumstantial evidence. Looking at the whole picture, the evidence is relevant, circumstantial evidence which could raise a doubt as to the identity of the perpetrator of the crime.

VI. DISPOSITION

[161] The appeal is allowed and a new trial ordered.

Appeal heard on October 1, 2002

Reasons filed at Edmonton, Alberta,
this 31st day of October, 2003

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Conrad J.A.

Appearances:

P.C. Fagan
For the Appellant

G. Tomljanovic
For the Respondent

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