COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Quinton, 2021 ONCA 44
DATE: 20210125
DOCKET: C65249

Tulloch, Paciocco and Harvison Young JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Carl Quinton

Appellant

Michael Dineen and Emily Lewsen, for the appellant

Craig Harper, for the respondent

Heard: August 17, 2020 by video conference

On appeal from the conviction entered by Justice Robert B. Reid of the Superior Court of Justice, sitting with a jury, on March 8, 2017, and from the sentence imposed on June 26, 2017.

Harvison Young J.A.:

A. OVERVIEW

[1] The appellant appeals his conviction for the second degree murder of Mark Gilby. Mr. Gilby was found dead in his apartment on Gale Crescent on January 19, 2014. The appellant knew Mr. Gilby and occasionally bought marijuana from him. He was captured on surveillance footage entering and leaving Mr. Gilby's apartment building during the morning of the murder.

[2] Central to the Crown's case was a confession that the appellant made to undercover police officers more than a year after Mr. Gilby was found dead in his apartment. The confession was the culmination of an eight-month operation during which the Niagara Regional Police befriended the appellant and recruited him into a fictitious criminal organization.

[3] In the course of the confession, Mr. Quinton divulged a number of details of the murder that, according to the Crown, corroborated his confession.

[4] In circumstances that I will discuss in greater detail below, the trial judge did not hold a *voir dire* on the issues as set out in *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544. The appellant argues that this was clearly an operation that fell within the parameters of a "Mr. Big" operation. This rendered the confession presumptively inadmissible and required the trial judge to conduct a *voir dire* to determine whether it met the *Hart* test for admissibility. Moreover, he takes the position that had the trial judge applied the *Hart* test and held a *voir dire*, there was ample basis to exclude the confession for two reasons: first, because its probative value did not outweigh its prejudicial effect; and second, because the circumstances leading up to the confession as a whole constituted an abuse of process on the part of the police, given the relationship that developed with the accused and his particular vulnerabilities. He seeks a new trial.

[5] The appellant also submits that even if the trial judge did not err in admitting the confessions, he erred in failing to charge the jury in accordance with *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3.

[6] The respondent Crown argues that the trial judge did not err in failing to hold a *Hart voir dire* because the defence counsel at trial waived it at trial. It takes the position that in any event, any concerns about the reliability of the evidence were addressed by the corroborative evidence and also submits that nothing in the circumstances gave rise to abuse of process concerns. Finally, it submits that the charge to the jury met the functional requirements of *Mack*.

[7] For the reasons that follow, I would allow the appeal and order a new trial. This was clearly a case to which the *Hart* considerations applied. The appellant did not waive a *voir dire*, and even had he done so, the waiver of the *voir dire* would have been invalid. It is not clear that the statement would have been admitted had a *voir dire* been held. In particular, the confession raised abuse of process concerns that needed to be canvassed in a *voir dire*.

B. THE FACTUAL BACKGROUND

(1) The murder

[8] Mark Gilby was discovered shortly before 5:00 p.m. in his apartment entryway surrounded by blood and without vital signs. He died of blunt force injuries to the head, likely caused by a hammer or a hammer like tool. His friend Diane Doucette

had become increasingly alarmed when she was unable to reach him on his phone throughout the day. She and a friend had gone to his apartment around 4:30pm. When there was no answer to the door, which was locked, they called 911. Paramedics found the body without vital signs.

[9] Mr. Gilby had been given two sets of keys to his apartment, including electronic building fobs which had distinct serial numbers. Mr. Gilby was in frail condition and used a motorized scooter. One set of his apartment and scooter keys could not be located in his apartment after the murder.

(2) The evidence against the appellant

[10] The appellant quickly became a person of interest in the murder after surveillance footage indicated that he had been at the deceased's apartment on the day of the murder.

[11] Surveillance footage first captured the appellant at Mr. Gilby's apartment shortly before 10 a.m. on the day of the murder. After waiting in the vestibule area, he left the building and walked back in the direction that he came from. Afterwards, the appellant was captured on St. Catharines Motorcycle Centre surveillance footage travelling on his bicycle northbound on Riordan Street, just north of where it intersects with Gale Crescent. He was wearing a dark jacket, dark pants, dark shoes, and gloves.

[12] At 10:25 a.m., the appellant again approached the intercom panel in the vestibule area of Mr. Gilby's building. After some discussion with a resident who was leaving the building, the appellant again left.

[13] The appellant walked down the sidewalk before turning around and returning to the vestibule. At 10:29 a.m., he used the intercom to call Mr. Gilby and he was granted entry. The appellant walked towards the elevator. He was out of view for approximately seven minutes before he reappeared and exited the building at 10:37 a.m. When he reappeared, the surveillance footage appeared to show some discoloration in the pocket areas of the appellant's jacket, as well as something bulging and protruding from his pockets.

[14] The appellant conceded his identity in the surveillance footage and the fact that he was at the apartment to see Mr. Gilby. The appellant testified that, on his last visit that day, someone he thought was Mr. Gilby answered his call from the intercom and buzzed him into the building, but that when he knocked on Mr. Gilby's unit there was no answer, so he left.

[15] Approximately one-and-a-half hours after the appellant left Mr. Gilby's apartment, he was captured on surveillance footage riding his bicycle. He was wearing a different jacket and shoes. The appellant testified that he changed his clothes because he got splashed while riding his bicycle.

[16] The police searched the appellant's apartment and seized clothing and a pair of boots. No blood was found on the items.

[17] The appellant testified that he had been to Mr. Gilby's Gale Crescent apartment 10-15 times to purchase marijuana prior to the date of the murder. On at least one occasion, he saw Mr. Gilby go into a toolbox in his bedroom and return with half an ounce of marijuana. He testified that, on January 18, 2014, the day before the murder, he attended Mr. Gilby's residence and bought a gram of marijuana that Mr. Gilby had in a coat pocket in the closet of the apartment entryway. The appellant testified that on that date, there were no other people in the apartment that he could see. He further testified that on the other occasions when he visited Mr. Gilby, he was generally alone in the apartment.

[18] The appellant's friend Sharon Shaw testified that she and the appellant would meet regularly and smoke marijuana together, which she purchased from the appellant. The appellant would purchase the marijuana from a number of sources, including Mr. Gilby. Ms. Shaw told police that two weeks after the murder of Mr. Gilby, the appellant gave her $170 in cash and a half-ounce of marijuana for free. She testified that this was out of the ordinary for the appellant. Ms. Shaw also testified that around this time, the appellant told her that he had a female friend who helped him dispose of a weapon.

(3) The circumstances of the appellant

[19] At the time of the murder, the appellant was living on disability benefits, which usually amounted to just over $1,000 a month. He testified that he had a trustee who

handled his money, because he was not very good with money. His trustee ensured that he had enough money for rent and hydro.

[20] After his expenses, he had around $500 a month leftover, which he mostly spent on alcohol and marijuana. He would often become intoxicated by the afternoon and would regularly drink to the point of passing out. He frequented Start Me Up Niagara, where he could receive free meals. He resold cigarette packs at a $5 profit on the side.

[21] The appellant had documented anxiety and clinical depression, for which he took medication. After the murder, the appellant appeared to be in a bad mental state. His 58th birthday was coming up, and he was depressed because he was about to outlive his father, who had died by suicide over 20 years earlier.

[22] In March, about two months after the murder, he sent Ms. Shaw a note. He and Ms. Shaw had a falling out, which he discussed in his note. He said he was depressed and heartbroken by what happened with Ms. Shaw. He also gave her his bank card and told her to withdraw $500 and to “do something useful with it.” She thought the note was a suicide note and went to the police with it.

(4) Project Gale

[23] In the spring of 2014, the Niagara Regional Police launched “Project Gale,” an undercover operation to investigate the appellant for the murder of Mr. Gilby. Detective Sergeant Sean Polly acted as the handler in charge of the operation. He

testified that as a handler he did not tell the undercover operators anything about the investigation or the appellant.

[24] On June 3, 2014, Ralph Hopiavuori, the principal undercover officer, established contact with the appellant by defending him from another undercover officer pretending to be an aggressive panhandler. Det. Hopiavuori was not aware of the details of the homicide, simply that there was a suspect.

[25] Det. Hopiavuori then started attending breakfasts at Start Me Up Niagara. One day, the appellant invited Det. Hopiavuori to his home after they ran into each other on the street while the appellant was inebriated, and Det. Hopiavuori was carrying a six-pack of beer. This became a regular event. Det. Hopiavuori would attend the appellant's apartment to watch movies together. Sometimes, Det. Hopiavuori would bring food or beer with him to share with whoever was in the appellant's apartment. While the appellant would smoke marijuana almost daily, Det. Hopiavuori never smoked with him. During these encounters, the appellant would become very intoxicated, sometimes to the point of losing control of his bowels or bladder.

[26] In mid-July 2014, Det. Hopiavuori recruited the appellant to Project Gale's fictional criminal organization that trafficked in contraband cigarettes and stolen property from the United States and Southern Ontario and arranged for passports to be forged to enable its members to cross the border. The appellant went on "box runs" in which Det. Hopiavuori would drive him to various locations and the appellant

would load boxes of what he thought was contraband with Det. Hopiavuori and other members of the organization. They also attended simulated business meetings.

[27] In addition to Det. Hopiavuori, there were around a dozen other officers who pretended to work for the organization, although the appellant was not introduced to all of them. The appellant became acquainted with Detective Sergeant Chris Lemaich and Detective Constable Kevin Neufeld. Det. Lemaich acted as someone with a similar role as the appellant and Det. Neufeld acted as someone in a higher position within the organization.

[28] Once, the appellant attended a clubhouse near Kitchener that was apparently affiliated with the organization. According to the appellant's testimony the clubhouse had pool tables, a Bentley, and was lined with motorcycles. During this period, the appellant occasionally travelled to hotels and casinos with Det. Hopiavuori and others. The appellant testified that he thought that Det. Neufeld was connected to a biker gang.

[29] In late August 2014, the appellant suffered a stroke and was hospitalized for 16 days. Det. Hopiavuori visited the appellant in the hospital regularly and Det. Neufeld visited once or twice. The appellant testified that no one else had come to see him, aside from one visit from a Start Me Up Niagara worker. Det. Hopiavuori also assisted the appellant by checking in on his home while he was in the hospital, delivering his marijuana and cigarettes to the hospital, and paying for a TV for his

hospital room. He also returned the appellant's overdue DVDs to the library and retrieved his bank card.

[30] When the appellant was discharged, he had a severe leg tremor and was unable to walk or take showers unassisted. He was initially reliant on a wheelchair but Det. Hopiavuori bought him a walker as well as clothing, food, and a haircut. Det. Hopiavuori also drove him to doctor's appointments. By his own words, the appellant was helpless after his stroke. He went from being a mobile person to being affected by leg tremors. The appellant continued to take part in the box runs after his stroke but in a modified capacity. Before his stroke, he assisted with moving boxes of contraband. After his stroke, his job was to keep watch for the police. He conducted 11 or 12 more runs, to further locations, and his compensation increased to between $50 and $100 per run. Det. Hopiavuori continued to provide him with food and beer.

[31] While the appellant was in the hospital, he was questioned by homicide detectives about Mr. Gilby's murder. He testified that the police would show up at his home and he would regularly bump into them on the street. In December, after what appeared to be months of increasing police pressure, Operation Gale staged a scenario where the appellant and Det. Hopiavuori were pulled over by the police. The police confiscated cigarettes from Det. Hopiavuori's truck, purportedly worth thousands of dollars. When questioned by Det. Neufeld about how this happened, Det. Hopiavuori told him that the appellant was the suspect in a murder. Det. Neufeld assured them that he would arrange something that would get the police to leave the

appellant alone. He came up with the following plan. The appellant would relay the details of the murder to Det. Lemaich, who was supposedly dying of cancer. In exchange, Det. Lemaich would receive $10,000 from Det. Neufeld, for him to give to his family. Det. Lemaich was going to receive $5,000 up front and then $5,000 after he confessed. It was in this context that the appellant ultimately confessed to the murder.

[32] The lead-up to the confession began on Monday, February 2, 2015, when the appellant's Red Cross worker did not show up to help the appellant shower. The next day, Det. Hopiavuori took him to a hotel where he could bathe himself. On Wednesday, Det. Hopiavuori drove him home to retrieve medication he left behind. As part of the scenario, police were outside the appellant's door when they arrived. The appellant wanted to stop and speak to them, but Det. Hopiavuori convinced him to return to the hotel. On Thursday, Det. Hopiavuori took the appellant to the doctor to obtain a new prescription. They planned to go to a pharmacy on Friday. At multiple points, the appellant suggested that he call the police or that he go back to his place. Det. Hopiavuori told the appellant that he would not take the appellant back to his apartment.

[33] By this point, the appellant was, in his words, a mess. He had been without his medication for several days and was in an altered mental state. He said that he had no idea what was happening with his head and that he did not know where he was. The increasing pressure he felt throughout the week from the undercover officers to

confess exacerbated this. He confessed on Thursday and Friday. He stated that he attended Mr. Gilby's apartment, stole his marijuana, and attacked him with a hammer that he brought with him. On his way out, he took Mr. Gilby's keys from the ignition of his scooter and locked the door. He turned his jacket inside out, as he was covered in blood, called a cab and returned home. He left the hammer in a park and threw the keys in a sewer.

[34] His confession came out in fragments. The appellant alleges that many details were prompted by Det. Hopiavuori and other officers. When his narrative contradicted known facts about the murder, Det. Hopiavuori challenged him on it and worked with him to create a coherent narrative.

[35] On Thursday, Dets. Hopiavuori and Neufeld took the appellant to a hardware store where the appellant pointed out a hammer similar to the one he said he used to kill Mr. Gilby. No hammer was ever found in the park.

[36] On Friday, the appellant said that he disposed of the keys with the hammer or elsewhere in the park. Later that day, however, the appellant brought Dets. Hopiavuori and Neufeld to a sewer where he said he threw the keys. The keys were found in the sewer. The appellant was arrested and charged shortly thereafter.

C. THE ISSUES

[37] There are three issues on appeal which will be addressed in turn:

1. Did the appellant waive the *voir dire* and, if so, was the waiver valid?

2. Would the confession have been admitted if a *voir dire* was held?

3. Was the jury charge adequate in warning the jury of the dangers inherent in the confession?

D. LAW AND ANALYSIS

(1) Did the appellant waive the *voir dire* requirement from *Hart*?

The Application of *Hart*

[38] The trial Crown took the position that *Hart* did not apply because the appellant did not make a Mr. Big confession. On appeal, the Crown did not seek to maintain this position, arguing instead that the appellant waived the need for a *Hart voir dire*. The appeal Crown's concession that *Hart* applies to the appellant's confession is correct. I will explain why this is so, and then address the Crown's waiver argument.

[39] *Hart* dealt with the admissibility of confessions made in the course of Mr. Big investigations. The classic Mr. Big operation involves the luring of a suspect into a fictitious criminal organization. The suspect is offered financial inducements and friendship. The operation "culminates with an interview-like meeting between the suspect and Mr. Big": *Hart*, at para. 2. During this interview, Mr. Big questions the suspect about the crime and pushes the suspect for a confession. By confessing, the suspect can gain acceptance into the fictious criminal organization. Confessions made during a Mr. Big investigation are presumptively inadmissible, because of the dangers posed by the investigative technique.

[40] In *Hart*, Moldaver J. foresaw that police might make superficial changes to their operations to avoid *Hart*. As a result, he defined a Mr. Big investigation broadly, at paras. 10, 85: "where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him…any confession is presumptively inadmissible" (emphasis added).

[41] Accordingly, this court took an expansive view of the application of *Hart* in *R. v. Kelly*, 2017 ONCA 621, 387 C.R.R. (2d) 93, leave to appeal dismissed, [2017] S.C.C.A. No. 474. Feldman J.A. wrote, at para. 35, that although the undercover operation in *Kelly* did not have the "most offensive tactics" of the traditional Mr. Big operation, *Hart* still applied. The relevant question to determine whether *Hart* applies to an operation is whether the operation poses the potential for the three dangers identified in *Hart*: "unreliable confessions, the prejudicial effect of the evidence of the appellant's participation in the scheme, and the potential for police misconduct": *Kelly*, at para. 35.

[42] The appellant's confession satisfies the requisite criteria. The operation satisfies the *Hart* definition because (i) the state recruited the appellant into a fictitious criminal organization of its own making in order to (ii) elicit a confession: *Hart*, at para. 10. The expanded criteria in *Kelly* are also met. As the following analysis discloses, the operation used to secure the appellant's confession posed the potential of producing an unreliable confession, generated prejudicial evidence relating to the appellant's participation in the scheme, and had the potential for police misconduct.

The confession was presumptively inadmissible, and the requirement for a *voir dire* was triggered, in which the Crown would have to show the confession to be admissible.

Waiver of the *voir dire*

[43] The admissibility of evidence is for the trial judge to determine: *R. v. J.H.*, 2020 ONCA 165, at para. 56. The party seeking to admit presumptively inadmissible evidence "must apply to the trial judge for an order permitting its reception": *J.H.*, at para. 57. The general practice is to invoke s. 645(5) of the *Criminal Code* and to have the application heard before jury selection: *J.H.*, at para. 58.

[44] Of course, a party may generally waive the benefit of exclusionary rules, thereby permitting presumptively inadmissible evidence to be received. The respondent argues that this occurred here. It maintains that through his trial counsel the appellant exercised his right to waive a *Hart voir dire*. The respondent contends that absent an ineffective assistance of counsel argument (which the appellant did not advance), the appellant must live with the consequences of tactical decisions made by his counsel. Counsel is presumed to know the law. He was aware of *Hart* and the *voir dire* procedure, as is evident by his lengthy submissions to the trial judge on this issue. He made a tactical decision to dispense with the *voir dire*.

[45] However, the law of waiver is unique as it applies to confessions, no doubt because a confession is often decisive in establishing guilt. A trial judge is obliged to conduct a *voir dire* into the admissibility of a confession, even in the absence of

objection, unless the right to a *voir dire* has been expressly waived: *Park v. R.*, [1981] 2 S.C.R. 64, at p. 70. In *R. v. Sabir*, 2018 ONCA 912, 367 C.C.C. (3d) 426, at para. 24, Strathy C.J.O. described what is required:

> As the Supreme Court explained in *R. v. Park*, [1981] 2 S.C.R. 64, at p. 73, there is no particular wording or formula required to communicate an informed waiver. However, the waiver must be express. "The question is: Does the accused indeed waive the requirement of a *voir dire* and admit that the statement is voluntary and admissible in evidence?": *R. v. Park*, at p. 74. In the context of a waiver made by defence counsel, the court stated that the trial judge must be "satisfied that counsel understands the matter and has made an informed decision to waive the *voir dire*": at p. 73.The onus on a trial judge with respect to voluntariness is high, even where an accused is represented by counsel. As the Supreme Court noted in *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 41: "The trial judge has a duty 'to conduct the trial judicially quite apart from lapses of counsel': see *R. v. Sweezey* (1974), 20 C.C.C. (2d) 400 (Ont. C.A.), at p. 417. This includes the duty to hold a *voir dire* whenever the prosecution seeks to adduce a statement of the accused made to a person in authority".

[46] Once a waiver has been offered the trial judge has discretion to accept the waiver, to hold a *voir dire*, or to make inquiries of counsel as to factual admissions underlying the waiver: *Park*, at p. 70. Although a trial judge is not required to make inquiries before accepting the waiver, the trial judge must be "satisfied that counsel understands the matter and has made an informed decision to waive the *voir dire*": *Park*, at p. 73.

[47] In *Hodgson*, [1998] 2 S.C.R. 449, at para. 41, Cory J. noted that "where the defence has not requested a *voir dire* and a statement of the accused is admitted into evidence, the trial judge will only have committed reversible error if clear evidence existed in the record which objectively should have alerted him or her to the need for a *voir dire* notwithstanding counsel's silence." It follows that if a statement of the accused is admitted into evidence without a valid waiver, the trial judge will have committed a reversible error if clear evidence existed in the record which objectively should have alerted him or her to the need for a *voir dire*.

[48] As I will explain, this review of the law exposes problems in finding that the appellant waived his right to a *voir dire*. First, defence counsel did not purport to waive the right to a required *voir dire*. Instead, he erroneously conceded that a *voir dire* was not required because the rule requiring a *voir dire* did not apply. This concession was not a "waiver". Second, it is evident that defence counsel did not understand the law that applies, and the trial judge accepted the "waiver" without satisfying himself that counsel understood the matter and made an informed decision. Indeed, there was clear evidence on the record that should have alerted the trial judge to the need for a *voir dire* to determine compliance with the rule in *Hart*, notwithstanding defence counsel's mistaken concession that the rule did not apply. Hence, even if defence counsel's concesssion amounts to a waiver, it was not a valid waiver.

The circumstances of the purported waiver

[49] In order to address the validity of the appellant's purported waiver, it is necessary to consider the pre-trial and mid-trial discussions between counsel and the trial judge.

[50] The admissibility of the statement was not properly canvassed at the judicial pre-trial. According to the trial Crown, there was brief discussion about the admissibility of the confession at the pre-trial stage. However, the appellant changed counsel after this pre-trial discussion. When new counsel attended a continued judicial pre-trial, he was not fully versed in the appellant's case. There was no discussion about a *Hart voir dire* at that point. He stated that he believed that the only live issue at the continued pre-trial was the *Charter* compliance of the intercepts.

[51] Defence counsel finally raised the issue a few weeks prior to the start of the trial, advising Crown counsel that he believed that *Hart* applied. Crown counsel disagreed and took the position that defence counsel bore the onus of proving that the investigation was a Mr. Big operation before the Crown was required to establish the admissibility of the confession. It seems that the Crown took this position because, according to him, there was no criminal hierarchy or violence.

[52] The issue did not come up again until mid-trial. In his cross-examination of Det. Polly, defence counsel asked questions related to the nature of the operation and the officer's understanding of the appellant's alcohol addiction, seemingly to establish a factual record for admissibility. The trial judge challenged defence counsel on the

relevance of this line of questioning. The next morning, on March 1, 2017, defence counsel made his first submissions on *Hart*:

> [A]t the end of my questioning of, of this witness, I would be arguing that *Hart* applies…after this witness is completed, I would be asking for you to make a finding. I would ask that then we would *voir dire* the, the next witness. Not necessarily about the statements themselves, just about circumstances in which the statements were taken, the utterances were taken. And, and Your Honour would, would make a finding that if the Crown had or had not satisfied the onus that I believe is now a common law onus.

[53] Upon hearing this, the trial judge was concerned that this was not canvassed at the pre-trial stage and was specifically concerned that the jury would be inconvenienced by the time it would take to make a decision on this issue. The trial judge initially characterized the question as whether or not the confession would go into evidence. At this, defence counsel offered a "third course":

> I think Your Honour will find that *Mack* is the, is, is – covers the ground here and that you will suggest that we just hear the evidence in front of the, the jury and then at the end Your Honour can make appropriate cautions about the, about the evidence…there are two – three outcomes…You could just deny the, the application, assuming that you'll hear the application, you'll deny the application. And I can understand how that could happen. You could grant the application, do the *voir dire* and – with the remedies that are available or I think with an eye to the *Mack* case which is a case, as I understand it, and please, I, I don't – I'm not terribly familiar with it at this juncture. But in, in *Mack* the trial proceeded to, to the end and the issue was the, the judge making the appropriate cautionary remarks to the jury about what use they can put the evidence to. [Emphasis added.]

[54] The trial Crown stated that he would have called its evidence in an entirely different manner had he known that this issue would have been raised. He also stated his position that, if there was a *voir dire*, that the Crown would have to introduce all 280 hours of recordings and call other police witnesses.

[55] At this point, the discussion of the admissibility of the confession paused so that the cross-examination of Det. Polly could be completed. The issue was again addressed after the completion of the cross-examination. The trial judge summarized the live issues in this way:

> As I see it, there are two issues for the Court to consider at this point. The first is should there be consideration of the confession, at this point, based on pre-trial conference discussions. To put that another way, the whole point of pre-trial discussions is to sort out in advance issues that are going to impact the trial, so that once the trial begins, particularly with a jury, it can proceed with relative efficiency, if I can call it that. The second issue for me to consider at this point is – and I'll put this in, in a short form, does *Hart* apply. In other words, is there sufficient evidence of a Mr. Big operation to trigger the presumption of inadmissibility at common law? [Emphasis added.]

[56] Crucially, from this point on, it seems that the only submissions on the substantive law related to whether or not *Hart* applied – not whether the confession was ultimately admissible.

[57] Crown counsel again insisted that if a *voir dire* was to be held he would have to play weeks of intercepted conversations to the Court:

> I don't know what the procedure is for you to consult with your colleague but no such application was brought before the Court. The Crown would have called its evidence in an entirely different manner. And if we are compelled to enter into a *voir dire* at this stage, I can tell you there are – in order for the Crown to make the record complete, there are 280 hours of recorded conversations.
>
> …
>
> It's up to the Crown to put all of the admissible evidence that would be relevant, in terms of how this relationship developed, how it was fostered, the nature of it and, I would respectfully submit that if it isn't being challenged on a *voir dire*, with all those factors in mind.

[58] Both defence counsel and trial judge pushed the Crown on this position. Defence counsel stated that he anticipated that a *voir dire* would take a few hours. The trial judge stated that it would not be necessary or realistic to hear all the intercepts to determine whether there was a Mr. Big or not. The trial judge indicated that a *voir dire* with 280 hours of recordings would lead to a mistrial. However, Crown counsel reiterated his position that all 280 hours would have to be introduced into evidence.

[59] On the substantive issue, Crown counsel stated that the onus was on the appellant to establish that it was a Mr. Big operation and that the groundwork for that argument had to have been done in a pre-trial motion.

[60] The trial judge again expressed concern about the effect that a long *voir dire* would have on the jury and encouraged counsel to come to make reasonable

concessions to shorten the time required for a *voir dire*. He also encouraged counsel to have an off-the-record discussion.

> Well, it might – can I suggest that rather than have a kind of an open, free flowing discussion on the record, you have a discussion and then based on what you may conclude you can advise me on the record.
>
> …
>
> If, as between counsel, you can agree that the only other evidence, or I should say, testimony that'll be called on this threshold issue of whether a Mr. Big operation applied and, if so, as to the Crown's onus, if the only evidence that you require is what's currently before the Court and the evidence of Mr. Hopiavuori then we can proceed on that basis. [Emphasis added.]

[61] The Court took a recess so that the Crown and defence counsel could have an off-record discussion about how to proceed. They returned having come to an agreement that: (i) defence would accept the Crown's position that there was no Mr. Big within the meaning of *Hart*; (ii) the issue of the reliability of the statement would be left to the jury; and (iii) counsel would be expecting an instruction from the trial judge about the nature of the inducements provided to the appellant. The Crown addressed the court:

> Your Honour, Mr. Hadfield and I have had conversations and what I've suggested to him is if he concedes the Mr. Big point, the evidence could easily be used that we've already heard to tell the jury that perhaps Mr. Quinton's will was overwhelmed when he was speaking with this officer and I think that's, that's fair play. So that's what we're aiming for. [Emphasis added.]

[62] After the next recess, Crown counsel confirmed that they would be proceeding without a *voir dire* and that the reliability of the confession would be dealt with in the jury instruction. Defence counsel made no explicit factual admissions.

[63] The trial judge made no inquiries about the legal basis for the conclusion that this was not a Mr. Big confession. But during the pre-charge discussions, defence counsel made the following comment, suggesting that in his view the criminal activity was not sufficiently serious, and the organization was not sufficiently hierarchical to technically constitute a Mr. Big operation:

> [W]hether Your Honour would have found this to be a Mr. Big operation or a Mr. Big style operation except with a very small Mr. Big and a very mundane and paltry criminal organization. There are analogues between, in my respectful submission, between Mr. Big style and this, this operation. [Emphasis added.]

[64] The trial judge appeared to agree with the position that the crimes were not sufficiently serious for the operation to constitute a Mr. Big operation. In pre-charge discussions, he distinguished between Project Gale and a Mr. Big operation in the following way:

> [U]nlike a Mr. Big where they're looking at some serious bad crime and in effect having to prove that you're capable of similar bad crime … this is to me some petty crime about moving some cigarettes around.

The purported waiver was not a waiver

[65] The respondent's submissions that the appellant waived his right to a Mr. Big *voir dire* cannot be accepted. Appellant's trial counsel did not advise the court that the appellant was waiving his right to a *voir dire* into the admissibility of the confession. Instead, he had agreed to accept the Crown position that Mr. Big did not apply. No waiver occurred.

[66] Even if defence counsel's mistaken concession that *Hart* did not apply to the appellant's confession qualified as a waiver, it would not have been a valid waiver. The decision made by defence counsel was not informed and the trial judge failed to determine that it was.

[67] First, it does not seem that defence counsel appreciated the legal issues involved. The entirety of the on-the-record discussion, prior to the purported waiver, related to the question of whether *Hart* applied to the confession. None of the discussion related to the admissibility of the confession under *Hart*.

[68] In addition, it does not appear that defence counsel had turned his mind to the abuse of process concerns in this case. Defence counsel's response to the trial judge's challenge to the relevance of his questioning of Det. Polly related to the nature of the inducements provided and how those inducements may undermine the reliability of the statement. Not once during this exchange or during pre-charge discussions did defence counsel highlight the abuse of process concerns.

[69] The agreement counsel reached after their off-the-record discussion was not an agreement that fully informed defence counsel would have made. After the discussion, defence counsel agreed to accept Crown counsel's position that *Hart* did not apply. In return, Crown counsel agreed that a *Mack*-style jury warning on the reliability of the confession would be given. However, the appellant would have been entitled to a jury warning on the reliability of the confession in any event if the evidence was admitted after a *voir dire*. A jury warning is required in every single case involving an admissible Mr. Big confession. Defence counsel received nothing in return for his concession. As appellant counsel described, this agreement was more of an unconditional surrender than it was a deal.

[70] Finally, statements made by defence counsel further support the view that the waiver was not informed. Defence counsel was, by his own admission, unfamiliar with the law around Mr. Big confessions. During the pre-charge discussions, defence counsel characterized the operation as a "Mr. Big style operation, except with a very small Mr. Big and a very mundane and paltry criminal organization." The only case that defence counsel relied upon in his submissions other than *Hart* and *Mack* was *R. v. Derbyshire*, 2016 NSCA 67, 340 C.C.C. (3d) 1. *Derbyshire* did not involve a Mr. Big investigation. Indeed, the circumstances of *Derbyshire* were far afield from this case.

[71] Upon review of the statements made by counsel on the record, the nature of the agreement reached off-the-record, and the legal issues, the only reasonable

inference is that defence counsel did not understand the legal issues and did not appreciate the implications of the waiver of the *voir dire*. In short, the purported waiver was not informed. Yet the trial judge failed to satisfy himself that counsel understood the matter and had made an informed decision to waive the *voir dire.* He should have done so. There was ample evidence on the record that should have alerted the trial judge that *Hart* applied, entitling the appellant to a *voir dire*. The trial judge erred in not holding one.

[72] However, this is not the end of the analysis. When there is no *voir dire* at trial, appellate courts will not intervene if it is clear that the statement would have met the admissibility threshold if a *voir dire* had been held: *R. v. Niemi*, 2017 ONCA 720, 355 C.C.C. (3d) 344, at paras. 3, 28; *Kelly*, at para. 78.

[73] In *Niemi*, the confession was admitted at trial, before the Supreme Court's decision in *Hart*. Paciocco J.A. dismissed the appeal, as he found that the statements would have been admitted under the *Hart* test. In his confession, Mr. Niemi had provided a number of unreleased details of the murder. This bolstered the reliability of the confession, "in spite of the non-coercive inducements" given to secure the confession: at para. 29. The probative value of the statements was "impressive": at para. 29. In addition, there was no abuse of process; the trial judge found that the Mr. Big operation was "exemplary" and "excellent police work": at para. 31.

(2) Would the confession have been admissible if a *voir dire* had been held?

[74] The appellant argues that the record in this case is insufficient for this Court to resolve the ultimate question of the admissibility of the confession. However, he argues that, on the record available, there is doubt that the confession was reliable. In addition, he submits that it is highly arguable that the police conduct in this case would shock the conscience of the community.

[75] The respondent argues that the confession would have been admitted. He argues that nothing in the circumstances of the investigation suggests that the appellant's will was overborne and that his confession was unreliable. In addition, the confession had several markers of reliability, including that it contained precise details, including some not publicized, and that it led to the discovery of further evidence. On the abuse of process branch, the respondent argues that the investigation was skillful police work. The investigation did not involve coercive behaviour that would shock the conscience of the community.

[76] A confession made during a Mr. Big operation is problematic because there is a risk that the confession is unreliable and an admitted confession is generally accompanied by bad character evidence: *Hart*, at paras. 68-77. In addition, Mr. Big operations "create a risk that the police will resort to unacceptable tactics in their pursuit of a confession": *Hart*, at para. 78. Unacceptable police tactics can undermine the reliability of a confession or be an abuse of process. In recognition of these dangers, Mr. Big confessions are presumptively inadmissible.

[77] In order to be admitted, the confession's probative value must outweigh its prejudicial effect, and the police conduct must not have amounted to an abuse of process. The confession's probative value is tied to the reliability of the statement, while its prejudicial effect arises primarily from the bad character evidence that must be disclosed during trial about the subject's misconduct during the operation: *Hart*, at para. 85.

[78] The abuse of process prong of the test "is intended to guard against state conduct that society finds unacceptable, and which threatens the integrity of the justice system": *Hart*, at para. 113. The operation "cannot be permitted to overcome the will of the accused and coerce a confession": *Hart*, at para. 115. Importantly, Moldaver J. stated, at para. 117, that "operations that prey on an accused's vulnerabilities – like mental health problems, substance addictions, or youthfulness – are also highly problematic. Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system" (emphasis added).

[79] In addition to mental health problems and substance addiction, courts have explored whether the accused possessed traits such as intelligence and "street smarts" and have also explored the degree to which the accused was emotionally bonded to the undercover operatives, dependant on the fictional criminal organization, socially isolated, and destitute: *Kelly*, at paras. 38-39; *Neimi*, at para. 29; *Yakimchuk*, 2017 ABCA 101, 352 C.C.C. (3d) 434, at para. 69.

[80] Notably, Moldaver J. wrote that the abuse of process in *Hart* was a "reinvigorated" analysis. He acknowledged, at para. 114, that the abuse of process doctrine was rarely used to guard against police misconduct in Mr. Big operations:

> I acknowledge that, thus far, the doctrine has provided little protection in the context of Mr. Big operations. This may be due in part to this Court's decision in *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, where Binnie J., writing for the majority, described the Mr. Big technique as "skillful police work" (para. 21). <u>But the solution, in my view, is to reinvigorate the doctrine in this context, not to search for an alternative framework to guard against the very same problem.</u> The first step toward restoring the doctrine as an effective guard against police misconduct in this context is to remind trial judges that these operations can become abusive, and that they must carefully scrutinize how the police conduct them. [Emphasis added.]

[81] The Mr. Big operation in *Hart* "preyed upon the respondent's poverty and social isolation": at para. 148. In addition, the police allowed Mr. Hart to drive long distances despite knowing that he had a risk of seizure and could have had an accident while driving. Moldaver J. commented, at para. 149, that "the police conduct in this case raises significant concerns, and might well amount to an abuse of process."

Analysis on admissibility

[82] I agree with the appellant's submissions that there are substantial issues related to the reliability of the confession and the police conduct in this case that require a new trial and a *voir dire* to properly address. I cannot say that had a *voir dire* been held, the confession would have been admitted.

[83] It the outset, I note that the trial Crown's position was that all 280 hours of intercepts would need to be introduced into evidence on a *voir dire*. This position was unreasonable and appears to be one of the root causes of why a *voir dire* was never held. In the face of the trial Crown's submissions on this point, the trial judge stressed that counsel should attempt to come to an agreement and make reasonable concessions and, in the end, defence counsel conceded the Mr. Big point. The respondent now attempts to argue on appeal that there is enough of an evidentiary record to conclude that the appellant's confession would have been admitted had a *voir dire* been held.

(i) Probative value vs. prejudicial effect

[84] The respondent is correct that the confession appears to have led to the discovery of powerful inculpatory evidence: Mr. Gilby's missing set of keys, which were in the storm sewer that the appellant led police to. This is, on its face, a persuasive indicator of the reliability of the confession. The defence position at trial was that the police officers coached the appellant on the content of the confession and that the officers led the appellant to the location of the keys. The appellant was simply responding to non-verbal clues when he directed them to the correct storm sewer. The appellant says that the recordings of the confession support the coaching theory. He called evidence which suggested that the keys would have been discovered much earlier, had they been deposited in the storm sewer when the appellant said they were. Given my conclusion on the abuse of process concerns

and the fact that the record is incomplete on this issue, it is not necessary to comment on the reliability of the appellant's confession, other than to say that the evidentiary record on this point is incomplete.

(ii) Abuse of process

[85] The police conduct in Project Gale raised serious concerns about abuse of process. The appellant was an alcoholic. He had anxiety and depression that he was taking medication for, and at least one recent instance of suicidal ideation. He eked out an existence on disability benefits. He drank and smoked marijuana regularly and had to leave his disability cheques with a trustee out of fear that he would not be able to afford his living expenses due to his substance consumption.

[86] When Det. Hopiavuori appeared as a new friend, the appellant's life became easier. He suddenly had a network of people he cared for, and who appeared to care for him. Det. Hopiavuori regularly bought him food and alcohol. He received cash from the organization. The amounts may not seem like a lot of money for most, but the appellant was a man scraping by on his benefits. In eight months, he incurred $585 worth of debt and repaid $440. Over that same period, the organization paid the appellant about $910. During the time before the appellant's stroke, Det. Hopiavuori spent $260 on alcohol for the two of them and whoever else was around. In total, he spent over $970 on alcohol and almost $1,900 on food during the operation. He spent around $160 on other expenses, including the walker, clothes, and a haircut for the appellant. The fictitious organization also spent $837.88 on

hotels for the appellant. As Det. Polly acknowledged, the money was a lot for the appellant. Perhaps most importantly, he was also made to feel useful and valued by the organization, which began to give him tasks in this apparently criminal enterprise.

[87] Up until the point of the appellant's stroke in August 2014, the circumstances of Operation Gale, although still concerning, may not have been much different from many Mr. Big operations. However, from that point on, the police conduct raised even more significant concerns. As the appellant submits, Det. Hopiavuori took on a caregiving role in addition to a friendship role. Det. Hopiavuori visited him in the hospital; purchased things for him, including a walker and a TV; and picked up his medication.

[88] This chronology reveals a significantly increased level of dependence and vulnerability on the part of the appellant after he suffered the stroke. While the evidence of Dets. Polly and Hopiavuori was that they were merely looking after him so that he would be able to continue in Operation Gale, it is clear that this also fostered a relationship of increased dependency on the part of the appellant. The appellant was even more vulnerable than he had been before the stroke. They accommodated his physical constraints by limiting his role to that of lookout. He testified that when he expressed some surprise at this, he was told that he was valued because he was smart. They also took him to a hotel and paid so he could bathe which he was unable to do, at least initially, at home.

[89] It was during this period that the police increased the pressure on him. They pulled the appellant and Det. Hopiavuori over and seized what the police convinced the appellant were thousands of dollars worth of cigarettes. Under this pressure, Det. Neufeld purportedly came up with a plan that would relieve that pressure and provide the appellant's friend, Det. Lemaich, with a way to support his family.

[90] Then, in the final days before the confession, the appellant's Red Cross worker did not show. The police staged an elaborate operation, where it appeared that his apartment was swarmed by police. When Det. Hopiavuori and the appellant saw the police cruisers, the appellant wanted to speak to the police and clear things up. The appellant also wanted to retrieve his medication. Det. Hopiavuori refused and convinced the appellant to leave. They ended up back at a hotel. During the time at the hotel, Det. Hopiavuori increasingly pressured the appellant to confess. Most concerning of all, the appellant did not have his medication for the entire time at the hotel. By the time he confessed, he was a mess, mentally.

[91] In summary, the appellant was extremely vulnerable and came to depend on Det. Hopiavuori: he had very little money and lacked a social network; he had documented mental health issues, including addition to alcohol; by the time of his confession, he had significant physical health issues; and he was off his medication for three days in the lead-up to his confession. The appellant's vulnerabilities were exploited, consciously or not, by the operation: the police officers provided him with money; they made him feel valued; they provided him food and alcohol; they were

invaluable to the appellant while he was recovering from his stroke; and they actively prevented the appellant from obtaining medication right before the confession.

[92] These are serious issues and it is by no means obvious that the confession would have survived the scrutiny of a *voir dire*. As the appellant states, it is highly arguable that the police conduct in this case would shock the conscience of the community. I stress that these statements were presumptively inadmissible, and the onus was on the Crown to show otherwise.

[93] A search of the post-*Hart* case law indicates that very few Mr. Big confessions have been excluded because the police conduct amounted to an abuse of process, despite Moldaver J.'s comments that the doctrine must be reinvigorated to guard against abusive police conduct. It appears that the doctrine of abuse of process might still "be somewhat of a paper tiger", especially in cases like the case at bar, where the accused was not threatened with overt or implied violence: *Hart*, at para. 79. This is despite Moldaver J.'s comments, at paras. 78, 114, that police conduct must be carefully scrutinized in light of the obvious "risk that the police will go too far".

[94] The promise of a "reinvigorated" abuse of process doctrine must not be an empty one. The facts of this case demonstrate that there is an ever-present risk that the police might go too far. It is the court's role to provide for an "effective mechanism for monitoring the conduct of the undercover officers who engage in these operations" and to "protect against abusive state conduct": *Hart*, at paras. 79-80. That did not happen in this case. These comments should not be taken to suggest that a particular

result must be reached in a new trial of this matter. Instead, they are intended to signal to the courts more broadly that they must seriously consider the applicability of the abuse of process doctrine in cases of this nature.

(3) The jury charge

[95] Because of my conclusion on the admissibility of the confession, it is not necessary to decide whether the jury charge was adequate because a jury charge presupposes that the confession was properly admitted. Moreover, had a *voir dire* been conducted, additional evidence may have been admitted, thus affecting the necessary content of the charge. It may be useful, however, to restate a few applicable principles.

[96] First, and most importantly, even if a confession obtained through a Mr. Big operation is determined to reach the admissibility threshold at a proper *voir dire* and is admitted into evidence, the issues about reliability and potential for prejudice identified in *Hart* are not eliminated. These evidentiary issues must still be mitigated at the jury instruction stage of the trial: *Mack*, para. 44.

[97] The appellant argues that the jury charge fell well short of the guidelines in *Mack*. Specifically, the jury charge did not address specific reliability concerns associated with Mr. Big confessions and it did not review the circumstances relevant to the confession. As a result, it did not properly caution the jury about the reliability concerns in the confession.

[98] The respondent argues that the jury charge was adequate. The charge as a whole accorded with the requirements of *Mack*. He argues that a more detailed charge about the circumstances of the confession would not have assisted the defence, because it would have included a list of evidence that confirmed the reliability of the confession.

[99] It is well established that an accused is entitled to a properly, but not perfectly, instructed jury: *Mack*, at para. 48. An adequate jury charge must caution the jury about the two evidentiary concerns raised by Mr. Big confessions: the risk that the confession may be unreliable and the fact that any confession is accompanied by bad character evidence. These concerns do not disappear after the confession is admitted: *Mack*, at para. 44. The details of this evidence will, obviously, inform the specific content of the instructions to be given to the jury.

[100] There is no magic formula for a jury instruction in Mr. Big cases. However, with respect to the reliability concerns, the trial judge should highlight that the reliability of the confession is a question for the jury: *Mack*, at para. 52. The trial judge should alert the jury to several factors relevant in assessing the reliability of the confession, including “the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused”:

Mack, at para. 52. The trial judge should also discuss any markers of reliability that the confession contains.

[101] Because there was no *voir dire* held in this case, it is not useful to parse the trial judge's charge beyond setting out these general principles. Depending on the *voir dire*, there may be more or less evidence adduced at trial in relation to the reliability of any statements or confession admitted.

E. THE SENTENCE APPEAL

[102] While the notice of appeal included a sentence appeal which has not been formally abandoned, the issue was not argued before us. In any event, it is not necessary to deal with the appeal given the conclusions I have reached in the conviction appeal.

F. DISPOSITION

[103] For these reasons I would allow the conviction appeal and order a new trial.

Released: January 25, 2021
"M.T."

"A. Harvison Young J.A."
"I agree M. Tulloch J.A."
"I agree David M. Paciocco J.A."