Citation: ***R. v. Robinson***
2000 BCCA 75

Date: 20000201
Docket: CA022959
Registry: Vancouver

# COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

**REGINA**

RESPONDENT

AND:

**COREY LAWRENCE ROBINSON**

APPELLANT

Before: The Honourable Mr. Justice Esson
The Honourable Mr. Justice Cumming
The Honourable Madam Justice Huddart

Neil L. Cobb — Counsel for the Appellant

G.C. Deedman — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
November 22 and 23, 1999

Place and Date of Judgment: Vancouver, British Columbia
February 1, 2000

**Written Reasons by:**
The Honourable Madam Justice Huddart

**Concurred in by:**
The Honourable Mr. Justice Esson
The Honourable Mr. Justice Cumming

**Reasons for Judgment of the Honourable Madam Justice Huddart:**

[1] On 17 December 1996, a jury found Corey Robinson guilty of the second degree murder of his neighbour, Lori Aiston. Mr. Robinson seeks a new trial on the basis of a variety of errors said to have been made by the trial judge. The focus of the appeal was on the appellant's right to remain silent.

**Facts**

[2] Lori Aiston spent the evening of 23 July 1992 at the apartment of Mr. Robinson and his common-law spouse Mariah Hutchinson. She left between 1:00 and 1:30 on the morning of 24 July 1992 and returned to her apartment next door.

[3] Ms. Hutchinson and Mr. Robinson went to bed and according to Ms. Hutchinson's testimony,

fell asleep around 2:30 or 3:00 a.m. after having sex. At about 5 or 5:30 a.m. Charity Speck, who lived in the apartment directly below Ms. Aiston, heard "a loud thumping, running, screaming" coming from her apartment that continued for about an hour. At 8:00 or 8:15 a.m., Ms. Hutchinson awoke after an undisturbed sleep; Mr. Robinson was in bed beside her. She did not notice any cuts or scratches on him or any change in his physical appearance. They spent the day together. Mr. Robinson spent much of the following day with his brother, fixing his car. That evening, having failed to get an answer by telephone or at the door of Ms. Aiston, on numerous previous occasions, Ms. Hutchinson went again to her apartment. She got no answer and heard nothing from Ms. Aiston's apartment. She and Mr. Robinson went out to pick up videos. After they returned about an hour later, she again went to Ms. Aiston's door. This time she heard water running. Ms. Aiston's 25-month old daughter, Chelsea, answered the door, agreeing when asked that her mother was in the shower. The door was locked.

[4] Not long after that, Ms. Hutchinson found Ms. Aiston lying on the floor in her bedroom. She had gone into the apartment with the help of the building manager to investigate a water leak coming from it. She found the bathroom sink stopper in place with the tap on. She learned later from the police that Ms. Aiston was dead. Meanwhile she and Mr. Robinson comforted and bathed Chelsea, Mr. Robinson assuring her that her mother was fine.

[5] Ms. Aiston was dressed in night clothes; she had suffered six stab wounds; her liver was pulverized; and she was partially asphyxiated by having her throat compressed. There was no evidence of sexual assault, robbery or any tampering with the door lock. Four days later, on 29 July 1992 police officers found Ms. Aiston's keys in a drain outside the apartment building.

[6] On 2 August 1992, police officers interviewed Mr. Robinson who was not then a suspect. Constable Gilkinson asked Mr. Robinson for hair samples explaining that the police needed to eliminate any of his hair found at the scene from that of the perpetrator because he and Ms. Hutchinson visited Ms. Aiston's apartment frequently. He did not caution Mr. Robinson or tell him that the samples might be used to incriminate him. Mr. Robinson willingly provided the hair samples.

[7] Sometime during 1994, Darren Richens, another resident of the apartment building and friend of Ms. Aiston, informed the police that Mr. Robinson had confessed Ms. Aiston's murder to him. The investigating officers, Corporal Carter and Constable Chicoine, had concerns about his motivation. Mr. Richens was a suspect in her murder, and was facing other criminal charges. Nevertheless, on 1 December 1994, they interviewed Mr. Robinson and informed him that they wished to conduct a polygraph for the purpose of excluding him as a possible suspect. Mr. Robinson agreed that he would go with the police to the Surrey Detachment office to undergo the polygraph examination at 11:30 a.m. on 18 December 1994.

[8] That Sunday the officers went to Mr. Robinson's home, woke him up, and took him to the Surrey Detachment Office. By the time he arrived at the polygraph interview room located in the basement of the detachment office, Sergeant Adam, an experienced and talented polygraphist and interrogator, had identified Mr. Robinson as a viable suspect. He had taken Mr. Richens' statements at face value unaware of the investigating officers' suspicions as to his motivation.

[9] The videotape of the polygraph examination began at 11:17 a.m. After a delayed start, Sergeant Adam briefly explained who he was and what he planned to do. He then gave Mr. Robinson a brochure to read and left the room. In his absence Mr. Robinson appeared to read the brochure, slowly and carefully. When Sergeant Adam returned at 11:40 a.m., he asked Mr. Robinson if he had any trouble reading it. When Mr. Robinson indicated some difficulty, Sergeant Adam explained what was in the brochure. Mr. Robinson responded, "Can I not, not take it?" Sergeant Adam responded, "Yeah, you can not take it." Mr. Robinson responded, "Oh." Sergeant Adam continued to talk about the test at some length with occasional "oh's" or "uhuhuh's" from Mr. Robinson until Mr.Robinson said, "I don't want to take the test."

[10] After a brief discussion about his reasons, Sergeant Adam told him it was his right not to take the test and then told him that he had the right to phone a lawyer at any time, that free Legal Aid services were available, and that he could help him call someone. Mr. Robinson responded, "I want to go home and think about it and phone up uh Legal Aid or something."

[11] Sergeant Adam then changed his tactics and began to tell Mr. Robinson about the information

contained in Mr. Richens' statement. He began what was to be his approach for the balance of the interview that morning and another interview that evening after Mr. Robinson's arrest and consultation with a lawyer, Gail Barnes. This approach can be described as an attempt to get Mr. Robinson to tell the truth "for his own good."

[12] Mr. Robinson responded to Sergeant Adam's first attempts by saying, "I'd like to go" and again, "go, right now." At that point, Sergeant Adam confronted Mr. Robinson with his version of what happened, presumably derived from information in the investigators' file. He told Mr. Robinson that he had killed Ms. Aiston because she was going to tell Ms. Hutchinson about an affair they were having. He continued a virtual monologue on that and related themes until 12:19 p.m., by which time Mr. Robinson had begun crying, appearing rather tentatively to agree with some of the accusations Sergeant Adam was repeatedly making to him. Corporal Carter testified that at that moment he decided to charge Mr. Robinson with second degree murder. He had been watching the interview by closed circuit television.

[13] Mr. Robinson and Sergeant Adam left the room. Sergeant Adam contacted Gail Barnes by telephone, telling her that "he had a fellow here who had killed a woman in Richmond and now needed a lawyer." He told Mr. Robinson, who was in the phone booth with him, to tell her the truth about what happened. This followed on his earlier advice to Mr. Robinson that a lawyer could never repeat what a client told him, even if it was a confession of guilt.

[14] After Mr. Robinson spoke with Ms. Barnes for about six minutes, he gestured to Sergeant Adam to come into the phone booth and handed him the telephone receiver indicating that Ms. Barnes wanted to speak to him. Ms. Barnes told Sergeant Adam that she was leaving immediately to meet with Mr. Robinson and that she did not want the police to interview him until she had done so.

[15] Sergeant Adam and Mr. Robinson returned to the interview room where in response to a question from Sergeant Adam, Mr.Robinson confirmed that he had spoken with Ms. Barnes and told her the truth about what happened and that she had advised him not to say anything until she arrived. Mr. Robinson indicated he wished to follow her advice. Sergeant Adam left the room briefly and returned with Corporal Carter. He told Mr. Robinson that Corporal Carter was going to arrest him for the murder of Lori Aiston. Corporal Carter testified that he never got the chance to tell Mr. Robinson at that time that he was under arrest for second degree murder because "we left the interview room, and he, Mr. Robinson, came out to make another phone call."

[16] That phone call was to Lisa Unrau, Mr. Robinson's common-law wife. Although Sergeant Adam told Mr. Robinson that he was not part of Corporal Carter's investigation and that he was not "out there working to solve this murder," he testified that neither Corporal Carter nor any other officer advised him that he should suggest to Mr. Robinson to speak to Ms. Unrau. He testified that he did so in the hope that Mr. Robinson would say something to her that would be useful to the prosecution. He considered that Mr. Robinson seemed remorseful. He wanted him to start telling people what he had done because that increased the chance that he would keep on talking.

[17] In keeping with his earlier advice, Sergeant Adam told Mr. Robinson that it was important for him to tell Ms. Unrau his side of the story so she would understand why he killed her friend. He took Mr. Robinson to the phone booth, asked Mr. Robinson for Ms. Unrau's telephone number, dialed the number, and spoke to Ms. Unrau briefly. Mr. Robinson spoke to Ms. Unrau privately for about nine minutes. Then he motioned Sergeant Adam to come into the phone booth, handed the receiver to Sergeant Adam and left. Sergeant Adam testified that Ms. Unrau seemed mad at him and wanted to know what he was going to do with Mr. Robinson. Sergeant Adam asked her what Mr. Robinson had told her; she replied that Mr. Robinson had said the police were accusing him of killing a woman. Sergeant Adam asked Ms. Unrau if Mr. Robinson had told her he had done it and she said, "no". Sergeant Adam then told Ms. Unrau that Mr. Robinson was having an affair with Mr. Aiston, and that "in fact Corey had done this." Ms. Unrau became upset, and began to cry. After a conversation of about nine minutes, Sergeant Adam motioned Mr. Robinson to come into the phone booth so that Mr. Robinson could hear what he was saying to Ms. Unrau. He told Ms. Unrau that Ms. Hutchinson had been cheating on Mr. Robinson and that he had had an affair with Ms. Aiston.

[18] The trial judge explained what happened next at paras. 179 to 183 of her written reasons

for the oral ruling she had made during the trial:

> Sergeant Adam used what he characterized as the "empathetic approach" that he'd been using all morning. Eventually, both Mr. Robinson and Ms. Unrau were crying. Sergeant Adam held the phone receiver away from his ear and said to Mr. Robinson "You never had a long-term plan to kill her, did you?" Sergeant Adam testified that Mr. Robinson was crying, with his head down, that he shook his head and said "no". Sergeant Adam then said "Was it just something that just got out of control and just happened?" and in response to that Mr. Robinson, still crying, nodded his head and said "yeah".
>
> Sergeant Adam told Ms. Unrau that he believed Mr. Robinson, handed the receiver to Mr. Robinson and told him to tell Ms. Unrau the truth. As he was leaving the phone booth, Sergeant Adam heard Mr. Robinson say into the receiver "it was a fight that got out of control".
>
> When the phone call between Ms. Unrau and Mr.Robinson was over, Sergeant Adam took Mr. Robinson back to the interview room. Sergeant Adam asked Mr. Robinson if he had told Ms. Unrau the truth, and Mr. Robinson nodded. Mr. Robinson continued to be tearful and emotional. He asked why the camera was there and Sergeant Adam gave him an explanation.
>
> Mr. Robinson asked to go to the washroom and Sergeant Adam escorted him there. They returned to the interview room. By this time, Mr. Robinson appears more composed. Sergeant Adam told Mr. Robinson he was anxious to ask him a couple of questions but that Mr. Robinson had better meet with his lawyer first.
>
> On the final page of the transcript, just before Sergeant Adam leaves the room, he tells Mr. Robinson he'll come back to see him later. The following exchange then occurs:
>
> > Adam: You take care of yourself alright? And listen, you're not a guy ... that wasn't a planned thing was it?
> >
> > Robinson: Shook his head.
> >
> > Adam: Okay. Is that the truth?
> >
> > Robinson: Nodded his head.

[19] On cross-examination Sergeant Adam acknowledged that after Mr. Robinson concluded his telephone conversation with Ms. Barnes, he wished to act on his counsel's advice and not answer any further questions. Sergeant Adam further acknowledged he was personally advised by Ms. Barnes to cease questioning until she had concluded her conversation with her client. However, Sergeant Adam persisted and suggested to Mr. Robinson, "[i]t's funny, I uh, you know I know, you know your lawyer told you not to say anything and, and uh I want to wait until you've talked to your lawyer, but I am dying to ask you a couple of questions."

[20] At 1:50 p.m. Corporal Carter arrested Mr. Robinson, booked and searched him in preparation for placing him in a cell. Ms. Barnes arrived at the Surrey Detachment and met with Mr. Robinson between 2:14 and 3:22 p.m.

[21] From 7:33 to 11:06 p.m. Sergeant Adam continued the same type of interrogation he had conducted that morning. On cross-examination, Sergeant Adam agreed that he referred to Mr. Robinson's right to counsel and to remain silent as "legal mumble jumble" during the interview that evening. This interview was videotaped, as was the first one that day. During that 2-1/2 hours Sergeant Adam continued his monologue, employing a very empathetic conversational interviewing style designed to keep Mr. Robinson's attention and to elicit a response by word or gesture. He touched Mr. Robinson frequently in a fraternal, supportive manner. He referred

frequently to what had happened that morning and his view of what Mr. Robinson had said. At one point he told the guard to "watch him closely, he may be suicidal, he's cold; I wonder if we can give him another blanket." Robinson was largely stolid, obviously determined to follow his lawyer's instruction to say nothing. At one point he told Sergeant Adam that he "didn't have nothing, no food." It seems probable he had consumed only some water since he had been roused from bed to go to the Detachment Office about 11:00 a.m. that morning. Sergeant Adam noticed a plate of food when he went to Mr. Robinson's cell around 7:30 that evening to ask him if he wanted to talk more. He assumed that Mr. Robinson had not eaten.

[22] Subsequently, the hair samples Mr. Robinson provided in August 1992 were analyzed. At trial an expert in DNA analysis testified that Mr. Robinson's DNA was found mixed with that of Ms. Aiston under a nail of her right hand. Mr. Mazzega explained that some force on the part of Ms. Aiston would have been required to transfer DNA from Mr. Robinson to her. He explained that DNA can remain stable for "thousands of years" in the right circumstances and that saliva, blood, and skin are potential sources of DNA. He thought skin to be the most likely source of Mr. Robinson's DNA. Blood on a paper towel found at the scene did not come from either Ms. Aiston or Mr. Robinson.

**Trial judge's rulings on admissibility of the statements**

[23] The trial judge found that a statement to Corporal Wakely in Mr. Robinson's apartment on the evening of 25 July 1992, a statement on the morning of 2 August 1992 to Constable Gilkinson, and a statement on the evening of 1 December 1994 to Corporal Carter and Constable Chicoine were voluntary and admissible. Those rulings are not in dispute. Nor were any of them inculpatory.

[24] The trial judge excluded the portion of the statement to Sergeant Adam on the morning of 18 December 1994 following Mr. Robinson's second and more direct assertion of his desire to leave immediately. Her reasons for doing so were these:

> [160] From p.13 onward, Sergeant Adam's approach to the interview indicates that he was no longer engaged in the general investigation of a crime, but was seeking to obtain incriminating statements from Mr. Robinson. I accept Sergeant Adam's assertion that he was seeking the truth, but by this time he was convinced that the truth was that Mr. Robinson had killed Ms. Aiston.
>
> [161] These circumstances lead me to conclude that when Sergeant Adam continued to question Mr. Robinson, after Mr. Robinson expressed his desire to leave in unambiguous terms, Mr. Robinson reasonably believed he was detained, and, in fact, was detained.
>
> [162] What flows from this finding? Mr. Robinson's counsel says that at this point, Sergeant Adam had a duty to explain Mr. Robinson's ***Charter*** rights, in particular, the right to silence, and the right to instruct and retain counsel without delay. The Crown says that Sergeant Adam had already explained Mr. Robinson's rights to him, only minutes before, and that any failure to caution Mr. Robinson after he was detained was a merely technical breach, and that it cannot be said that any evidence was "obtained" by virtue of that breach.
>
> [163] In my view, Mr. Robinson's rights were infringed when Sergeant Adam continued to question him after Mr. Robinson asserted his right to instruct and retain counsel. At p.20 of the transcript, Mr. Robinson said, unequivocally, "I would like to talk to my lawyer". Mr. Robinson was detained at this point. Sergeant Adam had a positive duty to refrain from questioning Mr. Robinson until he had been given a reasonable opportunity to obtain legal advice.
>
> [164] Sergeant Adam acknowledged that Mr. Robinson had that right, but he continued to question Mr. Robinson for several minutes longer, during which Mr. Robinson becomes very upset, makes one inculpatory statement, and appears to agree, by nodding, with several other inculpatory statements put to him by Sergeant Adam.
>
> [165] Sergeant Adam does not terminate the interview until Mr. Robinson asserts a

desire to consult counsel a second time, when he said "Can you find me a lawyer?" Even then, Sergeant Adam continues the interview and makes a very incriminating suggestion to Mr. Robinson, with which Mr. Robinson, by nodding, appears to agree.

[25] The trial judge then turned her attention to what counsel at the trial referred to as the fifth statement which she found to be voluntary and admissible. She explained why at paras. 184 to 188:

> Counsel for Mr. Robinson submits that Sergeant Adam's conduct infringed Mr. Robinson's s.10(b) right to counsel and a right to silence guaranteed by s.7 of the ***Charter***, when he encouraged Mr. Robinson to telephone Lisa Unrau, when he questioned Mr. Robinson in the phone room, and when he again questioned him in the interview room.
>
> I do not agree with this submission. By the time the interview in the phone room took place, Mr. Robinson had spoken with Ms. Barnes. He told Sergeant Adam he had been advised to say nothing, and the evidence does not demonstrate that he did not understand the advice he had received, or was incapable of following it.
>
> The fact that he did not follow the advice he had been given, without more, does not demonstrate either a lack of understanding or that his statements were involuntary.
>
> No doubt the tactic employed by Sergeant Adam - the suggestion to call Ms. Unrau and the appeal to her emotions as well as Mr. Robinson's - persuaded Mr. Robinson to speak, but this was not a "trick" which effectively deprived Mr. Robinson of his ability to make an informed choice about whether to speak or remain silent.
>
> The statement to Sergeant Adam in the phone room and the subsequent statement in the interview room were voluntary, and the accused has failed to prove, on a balance of probabilities, that Mr. Robinson's rights under the ***Charter*** were infringed.

[26] About what counsel called the sixth statement, the evening interview, she concluded:

> [199] The emotional appeals successfully employed by Sergeant Adam did not amount to "tricks" that deprived Mr. Robinson of the right to choose whether or not to make incriminating statements and/or gestures. Mr. Robinson did not testify on the voir dire that his words or actions were involuntary, or that what he said or did was the product of psychological pressure.
>
> [200] I have taken into account the evidence about Mr. Robinson's level of intellectual function. It cannot be denied that the interview, which was long, took place late in the evening, that Mr. Robinson had already been interviewed earlier in the day, that Mr. Robinson appears to have eaten little or nothing after he arrived at the detachment in the morning, and that the interview room was cold. Mr. Robinson appears quite tired and distressed at certain points during the interview.
>
> [201] Sergeant Adam came close to, but in my view, did not cross over, the line of acceptable interrogation by his use of strategies designed to appeal to Mr. Robinson's emotions or feelings of guilt or remorse. Although he was persuasive, the methods he employed fell short of denying Mr. Robinson the right to choose whether to speak or to remain silent. Indeed, Mr. Robinson does remain silent during most of the interview. Having carefully scrutinized the videotape, I am satisfied beyond a reasonable doubt that none of the circumstances referred to by

> defence counsel, considered individually, or collectively, robbed Mr. Robinson of an operating mind, or effectively deprived him of the right to choose to make the statements and gestures he did make.

[27] This was a response to the defence argument that the Court should have reasonable doubt about the voluntariness of Mr. Robinson's statement given the evidence of Mr. Robinson's level of intellectual function, the physical circumstances in which the interview was taking place, and the psychological techniques employed by Sergeant Adam.

[28] She also concluded that Mr. Robinson's right to remain silent was not infringed when Sergeant Adam continued to interview him after Mr. Robinson said he did not want to say anything. In this regard she was guided by the decision of the Supreme Court of Canada in ***R. v. Hébert***, [1990] 2 S.C.R. 151, to the effect that police persuasion short of denying the suspect the right to choose or depriving him of an operating mind does not breach the right to silence.

**Discussion**

[29] The appellant's primary submission on this appeal is that the trial judge erred in her approach to statements 5 and 6 after finding a violation of Mr. Robinson's right to "retain and instruct counsel without delay" during the aborted polygraph examination that became statement 4. It was during the excluded portion of this statement that Mr. Robinson first tentatively agreed with Sergeant Adam's allegation that he had killed Ms. Aiston.

[30] In the appellant's view the proper approach to an application under section 24(2) of the ***Canadian Charter of Rights and Freedoms*** is that to be found in the reasons of Chief Justice Dickson in ***R. v. Strachan***, [1988] 2 S.C.R. 980; Mr. Justice Sopinka in ***R. v. I. (L.R.) and T. (E.)***, [1993] 4 S.C.R. 504; Mr. Justice Lamer in ***R. v. Harper***, [1994] 3 S.C.R. 343, and Mr. Justice Sopinka in ***R. v. Goldhart***, [1996] 2 S.C.R. 463, as applied by Mr. Justice Rosenberg in ***R. v. Caputo*** (1997), 114 C.C.C. (3d) 1 (Ont.C.A.). I note that none of these authorities were included among those cited to and listed by the trial judge in her reasons.

[31] In those circumstances, it is not surprising the trial judge did not undertake the analysis required under s. 24(2) of the ***Charter*** set down in those authorities. Like the trial judge in ***Caputo***, *supra*, she treated statements 5 and 6 discretely from statement 4 when she found neither had been obtained in a manner that infringed or denied any rights guaranteed by the ***Charter***.

[32] She did not focus "on the entire chain of events during which the ***Charter*** violation occurred and the evidence was obtained" as a trial judge is obliged to do when considering whether to exclude evidence gathered following a ***Charter*** violation. In ***Strachan***, *supra*, Chief Justice Dickson described the proper approach at pages 1005-06:

> . . . Accordingly, the first inquiry under s. 24(2) would be to determine whether a *Charter* violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the *Charter* and the discovery of the evidence figures prominently in this assessment, particularly where the *Charter* violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will rise where evidence, though obtained following the breach of a *Charter* right, will be too remote from the violation to be "obtained in a manner" that infringed the *Charter*. In my view, these situations should be dealt with on a case by case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a *Charter* right becomes too remote.
>
> If a *Charter* violation has occurred in the course of obtaining the evidence, the analysis will proceed to the second, and in my view the more important, branch of s. 24(2), whether the admission of the evidence would bring the administration of justice into disrepute. In *R. v. Collins* the court articulated a comprehensive test for the second branch of s. 24(2). Lamer J. for the majority, identified three groups of factors to be considered in the curse of this inquiry. The first

> group concerns the fairness of the trial. The nature of the evidence, whether it is real evidence or self-incriminating evidence produced by the accused, will be relevant to this determination. The second group relates to the seriousness of the *Charter* violation. Consideration will focus on the relative seriousness of the violation, whether the violation was committed in good faith or was of a merely technical nature or whether it was willful, deliberate and flagrant, whether the violation was motivated by circumstances of urgency or necessity, and whether other investigatory techniques that would not have infringed the *Charter* were available. The final set of factors relates to the disrepute that would arise from exclusion of the evidence. In my view, the three groups of factors encompass aspects of the relationship between the *Charter* violation and the evidence at issue, thereby permitting some examination of the relationship in the course of the core inquiry under s. 24(2). The presence of a causal link will be a factor for consideration under the second branch of s. 24(2).

In ***Strachan***, the issue was whether narcotics were obtained in a manner that infringed the ***Charter***.

[33] In ***R. v. I.(L.R.) and T.(E.)***, *supra*, the issue was the exclusion of a second statement taken after communication with counsel that in and of itself involved no ***Charter*** breach. Mr. Justice Sopinka, writing for a unanimous court, held that the admissibility of such a statement is to be resolved under s. 24(2) of the ***Charter***. The statement was excluded because there was a close temporal relationship between the statements, indeed, the second statement was a continuation of the first, and because the first statement was a substantial factor leading to the making of the second. In the circumstances of that case the fact the accused had consulted with counsel between the making of the two statements and immediately before making the second did not "obviate" the conclusion that the second statement was causally connected to the first. An explanation is found at page 532:

> . . . In the end, then, as the appellant put it, "[o]nce the first statement was given, the rationale for further restraint in self-incrimination was gone". In short, in these circumstances, communication with counsel cannot be said to have the determinative effect that it would have had if it had taken place before the first statement.

[34] The reasons of Chief Justice Lamer in ***Harper***, *supra*, illustrate the pre-eminence of the second branch of s. 24(2) and within that analysis the importance of the evidence as to the effect of the violation on the behaviour of the accused. In ***Harper***, the Court was persuaded on a balance of probabilities that the accused would not have acted any differently had the police fulfilled their informational duty. Thus, the fairness of the trial was not significantly affected.

[34] The error identified by Mr. Justice Sopinka in his reasons in ***Goldhart***, *supra*, was the failure of the trial judge to consider whether a temporal link existed and to evaluate the strength of the connection between the impugned evidence and the breach. At paragraph 40 he explained:

> Although *Therens* and *Strachan* warned against over-reliance on causation and advocated an examination of the entire relationship between the *Charter* breach and the impugned evidence, causation was not entirely discarded. Accordingly, while a temporal link will often suffice, it is not always determinative. It will not be determinative if the connection between the securing of the evidence and the breach is remote. I take remote to mean that the connection is tenuous. The concept of remoteness relates not only to the temporal connection but to the causal connection as well. It follows that the mere presence of a temporal link is not necessarily sufficient. In obedience to the instruction that the whole of the relationship between the breach and the evidence be examined, it is appropriate for the court to consider the strength of the causal relationship. If

> both the temporal connection and the causal connection are tenuous, the court may very well conclude that the evidence was not obtained in a manner that infringes a right or freedom under the *Charter*. On the other hand, the temporal connection may be so strong that the *Charter* breach is an integral part of a single transaction. In that case, a causal connection that is weak or even absent will be of no importance. Once the principles of law are defined, the strength of the connection between the evidence obtained and the *Charter* breach is a question of fact. Accordingly, the applicability of s. 24(2) will be decided on a case-by-case basis as suggested by Dickson C.J. in *Strachan*.

[35] In this case the temporal connection between the violation of Mr. Robinson's right to speak with counsel and the statement in the phone booth was strong. The violation was followed by intensive, skillful interrogation designed to elicit a confession from Mr. Robinson. Only when he broke down emotionally did Sergeant Adam follow through on his earlier offer to assist Mr. Robinson to speak with counsel. After a six-minute conversation with Ms. Barnes, Mr. Robinson told Sergeant Adam that he had told Ms. Barnes the truth, that she had told him not to say anything, and that he was intending to follow her advice. Ms. Barnes had told Sergeant Adam that she did not wish the police to continue interrogating Mr. Robinson until she had an opportunity to continue her discussion with Mr. Robinson at the detachment office and that she would come there immediately from North Vancouver. Almost immediately Sergeant Adam told Mr. Robinson he would be arrested for murder and suggested he call his common-law wife and tell her the truth. When Mr. Robinson did not tell Ms. Unrau what Sergeant Adam believed to be the truth, Sergeant Adam did so. That conduct led to statement 5, considerably more inculpatory than the excluded statement.

[36] I am persuaded this statement was obtained in a manner that infringed Mr. Robinson's rights. In the circumstances, the brief telephone conversation with Ms. Barnes was part of a single transaction that included both the excluded portion of statement 4 and statement 5. The fact that Sergeant Adam was not only present on both occasions but in total control of events throughout is inconsistent with any other conclusion. Moreover, there is a strong causal link between the fifth statement and the violation of Mr. Robinson's right to consult counsel. Without the excluded statement, it is highly unlikely the fifth statement would have been obtained. Without the violation of Mr. Robinson's right to speak with counsel it is unlikely Mr. Robinson would have made the tentative acknowledgment of guilt obtained in the excluded statement.

[37] Ever since ***The Queen v. Collins***, [1987] 1 S.C.R. 265, the Supreme Court has consistently affirmed a strong presumption in favour of the exclusion of self-incriminating evidence acquired following a breach of the ***Charter***. In ***Harper***, the Court placed the burden on the Crown to show that the accused would have made the statement even if his or her rights had not been violated. The Crown did not satisfy that burden in this case.

[38] The violation of the appellant's right to seek the advice of a lawyer is particularly serious in this case because the appellant's intellectual functioning is at the lowest level of normal. This fact may not have been apparent to Sergeant Adam; he gave Mr. Robinson little chance to say anything, but he did know that Mr. Robinson was claiming to have difficulty understanding "big words" and acknowledged that Mr. Robinson's vocabulary was not as large as his own.

[39] At all times Sergeant Adam considered Mr. Robinson a viable suspect, although he knew the investigating officers did not consider they had reasonable and probable grounds to charge him with Ms. Aiston's murder, until after his morning interview. Regardless of what Sergeant Adam was telling Mr. Robinson, his objective would have been obvious to any objective and reasonably intelligent observer of that interview, to elicit a confession from Mr. Robinson.

[40] I am of the view that statement 5, the one in the phone booth, should have been excluded and probably would have been excluded had the trial judge undertaken the appropriate analysis rather than that suggested by counsel, perhaps unaware of the recent development of the law in this area, and certainly without the benefit of the clear exposition of those developments in ***Caputo,*** *supra*.

[41] I would also exclude the sixth statement. It may not matter whether this statement is excluded under section 24(2) of the ***Charter*** because it is unlikely to be admissible in any event once the fifth statement is excluded. Any probative value this statement might be seen as having flows from the earlier statements by way of adverse inference from Mr. Robinson's demeanour, including minimal responses by word and gesture to leading questions. Nevertheless, those words and gestures are causally and temporally linked to the violation of his right to consult counsel.

[42] I accept that at some point investigators must be able to resume questioning even where one of them has seriously violated a detainee's right to consult counsel.

[43] In ***Strachan***, *supra*, Chief Justice Dickson suggested some evidence obtained following a ***Charter*** breach will be too remote from the violation to be "obtained in a manner" that infringed the ***Charter***. That is not the case here. Sergeant Adam said as much: once a person begins to talk, he keeps on talking. That is particularly so when the same person is in control, using the same techniques, and referring constantly to what has gone before. In these circumstances the consultation with Ms. Barnes is not enough to break the chain of causation, although in other circumstances and with another accused, a fair opportunity to consult counsel might be found to do so. Had the Crown led evidence to establish that Mr. Robinson would have made incriminating statements during the sixth interview without the violation of his right to consult counsel, Chief Justice Lamer's comments in ***Harper*** would be apposite. Such might, for instance, have been the case, had Mr. Robinson been questioned the following day when he was warm, and had both eaten and slept well.

[44] The Crown submits this court should apply the curative proviso of section 686 (1)(b)(iii) of the ***Code*** and allow the conviction to stand on the basis that the DNA evidence and other unchallenged evidence was enough to sustain the conviction. The DNA in issue comes from one of the hairs Mr. Robinson willingly provided to Constable Gilkinson on 2 August 1992, when he was not a suspect.

[45] The trial judge was satisfied that Mr. Robinson understood both the nature and extent of his jeopardy at that time and consented to provide the hair samples with that knowledge. She further found that this consent was not vitiated when the samples were used two years later, as a source of DNA for analysis and comparison after he was charged with murder.

[46] I am not persuaded the trial judge erred when she admitted the DNA and Mr. Mazzega's opinion evidence about it. Since her ruling, the Supreme Court of Canada has considered a similar issue in ***R. v. Arp***, [1998] 3 S.C.R. 339. Mr. Arp gave hair samples willingly to the police while he was under arrest for a murder. Mr. Arp acknowledged that he did not have to do so. The police informed him that if any evidence was gathered as a result of the hair samples, it would be used in court. It would have been understood these samples would not be used for DNA analysis as the use of such technology was not common in 1990.

[47] The Supreme Court had to consider whether the hair samples could be used for DNA testing nearly two-and-a-half years later during an investigation of a different murder. The court found no violation of section 7 or 8 of the ***Charter*** because Mr. Arp ceased to have any expectation of privacy in his hair samples when he consented to the police taking them without placing any limitation on their use. Mr. Justice Cory opined that the obligation imposed on the police in obtaining a valid consent extends only to the disclosure of those anticipated purposes known to the police at the time the consent was given.

[48] Mr. Robinson granted his unconditional and reasonably informed consent to allow the police to take and use the hair samples in their investigation. The police informed him of their intended use at the time they took them. At that time they did not intend to use them for DNA analysis and matching. Once Mr. Robinson's hair samples were taken by the police with his unconditional and reasonably informed consent, he had no continuing privacy interest and the use of them for DNA analysis did not violate his right to be free from unreasonable search and seizure guaranteed in ss. 7 and 8 of the ***Charter***.

[49] Despite my conclusion that the trial judge did not err in admitting the DNA evidence, I would not apply section 686 (1)(b)(iii) of the ***Code*** and allow Mr. Robinson's conviction to stand. The evidence of Mr. Mazzega is persuasive that Mr. Robinson's DNA was found under a

fingernail of Ms. Aiston's right hand. However, the evidence of the relationship between Mr. Robinson and Ms. Aiston raises questions about the method of transfer of the DNA. When combined with the evidence of Mr. Mazzega, summarized earlier in para. 21 of these reasons, as to the stability of DNA and the means of such transfer from one person to another, and some aspects of Ms. Hutchinson's unchallenged evidence, I cannot be sure the jury did not resolve a doubt about the probative value of the DNA evidence by reference to the fifth statement.

[50] By reason of that uncertainty, I would allow the appeal and order a new trial.

"The Honourable Madam Justice Huddart"

**I AGREE:**

"The Honourable Mr. Justice Esson"

**I AGREE:**

"The Honourable Mr. Justice Cumming"