Lambert File Number: 39481
Beaver File Number: 39480

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

BRIAN JOHN LAMBERT

Appellant (on appeal)
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (on appeal)
(Respondent)

AND BETWEEN:

JAMES ANDREW BEAVER

Appellant (on appeal)
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent (on appeal)
(Respondent)

AND:

ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

FACTUM OF THE RESPONDENT HER MAJESTY THE QUEEN

RULES 36 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE RESPONDENT

PART I – OVERVIEW AND FACTS

Overview

1. The appellants and the deceased lived together in a Calgary townhouse. In the weeks before the homicide, there were conflicts about rental issues, and the police had been called. Two days before the homicide, police attended in response to a complaint that the deceased had assaulted Mr. Lambert. Mr. Lambert declined to press charges, but said he and Mr. Beaver would move out soon. The morning after the homicide, the appellants called 911 claiming they had found their roommate dead in the home, at the bottom of a flight of stairs.

2. This was not true. The 911 call was part of a ruse. The appellants had both assaulted the deceased, and he died of his injuries. Once the appellants realized the deceased was not breathing, they staged the scene to escape detection. They mopped up the deceased's blood and moved his body to the bottom of a staircase. They then left the residence and spent the night at a friend's place.

3. Officers who responded to the 911 call took the appellants into custody and transported them to the police station without lawful authority. This illegal detention breached the appellants' ss. 9 and 10 *Charter* rights. But homicide detectives realized the problem, formally arrested the appellants for murder, and provided them with their *Charter* rights. The detectives interviewed the appellants, who continued to deny any involvement in the killing. Eventually, after lengthy interviews, both appellants voluntarily confessed.

4. At trial, the appellants argued that the *Charter* breaches made the confessions inadmissible. In thorough reasons, the trial judge found otherwise. He held that the confessions did not arise from the *Charter* breaches because the arrest at the police station constituted a "fresh start", such that there was no nexus between the breaches and the confessions. He also held, in the alternative, that the *Grant* factors did not support exclusion. He convicted the appellants, and the Court of Appeal upheld the convictions. This Court granted leave to appeal.

Background

5. Sutton Bowers was 33 years old at the time of his death on October 8, 2016. He lived in a townhouse owned by his father.[1] About eight months earlier, the appellant Mr. Lambert responded to an advertisement to rent a room in the townhouse and moved in. A few months later, the appellant Mr. Beaver also moved in. On the date of the homicide, the three lived together at the townhouse. No one else lived there. The deceased was the live-in landlord and the appellants paid him monthly rent.[2]

6. Relations between the deceased and the appellants were troubled. The appellants often contacted the deceased's father to complain about him. These complaints included the deceased turning off water or power in the townhouse.[3] The deceased also complained about the appellants: he said they were poor roommates who did not pay their share of the utilities.[4] The difficulties led to a loose understanding that the appellants would move out on November 1, 2016, but there was still a dispute about the damage deposit.[5]

7. Police records identified the townhouse as a "location of interest" because of "issues with landlord and tenants."[6] The appellants had called police on earlier occasions. In one call, police records noted that EMS was there because a male had drank floor cleaner.[7] Two days before the homicide, the appellants called police because the deceased had punched Mr. Lambert in the groin. Mr. Lambert declined to give a statement, but told police he planned to move out soon.[8]

The Homicide

8. The night of the homicide, the residents argued again about rental issues. Mr. Lambert offered the deceased a GST cheque as partial rent, and the deceased ripped the check in half. A

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[1] Agreed Statement of Facts and Agreed Inferences, marked as Exhibit 1, on March 18, 2019 ("ASF") at paras 4-5 [Record of the Respondent ("RR") Vol. I Part III Tab 2B 42-43]
[2] *Ibid.* at para 6 [RR Vol. I Part III Tab 2B 43]
[3] *Ibid.* at para 7 [RR Vol. I Part III Tab 2B 43]
[4] *Ibid.* at para 8 [RR Vol. I Part III Tab 2B 43]
[5] *Ibid.* at para 9 [RR Vol. I Part III Tab 2B 43]
[6] Excerpt of Trial Transcript ("Trial") 358/20-39 [Joint Record of the Appellant ("JRA") Vol. I 215]
[7] Trial 359/21-24 [JRA Vol. I 216]
[8] Trial 365/9-366/13 [JRA Vol. I 222-223]

confrontation ensued, in which the deceased and Mr. Beaver pushed one another, then wrestled. They fell to the floor more than once as the scuffle became increasingly violent.[9]

9. Mr. Beaver started to hit the deceased in the face and head. Mr. Lambert restrained the deceased by "bear hugging" him from behind. Mr. Beaver kept punching him. At some point, one or both appellants applied force to the deceased's neck. As the struggle continued, Mr. Beaver and the deceased again fell to the ground. The appellants continued to punch and grab the deceased by the neck. Mr. Lambert kicked the deceased in the stomach. The appellants slammed the deceased's face onto the floor. The violence continued until the deceased stopped moving.[10]

10. The appellants realized that the deceased was not breathing. They did not call for medical assistance or try to help him. Rather, they moved his body to the bottom of the stairs. They cleaned up the blood in the living room and kitchen hallway. After the cleanup, they left the townhouse and went to a nearby pub. They arranged to spend the night at a friend's residence. They did not return to the townhouse until the next morning.[11]

11. Mr. Bowers died that night, either during the attack or soon after. The cause of death was blunt force trauma to the neck, causing a fracture to the thyroid cartilage. The fracture obstructed his breathing, which led to his death.[12] He had injuries to the head, face, neck, thorax, and extremities. The appellants fractured his thyroid cartilage in two places.[13]

The Plan to Mislead the Authorities

12. The trial judge found that the appellants' purpose in moving the deceased's body to the bottom of the stairs was to mislead authorities about his manner of death. He also found that the appellants had agreed on the story they would tell the authorities.[14]

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[9] ASF at para 32 [RR Vol. I Part III Tab 2B 47]
[10] *Ibid.* at para 32 [RR Vol. I Part III Tab 2B 47]
[11] *Ibid.* at para 32 [RR Vol. I Part III Tab 2B 47]
[12] *Ibid.* at para 32 [RR Vol. I Part III Tab 2B 47]
[13] Autopsy Report Created by Dr. Tara Jones, marked as Exhibit 7, on March 18, 2019 [RR Part III – Exhibits, Tab 2C 50-60]
[14] ASF at para 32 [RR Vol. I Part III Tab 2B 47]

13. The morning after the deceased's death, the appellants returned to the townhouse around 10:00 a.m. The deceased's body was still at the bottom of the stairs where they had left it the previous evening. In accord with their plan, Mr. Lambert phoned 911 while Mr. Beaver stood next to him, and said that the deceased was lying unresponsive at the bottom of the stairs. Mr. Lambert told the 911 operator that "Jim" thought it looked like the deceased fell down the stairs.[15] In response to questions from the operator, Mr. Lambert said:

> Well I got home last night, now there's been altercations all week, so I told to find a place to stay at night time. So, I came home last night and he had people there, so I wasn't about to get into a confrontation. So, me and my other roommate, we left. We were all day yesterday at Thanksgiving. Ah, he was working. (sighing) Wow. And then, ah, yeah, it was about 9:00, 9:30, that, ah, I went home.[16]

14. Mr. Lambert told the operator that he did not know how Mr. Bowers got hurt, but it looked like he fell and hit his head.

15. The suspicious nature of the circumstances was immediately obvious. The operator said to Mr. Lambert, "We just wanna treat this, uhm, just a little bit of a suspicion because we don't know what's going on at this point."[17] Police were dispatched immediately.

Police Arrive at the Scene

16. Police and EMS responded quickly to the 911 call. Cst. Husband arrived at the scene at 10:07 a.m. When she arrived at the townhouse the front door was open. Mr. Beaver was standing outside on the sidewalk, and Mr. Lambert was inside, standing over the deceased. Cst. Husband saw the deceased lying on the ground, not breathing, about six feet from the doorway at the base of the stairs. There was a wet pool of blood around his head. His face was bruised and swollen.[18]

17. Other officers soon arrived. Cst. Taylor spoke with Mr. Lambert, who told him they arrived at the townhouse and saw the deceased passed out in the doorway. He claimed this was not unusual as the deceased was often intoxicated and passed out.[19]

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[15] *Ibid.* at para 17 [RR Vol. I Part III Tab 2B 47]
[16] Hard copy transcript of 911 Call, marked as Exhibit VD-1, on October 22, 2018 ("911 Transcript") page 3/18-4/6 [RR Vol. I Part III Tab 2A 17]
[17] 911 Transcript 10/20-11/1 [RR Vol. I Part III Tab 2A 24-25]
[18] Trial 240/1 - 241/25 [JRA Vol. I 175-176]
[19] *R v Beaver*, 2019 ABQB 125 at para 13

18. Sgt. Lines instructed two officers to take the appellants into custody under the imaginary "Medical Examiner's Act". Sgt. Lines testified that he meant the Alberta *Fatality Inquiries Act*, but that law also did not authorize detention.[20]

19. A medical investigator also attended the scene. After a preliminary examination, she contacted the Calgary Police Homicide Unit and advised them that the death appeared suspicious. A homicide staff sergeant contacted Det. Vermette at home, instructing him to come in to work. Det. Vermette was to be the primary investigator.[21]

The Appellants' Detention and Arrest

20. At Sgt. Lines' direction, Cst. Taylor detained Mr. Lambert under the "Medical Examiner's Act". He gave Mr. Lambert his right to counsel. Mr. Lambert said that he wanted to speak with a lawyer, and that he was "not guilty of anything." Cst. Taylor then read Mr. Lambert the police caution. Cst. Taylor did not tell Mr. Lambert why he was detaining him.[22]

21. Cst. Taylor then drove Mr. Lambert to the police station. On the way, he asked Mr. Lambert what had happened. Mr. Lambert told him a story similar to what he told the 911 operator. At 11:15 a.m., they arrived. At 11:25, Mr. Lambert spoke to a lawyer by telephone.[23]

22. At 12:09 p.m., Det. Demarino, a homicide investigator, began to interview Mr. Lambert. He assumed that Mr. Lambert was under arrest, but after speaking with Cst. Husband he realized he had only been detained. He testified that Cst. Husband told him the appellants were "under arrest for investigative detention under the *Death Investigators Act*." Det. Demarino recognized this was illegal. He told Det. Vermette, who directed him to arrest Mr. Lambert for murder.[24]

23. At 12:29 p.m., Det. Demarino arrested Mr. Lambert for murder. He told Mr. Lambert of his right to retain and instruct counsel and his right to remain silent.[25] Mr. Lambert made another

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[20] *Ibid.* at para 16
[21] Trial 350/4-37 [JRA Vol. I 207]
[22] *R v Beaver*, 2019 ABQB 125 at para 19
[23] *Ibid.* at paras 20, 22
[24] *Ibid.* at para 35
[25] *Ibid.* at para 36

phone call to a lawyer. Afterward, Det. Demarino proceeded with the interview, which lasted around 12 hours.[26]

24. Early in the interview, Cst. Arns searched and photographed Mr. Lambert. Cst. Arns advised Mr. Lambert that he was being investigated as a witness.[27]

25. A similar sequence played out with Mr. Beaver. At 10:17 a.m. Cst. Husband took him into custody under the "Medical Examiners Act". She directed Mr. Beaver into the back seat of a police car, but did not handcuff him. She read him his *Charter* rights and police caution. She told Mr. Beaver he was being detained for "whatever is going on in there", referring to the townhouse where they found the body.[28] Mr. Beaver said he did not want to call a lawyer.

26. The wording of the caution was "You're not obliged to say anything unless you wish to do so, but whatever you say may be given in evidence. Do you understand?" Mr. Beaver responded, "Oh, yes."[29] The trial judge found that Mr. Beaver understood.[30]

27. Cst. Husband drove Mr. Beaver to the police station; they left the scene at 10:48 a.m. and arrived at 11:15 a.m. Once inside, police searched him and escorted him into a holding cell. Cst. Husband gave him another chance to call a lawyer, but he again declined.[31] Before interviewing him, Det. Hossack realized that Mr. Beaver had not yet been arrested for murder. Detective Vermette directed her to arrest Mr. Beaver for murder. She did so.[32]

Grounds to Arrest

28. Det. Vermette testified he believed he had reasonable and probable grounds to arrest both appellants for the murder of Mr. Bowers. He was aware of a history of conflict, anger, and violence between the deceased and the roommates, which included an assault three days

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[26] *Ibid*. at paras 34, 112
[27] *Ibid*. at para 37
[28] *Ibid*. at para 17
[29] Transcript of Taped Proceedings of In-Car Audio Interview of Mr. James Beaver by Constable Husband on October 10, 2016, marked as Exhibit VD-8, on October 25, 2018 7/19-21 [JRA Vol. III 24)
[30] *R v Beaver*, 2019 ABQB 125 at paras 17, 83, 90, 184, 207
[31] *Ibid*. at paras 18, 23, 29
[32] *Ibid*. at para 26

earlier.[33] He did not believe that the deceased's trauma resulted from a fall down the stairs. He believed that the history of conflict in the townhouse established a motive for the appellants. And he knew that as the only other residents, the appellants had a clear opportunity to have inflicted the injuries. The information he relied on included:

- The medical examiner described the death as "sudden"[34] and suspicious;[35]
- An email from his staff sergeant stating "Male found facedown in pool of blood at front door of his [address] … Apparently had altercation with roommates earlier."[36]
- Mr. Lambert's statement that the deceased "was pretty angry so we left". Det. Vermette considered that the anger between the deceased and the roommates was important.[37]
- The residence was a "Location of Interest" to police because they had been called there before about "issues with landlord and tenants".[38]
- Two months earlier a call related to "EMS here as a male drank floor cleaner".[39]
- Three days prior, police had been called to the address regarding a reported assault; the roommates had called police because the deceased had punched Mr. Lambert in the groin. Mr. Lambert would not give a statement, but told police he was planning on moving out within the next few weeks.[40]
- The 911 call was made by Mr. Lambert while Mr. Beaver was present;[41] in the call Mr. Lambert said it "appears [the deceased] fell and hit his head".[42]

The Confessions

29. When Det. Demarino interviewed Mr. Lambert, he maintained his false story for hours, but eventually admitted that he attacked the deceased. He said he was frustrated with the deceased because of a prior assault and other issues. He blamed Mr. Beaver for most of the

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[33] Trial 357/6 - 362/20 [JRA Vol. I 214-219]; Trial 365/7 - 366/40 [JRA Vol. I 222-223]; *R v Beaver*, 2019 ABQB 125 at para 151
[34] Trial 357/13/11 [JRA Vol. I 214]
[35] Trial 370/1-4 [JRA Vol. I 227]
[36] Trial 350/4-29 [JRA Vol. I 207]
[37] Trial 362/5-7 [JRA Vol. I 219]
[38] Trial 358/20-39 [JRA Vol. I 215]
[39] Trial 359/21-24 [JRA Vol. I 216]
[40] Trial 365/9-366/13 [JRA Vol. I 222-223]
[41] Trial 361/26-35 [JRA Vol. I 218]
[42] Trial 358/12-14 [JRA Vol. I 215]

violence, but admitted he kicked the deceased and held him down while Mr. Beaver punched him.[43]

30. The trial judge found that Mr. Lambert confessed because he wanted to: "Like Mr. Beaver, Mr. Lambert was firm, and he was confident…. He stuck to his exculpatory story until he was confronted with evidence that countered that story."[44]

31. At the start of Mr. Beaver's interview, Det. Hossack explained the circumstances to Mr. Beaver in plain language. She told him, "right now you're under arrest for murder." She told him they were investigating a death. She explained that the investigation was in its initial stages, and that police needed to find out what happened.[45] She read the standard right to counsel warning, which explained that Mr. Beaver could call any lawyer he wanted, or call a free legal advice service. After some discussion, she expanded on the availability of legal counsel:

> But it's important that you know that if you wanna call a lawyer you can. We have phones. I can get you on the phone. Um, if you don't want to um, it's totally up to you. But it's my, my job is to inform you that you can, and we can provide you with that if, if you wanna do that.[46]

32. Mr. Beaver said he did not want to call a lawyer. Det. Hossack told him that if at any time he changed his mind, he could call. The judge found that Mr. Beaver understood his right to counsel, but he chose not to call a lawyer because he wanted to profess his innocence.[47]

33. As the interview progressed, Mr. Beaver maintained his exculpatory version for several hours. Ultimately, after Mr. Lambert had admitted what happened, Det. Hossack brought in a video recording of his confession and played parts for Mr. Beaver. When he first viewed Mr. Lambert's video admissions, Mr. Beaver maintained that he did not remember a physical conflict

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[43] Transcript of Mr. Lambert's statement dated October 9, 2016, marked as Exhibit 3, on March 18, 2019 [JRA Vol. II 19-29, 239-312]
[44] *R v Beaver*, 2019 ABQB 125 at paras 122-124
[45] *Ibid.* at paras 88, 93
[46] Exhibit VD-10 Transcript of Recorded Proceedings of Interview of James Andrew Beaver by Detective R. Hossack on October 9, 2016 55/1-7 [JRA Vol. III 55]
[47] *R v Beaver*, 2019 ABQB 125 at para 245

with the deceased. He continued to claim a poor memory for several hours; but finally, around 1:00 a.m., he began to make admissions.[48]

34. The trial judge found that it was the knowledge that Mr. Lambert had confessed that persuaded Mr. Beaver to do so as well.[49]

Trial Judge's Rulings

35. A *voir dire* was held to determine the admissibility of the confessions. Neither appellant testified in the *voir dire.* The trial judge made several rulings.

Charter Breaches at the Scene

36. The trial judge found the police breached both appellants' s. 9 right to not be arbitrarily detained when Sgt. Lines directed Csts. Husband and Taylor to detain them under the non-existent "Medical Examiner's Act." He noted that Sgt. Lines could not establish a clear nexus between the appellants and the death, or that the deceased had died from a criminal offence. "Thus, Cst. Husband's detention of Mr. Beaver, and Cst. Taylor's detention of Mr. Lambert, were not *Charter* compliant, because the basis on which Sgt. Lines directed the officers to detain them was not *Charter* compliant."[50]

37. For s. 10, the trial judge accepted the prosecution's concession that the scene officers breached the appellants' rights. The prosecution conceded s. 10(a) was breached because Sgt. Lines directed Csts. Husband and Taylor to arrest the appellants under a non-existent law. As a result, s. 10(b) was also breached because the appellants did not know the jeopardy they faced.[51] The trial judge found the prosecution's concession to be "generous":

> This Court finds that concession to be generous, in the circumstances, as, arguably, the reason for the detention of Mr. Lambert and Mr. Beaver, and their potential jeopardy in the circumstances, should have been clear to both of them from the time they were first approached by the police officers, to the time they were placed in the holding cells. This is so despite Sgt. Lines' admitted error in the statute under which the police officers detained them. They were detained because there was a dead body in their home. There is no question in this Court's mind that Cst. Taylor

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[48] *Ibid.* at paras 31-33
[49] *Ibid.* at para 96
[50] *Ibid.* at paras 147-149
[51] *Ibid.* at paras 183, 188

> provided Mr. Lambert with his *Charter* s 10(b) right to counsel, Mr. Lambert understood this right, and Cst. Taylor explained Mr. Lambert that he had the right to remain silent. As well, it is clear that Mr. Lambert wanted to speak with a free lawyer, and that he was "not guilty of anything." Similarly, when Cst. Husband asked Mr. Beaver whether he wanted to contact a lawyer, he responded, "I don't need one ... No." He also understood the police caution.[52]

38. The trial judge also found Cst. Taylor breached Mr. Lambert's s. 10(b) right by asking him what happened on the drive from the scene to the police station.[53]

Arrests at the Police Station

39. The judge found that Det. Vermette had reasonable and probable grounds to arrest both appellants. He noted that Det. Vermette knew about the animosity between the appellants and the deceased. He concluded that the grounds were subjectively and objectively reasonable based on the traumatic nature of the death, the appellants' motive, and their opportunity.[54]

"Obtained in a Manner"

40. Despite the illegal detention at the scene, the trial judge admitted the confessions. He found that the lawful arrest of the appellants for murder at the police station severed any connection between the breaches at the scene and the appellants' confessions hours later. He cited this Court in *R v Mack* and said he had "to examine the circumstances in which the evidence is collected, which of necessity, deals with the purposive and contextual analysis. But there still must be a 'connection' between the breach and the evidence." He cited *Mack* for the proposition that there was no need for a causal link between the breach and the evidence. The connection could be causal, temporal, contextual or a combination of all three.[55]

41. The judge found that the conduct of the detectives at the police station meant that the appellants knew they were under arrest for murder and had an opportunity to contact counsel. Because of this "fresh start", the appellants' confessions were unconnected to the breaches.[56] He admitted them into evidence without subjecting them to a s. 24(2) analysis.

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[52] *Ibid*. at para 184
[53] *Ibid*. at para 185
[54] *Ibid*. at paras 151-159
[55] *Ibid*. at para 205, citing *R v Mack*, 2014 SCC 38 at para 38
[56] *Ibid*. at paras 206-209

Section 24(2) in the Alternative

42. The trial judge considered s. 24(2) in the alternative. He balanced the three factors in *R v Grant* and concluded that excluding the appellants' confessions "would exact a disproportionate toll which would tend to bring the administration of justice into disrepute in the minds to reasonable people who are aware of the circumstances relevant to the case at bar."[57]

43. He found that while the police's illegal detention of the appellants was serious and reckless, the impact of the breaches on the appellants was limited and the admission of the evidence would better serve the truth-seeking function of the criminal trial process. Because the appellants staged the homicide scene and then called 911, he found that they knew why the police had detained them and that the police would want to talk to them.[58] He also found that the breaches did not affect how the appellants responded to the police. He noted that for many hours after the breaches, the appellants maintained the initial false story they reported to 911.[59]

44. The judge also conducted an alternative s. 24(2) analysis in case he was wrong that Det. Vermette had proper grounds to arrest. He found that if the grounds for arrest were insufficient, the breach would be at the less serious end of the spectrum because Det. Vermette subjectively believed he had reasonable and probable grounds, and he was operating in a fluid situation without the benefit of hindsight.[60] Accordingly, all three branches of the *Grant* test supported admission.

Voluntariness

45. The trial judge held that both confessions were voluntary. Only Mr. Beaver appeals that ruling.

46. The trial judge noted that Mr. Beaver interacted with two officers: Cst. Husband and Det. Hossack.[61] He reviewed the interactions with each officer. Dealing first with Cst. Husband, he commented that the interactions were preserved on audio-video. At one point while Mr. Beaver

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[57] *Ibid*. at paras 255-258, citing *R v Grant*, 2009 SCC 32 at paras 84, 86
[58] *Ibid*. at paras 244-246
[59] *Ibid*. at para 247
[60] *Ibid*. at paras 232, 239-240
[61] *Ibid*. at para 80

was alone in the police car, he spoke aloud and said that police would want to take his statement, which indicated "he knew what was awaiting him." The judge found that there were no threats or promises from Cst. Husband and no police trickery. He observed that Mr. Beaver appeared to have an operating mind, and that he was firm in his decision to decline to speak to a lawyer.[62]

47. For Det. Hossack, the trial judge watched the video interview and found no threats, promises, or oppressive tactics. He had no doubt that Mr. Beaver had an operating mind. He found that Mr. Beaver chose to speak and give his exculpatory narrative without apparent reluctance. He rejected Mr. Beaver's argument that he did not know why the police were interviewing him – he concluded from the circumstances that Mr. Beaver knew exactly why he was being interviewed.[63]

48. The trial judge held that nothing Det. Hossack did broke Mr. Beaver's will; what broke his will was seeing the video recording of Mr. Lambert confessing.[64] He recognized that Det. Hossack was persistent, but he referred to *R v Singh* for the proposition that police have the right to ask questions. He concluded based on all the circumstances that the Crown had proven the voluntariness of the confession beyond a reasonable doubt.[65]

49. After the trial judge's *voir dire* ruling, the parties submitted an agreed statement of facts and available inferences.[66] Based on this, the trial judge convicted the appellants of manslaughter. The Crown withdrew the charge that the appellants had attempted to obstruct justice by trying to mislead the police in their homicide investigation.[67]

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[62] *Ibid*. at paras 81-82
[63] *Ibid*. at para 92-95
[64] *Ibid*. at para 96
[65] *Ibid*. at para 97-98, citing *R v Singh*, 2007 SCC 48
[66] ASF [RR Vol. I Part III Tab 2B 40-49]
[67] Transcript Excerpt of evidence of Agreed Statement of Facts, dated March 18, 2019 3/15-12/31 [RR Vol. I Part II Tab 1B 3-12]; Transcript Excerpt of evidence of Reasons for Judgement, dated March 18, 2019 13/6-41 [RR Vol. I Part II Tab 1C 13]; ASF [RR Vol. I Part III Tab 2B 40-49] ; Indictment in the Court of Queen's Bench of Alberta, January 5, 2018 [JRA Vol. 1 Tab 9]

Alberta Court of Appeal

50. The appellants appealed their convictions. They argued that the trial judge had erred in finding a "fresh start". They also argued that he erred in finding that there were reasonable and probable grounds for the arrest at the police station. Mr. Beaver also argued that the trial judge erred in finding that he confessed voluntarily.

51. The Court of Appeal dismissed the appeals. The panel noted that the concept of a "fresh start" should not overshadow the overarching question of whether the evidence was "obtained in a manner" that infringed the *Charter*.[68] Unlike in cases like *Plaha*, the appellants did not commit themselves to a position because of a *Charter* breach: for hours after their lawful arrest, they maintained the false narrative they started with the 911 call. The evidence supported the inference that the appellants were determined to speak with police to tell their story.[69]

52. Following *Mack*, the panel wrote that the strength of any connection between a piece of evidence and a *Charter* breach is a question of fact. They saw no reason to interfere with the trial judge's finding given his thorough handling of the "obtained in a manner" question.[70] Given this ruling, the Court declined to review the trial judge's *Grant* analysis.[71]

53. The Court also dismissed the other appeal grounds. They were satisfied that Det. Vermette had reasonable and probable grounds to arrest the appellants for murder, which they described as a "practical and common-sense decision".[72] And they found no reviewable error in the trial judge's assessment of voluntariness.[73]

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[68] *R v Beaver*, 2020 ABCA 203 at paras 17-18
[69] *Ibid.* at para 25
[70] *Ibid.* at paras 21-22, citing *R v Mack*, 2014 SCC 58 at para 39
[71] *Ibid.* at para 27
[72] *Ibid.* at para 9
[73] *Ibid.* at paras 28-31

PART II – ISSUES

Question in Issue #1 Whether the appellate court erred in upholding the trial judge's finding the primary investigator had reasonable grounds to arrest the appellants, which includes an assessment of the proper judicial considerations for scrutinizing an officer's claim of reasonable grounds for an arrest made while the arrestee is unlawfully detained.

Respondent's Position on Question in Issue #1 The Court of Appeal did not err in upholding the finding that the arrests were based on reasonable and probable grounds. In the alternative, if the grounds fell short of the test, a s. 24(2) analysis supports admission.

Question in Issue #2 Whether the appellate court erred in upholding the trial court's finding the police statements were admissible:

A. Whether a subsequent lawful arrest amounts to a "fresh start" which insulates evidence from admissibility consideration pursuant to s. 24(2) of the *Charter*; and

B. If evidence is obtained in a manner that violates the appellants' *Charter* rights, should the evidence be excluded under s. 24(2) *Grant* analysis.

Respondent's Position on Question in Issue #2

A. The trial judge applied the correct test and found that the evidence was not "obtained in a manner" that violated the appellants' *Charter* rights. The Court of Appeal found no error, and appropriately deferred to the trial judge's findings of fact.

B. The trial judge reasonably balanced the *Grant* factors in his alternative s. 24(2) analysis. In the absence of an error of law, his conclusion is owed deference.

Question in Issue #3 Whether the appellate court erred in upholding the trial court's finding that Mr. Beaver's police statement was voluntary.

Respondent's Position for Question in Issue #3 The voluntariness of the confession follows necessarily from the trial judge's findings of fact.

PART III – ARGUMENT

Question One: Reasonable and Probable Grounds

Overview

54. The appellants challenge their arrest, which Det. Vermette directed at the police station. They assert that police lacked reasonable and probable grounds to arrest them at that time.

55. The trial judge and the Court of Appeal disagreed with this position. Det. Vermette knew that there was a history of conflict between the appellants and the deceased – including a violent incident two days earlier. The appellants were the last known people to see the deceased alive, and they were the ones who called police about the body. As such, it was reasonable for Det. Vermette to believe that both men played a role in the deceased's death.

56. The appellants also argue that special scrutiny should apply to cases in which a person is unlawfully detained and police then make a decision to arrest them. This is a novel argument. The *Storrey* test applies, without modification.

General Principles

57. *Storrey* states the test for a peace officer to arrest without warrant. Police require subjective grounds, justifiable on an objective basis.[74] Police do not require a *prima facie* case for conviction. The test is not the balance of probabilities, and it does not require the exclusion of any other rational inference. The standard is lower than the civil standard of proof. The presence of other possible, plausible, innocent explanations does not negate credibly based probability. The phrase "reasonable belief" approximates the requisite standard.[75]

58. A trial judge's review of an officer's grounds for arrest is not a *de novo* assessment. Rather, the law requires judges "to assess the objective reasonableness of an arresting officer's belief that he or she had reasonable grounds to arrest from the perspective of a reasonable person standing in the arresting officer's shoes". An officer's training and experience are relevant in assessing the objective reasonableness of the belief. The reviewing court must ask itself whether

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[74] *R v Storrey*, [1990] 1 S.C.R. 241 at pages 249-251
[75] *R v Ha*, 2018 ABCA 233 at paras 34-35 citing *R v Debot*, [1989] 2 SCR 1140 at p 1166

the inference drawn by the arresting officer was a reasonable one to have made at the time of arrest based on the totality of circumstances known to the officer at that time.[76]

59. The review of grounds to arrest is not a "scientific or metaphysical exercise", but one that calls for the application of "[c]ommon sense, flexibility, and practical everyday experience".[77] It would be impractical to require proof on a balance of probabilities by police officers. Police are not finders of fact, and they must often make decisions quickly.[78]

60. Police do not require direct evidence to form reasonable and probable grounds. Police investigations are often rooted in circumstantial evidence. When police learn of a suspicious death, and there is no direct evidence about who is responsible, they naturally consider motive and opportunity. For example, in *R v Latimer,* this Court held that police had reasonable and probable grounds to arrest based on (a) carbon monoxide in the deceased's blood suggesting she had been poisoned; (b) it was improbable that the death was accidental; (c) because of the deceased's physical condition, her death could not have been a suicide; and (d) the accused had both opportunity and motive.[79] *Latimer* is like this case: the arrest was justified on the unlikelihood that the death was accidental and the appellants' motive and opportunity.

Application to This Case

61. The trial judge found that the facts known to Det. Vermette, taken cumulatively, established an objective basis for his reasonable and probable grounds to arrest.[80] The appellants had a motive based on the history of violence and conflict at the residence. And they had opportunity: they lived with the deceased, they were the last known individuals to see the deceased alive, and they claimed to have discovered the body. There is no error in this reasoning. The evidence, taken together, supported a reasonable belief that there had been a physical altercation between the deceased and his roommates that resulted in death.

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[76] *R v Todd*, 2019 SKCA 36 at paras 28-29
[77] *R v Canary*, 2018 ONCA 304 at para 22
[78] *R v Glendinning*, 2019 BCCA 365 at para 31
[79] *R v Latimer*, [1997] 1 S.C.R. 217 at para 27
[80] *R v Beaver*, 2019 ABQB 125 at para 159

62. The appellants criticize the Court of Appeal for finding that their arrests were "a practical and common sense decision".[81] They say this shows that the Court of Appeal did not properly review the ruling. But authorities confirm that practicality and common sense are exactly what the law requires. When determining whether the relevant threshold has been met, "a common sense and practical approach to considering all of the circumstances is called for."[82] And as an experienced homicide investigator, Det. Vermette was expected to interpret the information before him based on his practical, everyday experience.[83]

Police Notes

63. The appellants argue that Det. Vermette's failure to take notes about his grounds for arrest ought to lead to exclusion of evidence. This is unwarranted. The Crown agrees that detailed notes are desirable, and when a particular point is not recorded in an officer's notes a trier of fact may consider this in weighing the credibility and reliability of the officer's testimony. But notes are not mandatory. Each case depends on its facts and deficiencies in an officer's notes may hold no significance.[84] Here, the trial judge had the advantage of hearing the *viva voce* evidence of Det. Vermette on his grounds for arrest. Det. Vermette acknowledged that his notes could have been more detailed, but explained that at the relevant time he was doing the best he could.[85] The judge assessed this *viva voce* evidence. His credibility findings are entitled to deference.

64. The concerns about notes the appellants raise from *Fearon* and *Golden* do not apply here. *Fearon* and *Golden* are about particularly intrusive types of searches – personal electronic device searches in *Fearon* and strip searches in *Golden.*[86] This Court explained that note-taking in those contexts is mandatory because a record of how the search was conducted is essential for after-the-fact judicial review.[87] The point is that police must create a record of what they search and

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[81] *R v Beaver*, 2020 ABCA 203 at para 9
[82] *R v Buchanan*, 2020 ONCA 245 at para 23
[83] *Ibid.* at para 33
[84] *R v Lofty*, 2017 BCCA 418 at paras 48-51, citing *R v Gill*, 2015 ONSC 7872 at paras 44-45, *R v Dhillon* , 2015 ONSC 5400 at para 39
[85] Trial 383/15-23 [JRA Vol. I 229]
[86] *R v Fearon*, 2014 SCC 77; *R v Golden*, [2001] 3 S.C.R. 679
[87] *R v Fearon*, 2014 SCC 77 at para 82

how they search it. It did not require that officers make notes of their reasons for doing a search in the first place. This rationale has no application here.

Standard of Review

65. The trial judge's ruling that there were reasonable and probable grounds to arrest the appellants is one of mixed fact and law. When a trial judge has applied the correct legal test and the application of that test is inextricable from the findings of fact, then the decision is reviewed for palpable and overriding error. "Where the trier of fact has considered all the evidence the law requires and still comes to a wrong conclusion, this is an error of mixed fact and law and is subject to a more stringent standard of review."[88]

66. When reviewing a judge's ruling about reasonable and probable grounds to arrest, the standard of review will vary depending on the circumstances. When the dispute is over a general proposition that might qualify as a principle of law, the standard of review will be correctness. That was the case in *Shepherd,* where this Court wrote, "This Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law."[89]

67. But when the dispute is over "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future", the standard will be palpable and overriding error.[90] That was the case in *Bernshaw,* where this Court wrote, "the decision as to whether a peace officer believes on reasonable and probable grounds that an offence is being committed … must be based on the circumstances of the case. It is, therefore, essentially a question of fact and not one of pure law."[91] This Court said the same in *Rhyason.*[92]

68. Here, some of the appellants' submissions address the proper judicial considerations for scrutinizing an officer's claim of reasonable and probable grounds for an arrest made while the arrestee is unlawfully detained. This is a question of law, reviewable for correctness. But the appellants' complaints about the judge's weighing of the various pieces of information known to

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[88] *Housen v Nikolaisen*, 2002 SCC 33 at paras 26-28
[89] *R v Shepherd*, 2009 SCC 35 at para 20
[90] *Housen v Nikolaisen*, 2002 SCC 33 at para 28
[91] *R v Bernshaw*, [1995] 1 SCR 254 at para 57
[92] *R v Rhyason*, 2007 SCC 29 at para 12

police are akin to challenging his findings of fact. For example, Det. Vermette learned from the death investigator that she viewed the death as suspicious. Det. Vermette testified about the death investigator's experience, and explained why he considered her assessment important.[93] The trial judge accepted this evidence and treated Det. Vermette's impression that the death was suspicious as an important factor.[94] This Court should not reassess or re-weigh the factors to come to its own conclusion about Det. Vermette's grounds. So long as the trial judge correctly identified the scope of the *Charter* right, it was his role to weigh the evidence and determine whether the facts he found met the legal test. Where the dispute centers around his assessment of particular circumstances, there is no extricable error of law and the judge's conclusion is entitled to deference.

69. The Crown submits that the trial judge applied the correct legal test and considered the relevant factors. It follows that his finding is largely factual and should be reviewed deferentially.

Conclusion

70. The grounds to arrest were sound. The deceased died by trauma under suspicious circumstances. The appellants had a motive that became immediately obvious when Det. Vermette reviewed recent police reports from previous incidents at the townhouse. The appellants also had opportunity because they admitted to the 911 operator that they had argued with the deceased the night before, and they were the ones who pointed police to the body. The arrest directed by Det. Vermette at the police station was lawful.

71. If this Court concludes that Det. Vermette did not have reasonable and probable grounds to arrest, then it must consider whether to exclude the appellants' confessions under s. 24(2). Submissions about s. 24(2) are below at paragraphs 125 to 129.

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[93] Trial excerpt of evidence of Christian Alain Vermette, examined by the Ms. Froese, Defence, dated October 30, 2019 1/30 - 2/27 [RR Vol. I Part II Tab 1A 1-2]

[94] *R v Beaver*, 2019 ABQB 125 at para 151

Question Two: "Obtained in a Manner"

Overview

72. Violations of the appellants' *Charter* ss. 9 and 10 rights at the scene do not mean the confessions given many hours later were automatically subject to s. 24(2) and a *Grant* analysis. For that to happen, the trial judge had to find that the police obtained the confessions in a manner that infringed or denied their *Charter* rights.[95] This "obtained in a manner" finding is the threshold requirement for engaging s. 24(2).[96]

73. The test for the threshold requirement is not in dispute. The appellants argue that when determining whether evidence was "obtained in a manner" that breached the *Charter,* a trial judge should take a generous and purposive approach. They also argue that it is wrong for a trial judge to require a causal link between the *Charter* breach and the evidence; rather the connection between the breach and the evidence may be causal, temporal, contextual or a combination of all three. On all points, the appellants are correct.

74. The problem with the appellants' position is that no one disagrees with them. The Crown agrees. The trial judge and the Court of Appeal agreed. No matter how the appellants dress up their argument, their dispute is only with the trial judge's factual finding and the Court of Appeal's decision to apply an appropriately deferential standard of review.

Whether Evidence was "Obtained in a Manner" is a Question of Fact

75. Whether police obtained evidence in a manner that breached the *Charter* is a finding of fact "entitled to considerable deference on appeal."[97] The words of this Court in *Mack* are a complete answer to this ground:

> This ground of appeal is fact-driven and I would not give effect to it. Distilled to its essence, the appellant is effectively inviting the Court to reweigh the factors the trial judge considered in deciding that s. 24(2) was not engaged.[98]

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[95] *Canadian Charter of Rights and Freedoms*, RSC 1985, App. II, No. 44, Sched. B, Part I, ss 9, 10, 24(2)

[96] *R v Beaver*, 2020 ABCA 203 at para 13, citing *R v Plaha*, (2004) 188 CCC (3d) 289 (Ont CA) at para 44 and *R v McSweeney*, 2020 ONCA 2 at para 58

[97] *R v Mack*, 2014 SCC 58 at para 39

[98] *Ibid.* at para 41

76. As *Mack* states, the factual finding depends on "the nature of the connection between the *Charter* violation and the evidence that was ultimately obtained." An accused need not show a causal link between the breach and the discovery of evidence, but there must be some real connection. So, evidence will engage s. 24(2):

> … if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A 'remote' or 'tenuous' connection between the breach and the impugned evidence will not suffice."[99]

77. This Court based the *Mack* approach on its earlier ruling in *R v Wittwer*.[100] There, Justice Fish said that when considering the threshold question, "courts have adopted a purposive and generous approach."[101] *Wittwer* in turn relied on the test set out by the Ontario Court of Appeal in *R v Plaha*.[102] In that case, Justice Doherty explained that when an initial statement is tainted by a breach of s. 10(b), a court must consider whether later statements were obtained in a manner that violated the *Charter*. This will occur "if on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct."[103]

78. The *Mack* approach does not favour either party. The Alberta Court of Appeal found no reason to create new law as *Mack* provided all the guidance necessary. The *Mack* approach is broad and permits a trial judge to consider any evidence they find important in determining whether there is a connection between a *Charter* breach and evidence. *Mack* tells the trial judge to consider the totality of the circumstances, and to approach the "obtained in a manner" inquiry generously. The test puts the determination for whether s. 24(2) is engaged where it belongs: within the discretion of the trial judge who finds and weighs the facts.

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[99] *Ibid.* at para 38
[100] *R v Wittwer*, 2008 SCC 33
[101] *Ibid.* at para 21
[102] *R v Plaha*, (2004) 188 CCC (3d) 289 (Ont CA)
[103] *Ibid.* at para 45; see also *R c Archambault*, 2012 QCCA 20 at para 57, where Chief Justice Wagner (as he then was) discussed the relationship between the temporal and causal link.

79. There are cases where the "obtained in a manner" connection is obvious: for example, if police find evidence in an illegal search, there can be no doubt that s. 24(2) applies. At the other end of the spectrum, there are cases where evidence is obviously unconnected to a prior breach: for example, if police carry out an illegal drug search, find nothing, and then a week later the accused confesses to arson. In that situation, it is easy to see that the confession was not obtained because of the search.

80. In between these two extremes, there will be difficult cases where the strength of the connection is unclear. *Mack* holds that trial judges are better situated than courts of appeal to make those determinations. This Court need not change the test.

The Lower Courts did not Expand the "Obtained in a Manner" Test

81. The appellants argue that the lower courts' decisions broaden the circumstances in which the police can insulate evidence from *Charter* scrutiny. These arguments are unfounded.

82. The trial judge applied *Mack*. He reminded himself to take a purposive and case-specific approach to the threshold inquiry.[104] He found no temporal, contextual, or causal connection between the breaches at the scene and the confessions. He based this on finding that at the police station, the police arrested the appellants for murder, told them they had the right to contact and instruct counsel (which Mr. Lambert exercised and Mr. Beaver did not), and that both appellants knew they had the right to remain silent. Thus, when they confessed, they knew the gravity of what the police had charged them with and made the informed choice to speak.[105]

83. In finding no connection, the trial judge considered the concept of a fresh start as explained by the Ontario Court of Appeal in *R v Manchulenko*.[106] There, police arrested a driver and demanded that he provide breath samples. They breached his *Charter* rights because they did not give him an opportunity to call counsel before his first sample; but after the first sample, police allowed him to speak to counsel. He then provided a second breath sample. Justice Watt held that the trial judge properly excluded the first test, but had erred by ignoring whether the

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[104] *R v Beaver*, 2019, ABQB 125 at paras 205-206
[105] *Ibid.* at paras 206-209
[106] *R v Manchulenko*, 2013 ONCA 543

accused's consultation with counsel had severed the second breath test from the earlier breach.[107] He analogized the provision of breath samples to a confession. Citing *Wittwer*, he stated:

> In some circumstances, conduct by investigators prior to a second statement may sever the link between the original taint and the subsequent statement. In other words, investigators may attempt a "fresh start" in order to insulate the second statement from the taint that rendered the earlier statement inadmissible.[108]

84. Justice Watt was not the first judge to use the term "fresh start". Justice Sopinka approved of the fresh start concept in *R v R(D)*.[109] There the issue was whether the police's failure to comply with a section of the *Young Offenders Act* rendered a confession inadmissible. The Crown argued that the young person had given two statements, and the second statement was unaffected by the police failure. Justice Sopinka, writing for the Court, disagreed but endorsed the concept of a fresh start:

> It was submitted by the respondent that the s. 56 caution which preceded the second part of the statement was a "fresh start" rendering the inadmissibility of the first part of the statement irrelevant. We disagree. In the circumstances of this case, in order to constitute a "fresh start", the effect of the first statement would have had to be dispelled by appropriate language. This was not done.[110]

85. Then in *Wittwer*, this Court returned to the fresh start concept. There, the appellant made an incriminating statement to police after they confronted him with an earlier statement obtained in violation of his s. 10(b) rights. Justice Fish, writing for the Court, disagreed that the efforts made by the police constituted a fresh start, but found it was proper for police to try a fresh start:

> Initially, the interrogating officer attempted to insulate the confession he hoped to secure on this occasion from two earlier statements impermissibly obtained by his colleagues. But what the officer properly intended as a "fresh start" soon foundered. After more than four hours of fruitless interrogation, he and the appellant — in the officer's words — were "at loggerheads".
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> As a last resort, the officer thus returned to where his colleagues had left off: He confronted the appellant with the appellant's prior inadmissible statements or, at least, one of them. Only then did the interrogating officer induce the appellant to make the incriminating admissions he had otherwise been unable to secure. What

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[107] *Ibid*. at paras 52-78
[108] *Ibid*. at para 68, citing *R v Wittwer*, 2008 SCC 33 at paras 2-3
[109] *R v R(D)*, [1994] 1 SCR 881
[110] *Ibid*. at page 882

> began as a *permissible* fresh start thus ended as an *impermissible* interrogation inseparably linked to its tainted past.[111]

86. Both the trial judge and Court of Appeal followed these principles in assessing the connection between the breaches and the later confessions. The conclusions reached by the trial judge (that there was no connection) and the Court of Appeal (that the trial judge's finding was reasonable) are logical. There was "little evidence of any significance" obtained by police during the appellants' initial detentions, the police provided them both the opportunity to contact counsel after arresting them at the police station, and they both knew they had the right to remain silent.[112] This is different from *Wittwer*, where the detainee's confession resulted from police references to a prior, inadmissible statement, which undermined the attempted fresh start.[113]

87. Thus, the reasoning of the courts below is neither novel nor unreasonable: it fits with the plain wording of s. 24(2) and aligns with this Court's jurisprudence. A fresh start is not a standalone principle of law; it describes a police action to correct mistakes and it assists a trial judge in assessing the "obtained in a manner" requirement. The Alberta Court of Appeal made this point:

> A "fresh start" is a way to conceptualize an attempt by police to rectify or "cure" an earlier *Charter* breach so that any subsequently obtained evidence would not be "obtained in a manner" that infringed the rights of an accused under s. 24(2) of the *Charter*.[114]

"Fresh Start" is not Restricted to S. 10

88. The appellants claim that a fresh start cannot occur after a s. 9 breach and might only be attempted after a s. 10 breach. This argument is contradicted by the plain wording of s. 24(2), which applies to any evidence that was "obtained in a manner" that breached a *Charter* right. Nothing limits the "obtained in a manner" language to s. 10 breaches. And here the judge found that the s. 10 breaches flowed from the s. 9 breach.[115]

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[111] *R v Wittwer*, 2008 SCC 33 at paras 2-3 (emphasis in original)
[112] *R v Beaver*, 2020 ABCA 203 at paras 17, 22-26
[113] *R v Wittwer*, 2008 SCC 33 at paras 2-3, 22
[114] *R v Beaver*, 2020 ABCA 203 at para 12
[115] *R v Beaver*, 2019 ABQB 125 at para 223

89. Most fresh start cases will likely involve s. 10 breaches. But the facts here are unusual because the appellants had formed a plan to tell their concocted narrative to the police to escape suspicion. They called 911 knowing that police would respond and would ask them what happened.[116] They maintained their false narrative to police for hours, well after the police arrested them for murder. By the time they confessed, they were properly arrested and knew their rights. On these facts, it was reasonable for the trial judge to conclude that the confessions did not engage s. 24(2).

90. That the police can try a fresh start is essential to the investigation of crime. After all, if the police could not attempt a fresh start, any evidence they gathered after an initial breach would automatically be subject s. 24(2). Such an approach cannot be right. Nor should a fresh start be limited only to instances in which a person's s 10 rights have been violated.

91. The appellants concede the practical need to permit the police to try a fresh start. But they argue that for an arrest and re-*Charter* and caution to affect the "obtained in a manner" analysis, the police must tell the accused person of the *Charter* violations they are trying to remedy.[117]

92. Though the appellants say that the police should have told them of the earlier breaches for the fresh start to be effective, they do not adequately explain how it matters. They merely state it would have permitted them to receive informed legal advice. In reality, it would have made no difference. The appellants' staging of the homicide scene and deceitful 911 call show they knew they would be in jeopardy if police learned the truth. Knowledge of the earlier breaches would be irrelevant to the advice they received from counsel. Either way, the appellants knew they had the right to silence, that anything they said could be used against them, and that the truth would incriminate them.

93. The appellants seek to frame the Court of Appeal decision as holding that an initial unlawful detention will *never* be considered in determining the admissibility of a statement, so long as the police *eventually* comply with the *Charter*. But the Court of Appeal said no such

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[116] *R v Beaver*, 2019 ABQB 125 at para 246
[117] Factum of Mr. Lambert at para 105

thing. The Court found that the trial judge conducted a *Mack* analysis, considered the proper factors, and came to a reasonable conclusion.[118] The decision created no new law.

94. Lastly, the appellants' argument is also circular. It presumes their confessions were tainted. They say the police should not circumvent an accused's *Charter* rights by "attempting to cure the tainted evidence by later *Charter* compliance." But the judge found the evidence was not tainted. Thus, it did not engage section s. 24(2).

The Trial Judge's Decision was Reasonable

95. The trial judge was uniquely positioned to find facts and draw inferences from those facts.[119] The appellants did not call *voir dire* evidence. So it was reasonable for the trial judge to conclude that the police properly arresting them and advising them of their rights meant that there was no connection between the earlier breaches and the later confessions. This is particularly so given that the appellants said nothing other than repeating their concocted narrative for hours after they were properly arrested.

96. There is no merit to the appellants' claim that the judge imported a causal requirement into the "obtained in a manner" test. The judge was careful not to import a causal test. He stressed the requirement for a contextual analysis.[120] He should be taken at his word.[121]

97. The appellants are correct that the trial judge incorrectly credited a dissenting opinion in his review of the law. But nothing came of it. He quoted from *R v Nguyen*, a decision of the Saskatchewan Court of Appeal[122]. He misattributed the quote to the majority opinion of Justice Jackson when it was from the dissent of Justice Smith. The judge said Justice Jackson (really Justice Smith) "saw some importance in the causal relationship between the *Charter* breach and the resulting evidence." However, after relating this opinion, he applied this Court's binding

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[118] *R v Beaver*, 2020 ABCA 203 at para 22
[119] *Housen v Nikolaisen*, 2002 SCC 33 at paras 18, 25
[120] *R v Beaver*, 2019 ABQB 125 at paras 205-206
[121] *R v O'Brien*, 2011 SCC 29 at para 18
[122] *R v Nguyen*, 2008 SKCA 160

authority from *Mack* that no causal connection is required, making his *Nguyen* comment harmless.[123]

98. Ultimately, the trial judge's conclusion that the appellants' confessions were not "obtained in a manner" was a finding of fact, reasonable on the evidence before him. Having found no error, the Court of Appeal properly deferred to this finding. This Court should do the same.

Question Three: Voluntariness

99. Mr. Beaver argues that his statement was involuntary because he was not given a meaningful choice to decide whether to speak to police. He also claims he had no idea what was at stake in the interview. But he never testified to that and his claims conflict with the trial judge's findings of fact. A review of the trial judge's reasons shows that he applied correct legal principles. His factual findings are entitled to deference. There is no basis to overturn his ruling that Mr. Beaver's confession was voluntary.

General Principles

100. To admit an accused person's statement to a person in authority, the Crown must prove beyond a reasonable doubt that the accused's will was not overborne by inducements, oppressive circumstances, or the lack of an operating mind. A confession will also be involuntary where it is obtained by police trickery that is so appalling as to shock the community.[124] The analysis under the confessions rule is contextual. A court should strive to understand the circumstances surrounding the confession and ask if they give rise to a reasonable doubt about the confession's voluntariness.[125] This requires a balancing between society's interest in effective investigation and the rights of the accused.[126]

101. In assessing whether a person understood their jeopardy, this Court has held that "it is the substance of what the accused can reasonably be supposed to have understood, rather than the

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[123] *R v Beaver*, 2019 ABQB 125 at paras 193, 203-205
[124] *R v Oickle*, 2000 SCC 38 at paras 47-71; *R v Spencer*, 2007 SCC 11 at paras 11-15
[125] *R v Oickle*, 2000 SCC 38 at paras 68-71
[126] *R v Singh*, 2007 SCC 48 at paras 1, 7

formalism of the precise words used, which must govern."[127] *Latimer* illustrates this principle. The police took the accused into custody at his farm, telling him only that he was being detained for an investigation into the death of his daughter. They did not tell him he was under arrest. They offered him a chance to call a lawyer, which he declined. He eventually gave a full confession. This Court found that although police never used the word "arrest", Mr. Latimer understood his jeopardy:

> On the facts of this case, I have no doubt that the trial judge was right in finding that Mr. Latimer understood the basis for his apprehension by the police and hence the extent of his jeopardy. He knew that his daughter had died, and that he was being detained for investigation into that death. Constable Lyons prefaced his comments in the car by saying "what I am about to say has very serious consequences". Mr. Latimer was then informed of his right to counsel and his right to silence, which clearly conveyed that he was being placed under arrest. Finally, he was told that he could not go into his own house by himself to change his clothes. It is clear on these facts that Mr. Latimer knew that he was in an extremely grave situation as regards his daughter's death, and that s. 10 (a) cannot be said to have been violated.[128]

102. In *Latimer,* this Court considered the issue under section 10(a) of the *Charter*. Here, the appellant makes the same argument under the aegis of voluntariness. Either way, the principle is the same: the substance of what the appellant must have understood, rather than the words used, determines whether he understood his jeopardy.

No Error in the Judge's Reasoning

103. The trial judge referred to *R v Singh* and recognized that the absence of a caution was a factor in the voluntariness analysis, but it was not dispositive.[129] He also found that the appellant understood the caution Cst. Husband read to him at the scene. The Court of Appeal found no error in this reasoning.

104. Det. Hossack's explanation to Mr. Beaver – that he was being charged with murder, that police needed to figure out what happened, and that right now he was not allowed to leave – was

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[127] *R v Evans*, [1991] 1 SCR 869 at para 30
[128] *R v Latimer*, [1997] 1 S.C.R. 217 at para 31
[129] *R v Beaver*, 2019 ABQB 125 at para 90, citing *R v Singh*, 2007 SCC 48 at para 31

practical, truthful, and given in plain language. These words clearly explained the purpose of the interview.

105. The appellant complains that his words in the interview indicated that he had no idea what was at stake. This overlooks that the trial judge found as a fact that Mr. Beaver knew exactly why Det. Hossack was interviewing him.[130] He also found that Mr. Beaver's real reason for confessing was that he was faced with Mr. Lambert's confession.[131] These findings of fact are determinative.

Reliance on Tessier

106. In support of his assertion that the trial judge misunderstood the law surrounding voluntariness, the appellant relies on the Alberta Court of Appeal's decision in *R v Tessier*. In that case, the accused spoke to police without being read the police caution. The Court of Appeal held that the trial judge erred by failing to inquire whether the accused "understood the police could use his statements to his detriment and that he was not obliged to speak to police."[132]

107. The appellant points out that the trial judge in *Tessier* was the same trial judge here. He argues that if the judge made an erroneous ruling on voluntariness in *Tessier* then he likely made the same error here. This argument should be rejected. First, the cases are distinguishable. Police did not read Mr. Tessier a caution. Cst. Husband read the police caution to Mr. Beaver, and the trial judge found that he understood it.[133] Second, the respondent disagrees with the Alberta Court of Appeal decision in *Tessier*, and notes that this Court has granted leave to appeal. Third, and most importantly, the appellant's arguments neglect a fundamental principle of appellate review: the appeal must be decided based on the record.

108. The reliance on *Tessier* is not an attack on the trial judge's reasons or his conduct of this trial. Rather, the appellant tries to rely on a supposed error made in another case. This approach is improper. Appeals do not proceed by reviewing a judge's reported decisions in search of errors made outside of the case. If they did, presumably the respondent would be entitled to put forward

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[130] *Ibid*. at para 93
[131] *Ibid*. at para 96
[132] *R v Tessier*, 2020 ABCA 289 at para 58
[133] *R v Beaver*, 2019 ABQB 125 at para 90

other cases in which the trial judge made correct rulings. Then an appeal court would have to listen to arguments about whether the judge was correct in those other cases – just as it might have to entertain arguments here about whether the trial judge's ruling in *Tessier* was really an error. Appeals do not and cannot proceed in this manner.

Conclusion

109. The trial judge made three central findings of fact that taken together are decisive. First, he found that Mr. Beaver understood the police caution – which means that he understood he did not have to speak to police, and that anything he said could be used against him. Second, the judge found that despite his arguments to the contrary, Mr. Beaver knew exactly why police were interviewing him. Third, he found that Mr. Beaver chose to confess not because of anything that police did, but because he knew that Mr. Lambert had done so.[134]

110. These findings are reviewed for palpable and overriding error, which the appellant does not assert. This ground of appeal should be dismissed.

Section 24(2) Analysis

111. The trial judge conducted an alternative s. 24(2) analysis in case he was wrong about the "obtained in a manner" threshold. In this alternative analysis, he considered:

- Arbitrary detention contrary to s. 9, from which flowed a breach of s. 10.
- Sgt. Lines' error in referring to non-existent legislation as the basis for detaining the appellants contrary to s. 10(a), which led to a weak basis on which they could contact counsel in breach of their s. 10(b) rights, which also breached their s. 7 right to silence.
- Cst. Taylor breaching Mr. Lambert's s. 10(b) rights and his s. 7 right to silence, when he failed to hold-off questioning on the drive to the police station.[135]

Governing Principles

112. When faced with an application for exclusion under s. 24(2), a trial judge must consider three factors. First, the seriousness of the *Charter*-infringing state conduct. Second, the impact of

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[134] *Ibid.* at paras 90, 93, 96
[135] *Ibid.* at para 223

the breach on the *Charter*-protected interests of the accused. Third, society's interest in the adjudication of the case on its merits. The judge's role is to balance their assessments under each line of inquiry to determine whether admission of the evidence would bring the administration of justice into disrepute.[136]

The Standard of Review is Deferential

113. The Crown disagrees with the appellants about the standard of review. The appellants say that if this Court reaches a different conclusion about the "obtained in a manner" requirement, then the Court owes no deference to the trial judge's s. 24(2) analysis. This Court has never said that. In *Grant,* this Court said if an appellate court reaches a different conclusion on the "breach itself" deference is not required, though the trial judge's underlying factual findings must be respected absent palpable and overriding error.[137] Here, there is no dispute over the "breach itself": the trial judge found the police breached the appellants' *Charter* rights.

114. In the cases cited by the appellants to support their argument against deference, the appellate courts reached a different conclusion about the breach itself, not the "obtained in a manner" requirement. It does not follow that where an appellate court reaches a different conclusion about the obtained in manner analysis, that no deference should be shown to a trial judge's alternative s. 24(2) analysis. This is shown by one of the cases relied on by the appellants, *R v GTD*. There, Justice Veldhuis explained that an appellate court owes no deference to a trial judge's "alternative" 24(2) analysis if they find the trial judge wrongly concluded the police did not breach the appellant's rights. She stated, "[i]f a trial judge does not believe the police violated the *Charter*, the judge's assessment of the seriousness and impact of a "hypothetical" *Charter* breach is often somewhat artificial, since the trial judge weighs the seriousness and deleterious effects of investigative actions that she believes were constitutionally sound."[138] This rationale does not apply here. The trial judge did not believe the actions of the police were constitutionally sound and his analysis was not artificial.

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[136] *R v Grant*, 2009 SCC 32 at para 71
[137] *R v Grant*, 2009 SCC 32 at paras 86, 127, 129
[138] *R v GTD*, 2017 ABCA 274 at para 51; Justice Veldhuis' dissent applied 2018 SCC 7

115. The *Grant* factors are fact dependent. Deference is critical to the administration of justice and an appeal court should be slow to marginalize it. Appellate courts defer to a trial judge's factual findings for many reasons. Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts' factual findings would duplicate judicial proceedings at great expense, without any guarantee of more just results. Finally, according deference to a trial judge's findings of fact reinforces the notion that they are in the best position to make those findings. Trial judges are immersed in the evidence, they hear *viva voce* testimony, and they are familiar with the case as a whole. Their expertise in weighing large quantities of evidence and making factual findings ought to be respected.[139]

116. Thus, this Court should not start from scratch. The trial judge considered the proper s. 24(2) factors and did not make any unreasonable finding. His alternative analysis is not artificial. His s. 24(2) analysis is owed considerable deference on appellate review.[140]

Seriousness of the Breaches

117. To determine the seriousness of the breaches, the trial judge had the duty to assess the police conduct and to situate that conduct on a scale of culpability.[141] His conclusions are reasonable and supported by his factual findings. He found that Sgt. Lines' decision to detain the appellants at the scene under non-existent legislation lacked good faith and was "reckless." This led to the breaches of the appellants' s. 10 rights. He found that Sgt. Lines was "looking for a way to maintain control over Mr. Beaver and Mr. Lambert, but was not sure exactly how to do it." All told, the trial judge found that the seriousness of Sgt. Lines' breach of the appellants' rights favoured exclusion of the evidence.[142]

118. For Cst. Taylor's questioning of Mr. Lambert on the drive to the police station, he found this breach was not serious. When Cst. Taylor asked Mr. Lambert what happened, he responded

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[139] *Benhaim v St-Germain*, 2016 SCC 48 at para 37, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 15-18
[140] *R v Cote*, 2011 SCC 46 at para 44
[141] *R v Le*, 2019 SCC 34 at para 143
[142] *R v Beaver*, 2019 ABQB 125 at paras 228-231

with a similar story to what he already told Cst. Taylor when he first arrived on scene, which itself was much like what he had told 911. The trial judge did not find the officer "completely blameless". He found as fact that Cst. Taylor was posing the question in good faith because he was trying to find out how the deceased died. "In so doing, he was negligent, but not grossly so. His behaviour would fall more to the less serious side of the spectrum."[143] Also, by this time Mr. Lambert had acknowledged his right to counsel and understood his right to remain silent. With little prompting, he chose to speak:

> … Mr. Lambert provided his explanation to Cst. Taylor spontaneously following Cst. Taylor's *Charter* breach. This Court finds that Mr. Lambert would have provided the explanation in any event, as he was trying to profess his innocence. In fact, he did so during his interview with Det. Demarino. The breach was not serious, in these circumstances. [144]

The Impact of the Breaches on the Appellants was Limited

119. The trial judge found that the breaches had little effect on the appellants. Contrary to the appellants' claim that they were unaware of the jeopardy they faced when the police detained them, the trial judge recognized that the appellants staged the homicide scene and then called 911 on their "discovery" of the deceased's body. The appellants "knew why they were being detained" and it "would not be unreasonable for both of them to expect that the CPS would want to obtain a statement from them".[145]

120. In the end, the appellants' claim that they did not know why the police were detaining them is at odds with the trial judge's finding:

> Were they aware that it was a murder investigation? The words that the CPS actually used were not as important as the fact that both Mr. Beaver and Mr. Lambert knew, or had to have known, that they were going to be questioned concerning Mr. Bowers' death. This was the substance, whether or not the CPS officers used the words "killing," "murder," or "homicide."[146]

121. The trial judge also noted that for "many, many hours" after their detention at the scene the appellants continued to assert their innocence. Both gave "a detailed explanation that they

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[143] *Ibid*. at paras 233-234
[144] *Ibid*. at paras 235-238
[145] *Ibid*. at para 244
[146] *Ibid*. at para 246

knew nothing about how Mr. Bowers met his fate." Ultimately, the trial judge found as fact the appellants confessed, "not based on any breaches of their *Charter*-protected rights, but on the evidence that was beginning to unfold." Thus, he found this factor favoured admission.[147]

Society's Interest in the Case

122. The trial judge also found the last factor, society's interest in the adjudication of the case on its merits, favoured admission. He noted that because the appellants confessed voluntarily, their confessions were on their face reliable. He balanced reliability against the way the police obtained the evidence. Contrary to the appellants' assertions, he found no pattern of disregard by the police. Rather, he found as fact that the primary violator was Sgt. Lines and, to a lesser extent, Cst. Taylor. After he balanced the conduct of the police and the reliability of the evidence, he found that this factor favoured admission.[148]

The Trial Judge Reasonably Balanced the Grant Factors

123. The trial judge had considerable discretion on how to balance the three factors: He cited *Grant*: "No overarching rule governs how the balance is to be struck".[149] The judge understood that the seriousness of the charge cuts both ways. Again citing *Grant*, he noted that though society has an interest in seeing serious charges prosecuted, it also has an interest in a justice system that is above reproach when the penal stakes are high.[150] Ultimately, he found that while Sgt. Lines' direction to Csts. Husband and Taylor to detain the appellants under non-existent legislation favoured exclusion, the limited impact of the breaches and society's interest in the adjudication of the case on its merits tipped the balance in favour of admission.[151]

124. The trial judge reasonably balanced the three factors. His assessments and weighing of the *Grant* factors are entitled to deference. There is no reason for this Court to overrule him.

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[147] *Ibid*. at paras 247-248
[148] *Ibid*. at paras 249-254
[149] *Ibid*. at para 255, citing *R v Grant*, 2009 SCC 32 at para 86
[150] *Ibid*. at para 256, citing *R v Grant*, 2009 SCC 32 at para 84
[151] *Ibid*. at paras 257-259

Alternative Section 24(2) Analysis of the Arrest at the Police Station

125. The trial judge also conducted an alternative s. 24(2) analysis in case he was wrong about his ruling that Det. Vermette had reasonable and probable grounds to arrest the appellants at the police station. He concluded that none of the *Grant* factors favoured exclusion.

126. First, if there were not objectively reasonable grounds to arrest, it would not be at the serious end of the scale. The judge observed that even with the benefit of hindsight and complete analysis the Court had to undertake a thorough review to assess the grounds. He could hardly expect a police officer in a fluid situation to have done the same.[152] His reasoning in this regard is similar to what the Ontario Court of Appeal wrote in *R v Buchanan:* "There is a difference between a police officer miscalculating whether she had sufficient grounds to arrest, when on the trial judge's view she only had sufficient grounds to detain for investigation, and other more serious forms of police miscalculation."[153] Likewise, if Det. Vermette made a miscalculation about the strength of the grounds to arrest, that is an understandable error. If police were short on grounds, it was not by much.

127. The judge's findings on the second and third branches of the test aligned with his other alternative s. 24(2) analysis: the impact was limited because the appellants planned to tell their concocted narrative to police from the beginning, and society's interest in adjudication on the merits also favoured admission.

128. In any event, the impact of a police mistake in this context is attenuated by the discovery of further evidence shortly after the arrests. Mr. Beaver's arrest was at 12:20 p.m. and Mr. Lambert's arrest was at 12:29 p.m.[154] At 12:35 p.m. Det. Vermette learned from the medical examiner that the deceased had sent messages on his computer to one of his friends on the evening of October 8, 2016:

6:36 p.m.	im taking brian and jim down they fucked me
9:13 p.m.	I just destroyed brian and jim now I can get some worthy

[152] *Ibid.* at para 232
[153] *R v Buchanan*, 2020 ONCA 245 at para 54
[154] *R v Beaver*, 2019 ABQB 125 at paras 26, 36

roommates any suggestions[155]

129. These utterances by the deceased would have further confirmed the recent animus between him and the appellants. This additional information would have resolved any doubt about Det. Vermette's grounds for arrest. If the grounds fell short at 12:20 p.m., the shortfall was cured 15 minutes later. This is an important factor in support of a finding that the confessions were admissible even if there had been a breach.

PART IV – COSTS

130. The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

131. The Respondent asks that the appeals be dismissed.

PART VI – CASE SENSITIVITY

132. There are no restrictions listed in Rule 42(2)(f) of the *Rules of the Supreme Court of Canada* that impact this Court's reasons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 8th day of October, 2021.

Raylin Dhillon for

ANDREW BARG
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[155] *Ibid*. at paras 160-161

PART VII – TABLE OF AUTHORITIES AND LEGISLATION

Authorities	**Cited at Paragraph No.**
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