R. *v.* Evans, [1991] 1 S.C.R. 869

Wesley Gareth Evans *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Evans

File No.: 21375.

1991: January 21; 1991: April 18.

Present: Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Right to be advised of reason for detention -- Right to counsel -- Accused not understanding right -- Police initially investigating drug offence -- Investigation changing to murder investigation -- Accused initially waived right to counsel -- Accused not formally informed of change of nature of investigation -- Accused not informed of right to counsel when nature of investigation changed -- Incriminating statements made during investigation -- Whether or not infringement of accused's right to be informed of reason for detention -- Whether or not infringement of accused's right to counsel -- Whether or not statements should be

excluded for bringing administration of justice into disrepute -- Canadian Charter of Rights and Freedoms, ss. 10(a), (b), 24(2).

Evidence -- Admissibility -- Charter of Rights -- Right to be advised of reason for detention -- Right to counsel -- Accused not understanding right -- Police initially investigating drug offence -- Investigation changing to murder investigation -- Accused initially waived right to counsel -- Accused not formally informed of change of nature of investigation -- Accused not informed of right to counsel when nature of investigation changed -- Incriminating statements made during investigation -- Whether or not infringement of accused's right to be informed of reason for detention -- Whether or not infringement of accused's right to counsel -- Whether or not statements should be excluded for bringing administration of justice into disrepute -- Canadian Charter of Rights and Freedoms, ss. 10(a), (b), 24(2).

Appellant, a youth of subnormal mental capacity, was convicted of first degree murder in the brutal killings of two women. Initially, the police thought his brother had committed the murders and arrested the appellant on a marijuana charge in the hope that he would be able to provide evidence against his brother. The police informed Evans of his right to counsel but were given a negative answer when asked if he understood his rights. Any understanding that the accused may have had of his rights was confined to a garbled version based on American television. No attempt was made to communicate the meaning of his right to counsel to him. During the course of the interrogation that followed, Evans became the prime suspect in the two murders. The police did not formally advise the appellant that he was then being detained for murder, nor did they reiterate his right to counsel. The police

investigation was aggressive and marked by their lying about finding the appellant's fingerprint at one of the murder scenes. Eventually incriminating statements were obtained from the appellant. These statements formed virtually the entire basis of his conviction for the two murders. An appeal to the Court of Appeal was dismissed. At issue here is whether appellant's rights under ss. 7, 10(*a*) and 10(*b*) of the *Canadian Charter of Rights and Freedoms* were violated so that the resultant confessions should have been excluded pursuant to s. 24(2) of the *Charter*.

Held: The appeal should be allowed.

Per Gonthier, Cory and McLachlin JJ.: The right to be promptly advised of the reason for one's detention embodied in s. 10(*a*) of the *Charter* is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(*b*) of the *Charter*. In interpreting s. 10(*a*) in a purposive manner, regard must be had to the double rationale underlying the right.

When considering whether there has been a breach of s. 10(*a*) of the *Charter*, the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, must govern. What the accused was told, viewed reasonably in all the circumstances of the case, must be sufficient to permit him to make a reasonable decision to decline to submit to arrest or, alternatively, to undermine his right to counsel under s. 10(*b*).

The police indicated that they were investigating the appellant for murder shortly after he became the prime suspect in the killings and the appellant in turn seemed to recognize that the nature of the questioning had altered. The appellant therefore was given the facts relevant to determining whether he should continue to submit to the detention. Any failure to comply with s. 10(*b*) cannot be attributed to failure to advise the accused of the reasons why his detention and questioning was continuing.

The police did not comply with s. 10(*b*) at the time of the initial arrest. Although they informed the appellant of his right to counsel, they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(*b*) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. But where, as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.

A second violation of the appellant's s. 10(*b*) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. The police have a duty to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. The accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of

the charge. The new circumstances may require reconsideration of an initial waiver of the right to counsel. The police in the course of an exploratory investigation, however, need not reiterate the right to counsel every time that the investigation touches on a different offence.

The reception of the appellant's statements would tend to bring the administration of justice into disrepute. Three broad categories of factors bear on a s. 24(2) determination: (a) the effect of the admission of the evidence on the fairness of the trial; (b) the seriousness of the *Charter* violation; and, (c) the effect of exclusion on the repute of the administration of justice.

The admission of appellant's statements, which were essential to his conviction, worked an unfairness against him. Using an incriminating statement, obtained from an accused in violation of his rights, generally results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way -- by supplying evidence which would not be otherwise available. There can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence. Here the appellant's deficient mental state, combined with the circumstances in which the statements were taken, cast significant doubt on their reliability.

The violation of the accused's right to counsel was very serious. The police, despite knowledge of the appellant's deficient mental status and despite his statement to them that he did not understand his right to counsel, proceeded to subject him to a series of interviews and other investigative techniques. Moreover,

they lied to him in the course of the interviews, falsely suggesting that his fingerprint had been found. The pressure the police were under to find a suspect did not justify their conducting repeated and dishonest interrogations of a weak person in violation of his *Charter* rights. The seriousness of this *Charter* violation was not mitigated by appellant's notion of his rights. This "understanding" was confined to a garbled version based on American television. The appellant had, moreover, initially asserted to the police that he did not understand what his right to counsel entailed.

The exclusion of this evidence would not bring the administration of justice into disrepute. Its admission was not required in order to avoid the disrepute that would follow the acquittal of a self-confessed killer on the basis of *Charter* infringement. Such reasoning was flawed because it rests on the questionable assumption that the confessions were reliable and true. More fundamentally, it rests on the assumption that the appellant is guilty. The appellant was entitled not to be found guilty except upon a fair trial. To justify the unfairness of his trial by presuming his guilt is to stand matters on their head and violate that most fundamental of rights, the presumption of innocence. Few things could be more calculated to bring the administration of justice into disrepute than to permit the imprisonment of a man without a fair trial. As a practical matter, it cannot be said that such imprisonment would prevent further murders by the killer. Only a conviction after a fair trial based on reliable evidence could give the public that assurance.

Per Sopinka J.: The conclusions of McLachlin J. with respect to ss. 10(*b*) and 24(2) of the *Canadian Charter of Rights and Freedoms* were agreed with. Section 10(*a*) was violated as well.

Section 10(*a*) requires that a person be informed of the reasons for the arrest or detention so that he or she can immediately undertake his or her defence, including a decision as to what response, if any, to make to the accusation. This information should therefore be conveyed prior to questioning and obtaining a response from the person under arrest or detention.

The initial questions put before an incriminatory response is obtained can, but did not here, disclose the true ground for an arrest. The appellant, whose mental development was equated to that of a 14-year-old, should not have been required to deduce from the content of questions that the initial explicit reason for his arrest had shifted to a far more serious ground. The arresting officers had advised him that he was in jeopardy for trafficking in narcotics and were obliged to disabuse him of this false information before seeking to elicit incriminatory evidence from him. This could only be accomplished by an equally explicit statement of the true ground for his arrest.

Per Stevenson J.: The police violated s. 10(*b*) of the *Charter* in failing to make a reasonable effort to explain to the accused his right to counsel and the appeal should be allowed solely on this ground. This was not a case in which to decide whether there is an obligation to reiterate the right to counsel when the course of the investigation takes some change.

Section 10 does not apply to police investigations or questioning in the absence of detention. The object of the section is to provide safeguards in the circumstances of detention. On one hand, the police may be found to have detained someone on one charge with the object of questioning on another charge. On the other extreme, there can be cases in which an accused under detention fortuitously discloses information relating to other activities. These raise fact issues not dependent on the nature or seriousness of the other activities. One extreme would be readily characterized as an abuse of the detention and a violation of s. 10(*a*) and (*b*), while the other does not appear to violate the section.

McLachlin J.'s analysis and application of s. 24 of the *Charter* was agreed with.

Cases Cited

By McLachlin J.

Referred to: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Anderson* (1984), 10 C.C.C. (3d) 417; *R. v. Nelson* (1982), 32 C.R. (3d) 256; *R. v. Broyles* (1987), 82 A.R. 238; *Clarkson v. The Queen*, [1986] 1 S.C.R. 383; *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *R. v. Collins*, [1987] 1 S.C.R. 265.

By Sopinka J.

Referred to: *Christie v. Leachinsky*, [1947] A.C. 573.

By Stevenson J.

Distinguished: *R. v. Broyles* (1987), 82 A.R. 238; **referred to**: *R. v. Black*, [1989] 2 S.C.R. 138.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 10(*a*), (*b*), 24(2).
Criminal Code, R.S.C. 1970, c. C-34, s. 218.

APPEAL from a judgment of the British Columbia Court of Appeal (1988), 45 C.C.C. (3d) 523, dismissing an appeal from conviction by Callaghan J. sitting with jury. Appeal allowed.

Glen Orris, Q.C., for the appellant.

John E. Hall, Q.C., for the respondent.

//*Sopinka J.*//

The following are the reasons delivered by

SOPINKA J. -- I agree with the conclusion reached by Justice McLachlin with respect to s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* and that the admission of the statements would bring the administration of justice into disrepute. I also agree with her disposition of the appeal. As was Southin J.A., however, I am of the opinion that s. 10(*a*) was violated as well.

Section 10(*a*) and (*b*) set out very fundamental rights of a person arrested or detained. The instructions to the authorities which they contain are relatively simple. In each case, the detainee is to be "informed". In the case of s. 10(*a*), the right is to be informed of the reasons for the arrest or detention. The right to be informed of the true grounds for the arrest or detention is firmly rooted in the common law which required that the detainee be informed in sufficient detail that he or she "knows in substance the reason why it is claimed that this restraint should be imposed" (*Christie v. Leachinsky*, [1947] A.C. 573, at pp. 587-88). When an arrest is made pursuant to a warrant, this is set out in writing in the warrant. An arrest without warrant is only lawful if the type of information which would have been contained in the warrant is conveyed orally. The purpose of communicating this information to the accused in either case is, *inter alia*, to enable the person under arrest or detention to immediately undertake his or her defence, including a decision as to what response, if any, to make to the accusation. It seems axiomatic, therefore, that this information should be conveyed prior to questioning and obtaining a response from the person under arrest or detention. These basic and important values are included in s. 10(*a*) of the *Charter*.

In this case, the arresting officers were forewarned that they were dealing with a person of subnormal intelligence. In these circumstances, it was incumbent on them to be scrupulous in ensuring that his rights were respected. Instead, they concocted a ground for the arrest in order to question him about the involvement of his brother in the murders. In my opinion, having explicitly advised the appellant that he was in jeopardy for trafficking in narcotics, the arresting officers were obliged to disabuse him of this false information before seeking to elicit incriminatory evidence from him. This could only be accomplished by an equally explicit statement of the true ground for his arrest.

While in some circumstances the initial questions, which are put before an incriminatory response is obtained, may disclose the true ground for an arrest, in my opinion this is not such a case. The appellant, whose mental development was equated to that of a 14-year-old, should not have been required to deduce from the content of questions that the initial explicit reason for his arrest had shifted to a far more serious ground.

I have agreed that the statements referred to in the reasons of McLachlin J. should be excluded by reason of the violation of s. 10(*b*). The violation of s. 10(*a*) gives added support to the reasons for such exclusion.

//*McLachlin J.*//

The judgment of Gonthier, Cory and McLachlin JJ. was delivered by

MCLACHLIN J. --

Introduction

The appellant Evans, a youth of subnormal mental capacity, was convicted of first degree murder in the brutal killings of two women. Initially, the police thought his brother had committed the murders, and arrested the appellant on a marijuana charge in the hope that he would be able to provide evidence against his brother. The police informed Evans of his right to counsel, but when asked if he understood his rights he replied: "No". During the course of the interrogation that followed, Evans became the prime suspect in the two murders. The police did not formally advise the appellant that he was then being detained for murder, nor did they reiterate his right to counsel. Eventually incriminating statements were obtained from the appellant. These statements formed virtually the entire basis of his conviction for the two murders.

The appellant appeals his conviction to this Court both as of right and by leave. He argues, *inter alia*, that his rights under ss. 7, 10(*a*) and 10(*b*) of the *Canadian Charter of Rights and Freedoms* were violated and that the resultant confessions should have been excluded pursuant to s. 24(2) of the *Charter*.

I have concluded that the appeal should be allowed on the basis that the statements were obtained in violation of the appellant's right to counsel, as guaranteed by s. 10(*b*) of the *Charter*, and that the repute of the administration of justice requires their exclusion under s. 24(2) of the *Charter*.

Facts

The appellant was convicted by a jury of first degree murder contrary to s. 218 (now s. 235) of the *Criminal Code*, R.S.C. 1970, c. C-34, in relation to the deaths of Lavonne Cheryl Willems and Beverley Mary-Ann Seto. The British Columbia Court of Appeal (Hutcheon J.A. dissenting) dismissed an appeal from that verdict.

The body of Ms. Willems was discovered on November 24, 1984 in a home in Matsqui. She had been in the home alone, house sitting while the residents were away on vacation. In addition to having received some minor bruises, her body had been stabbed 25 times. Some months later on March 31, 1985, the body of Ms. Seto was discovered in the bedroom of a newly constructed house in Abbotsford. Ms. Seto was a real estate agent and had been conducting an open house at the home. She, too, died as a result of multiple stab wounds as well as a severe cutting wound to the front of the neck.

The appellant Evans was born on July 7, 1964. At the age of 9 he was hit by a truck at a cross-walk and suffered brain injuries. Two years later as a result of an accident with a cigarette lighter he suffered extensive third degree burns to the upper part of his body. He has undergone numerous skin grafts to his torso in order to repair the burn damage and remains heavily scarred. He has attained a grade 5 or 6 equivalency in education and spent many years in rehabilitation for "the brain-injured victim" to improve his coordination, speech and living skills. A psychiatrist and a psychologist, who examined him after he was charged, concluded that he has

an IQ between 60 and 80 (borderline retardation) and functions at an emotional level of a 14-year-old.

The appellant was arrested on August 1, 1985 along with his older brother, Ron Evans. At the time, Ron Evans was the principal suspect in the murders of Ms. Willems and Ms. Seto. The appellant was ostensibly brought in on a charge of trafficking in narcotics (the police, in the course of their investigation of Ron Evans, had obtained some wiretap evidence indicating that the appellant may have been involved in the sale of a small amount of marijuana), but the police acknowledge that a collateral purpose in arresting the appellant was to try to obtain evidence against Ron Evans, with whom the appellant lived, in relation to the murders of Ms. Willems and Ms. Seto. Some time during the course of the police's first interview with the appellant, police suspicion turned to the appellant and he became the prime suspect in the murders of Ms. Willems and Ms. Seto.

Prior to arresting the appellant, the arresting officers, Detectives Brian Metzgner and John Spring, had been informed of the appellant's mental deficiency and were cautioned to make sure that the appellant understood the warnings given to him. The arrest took place at 9:52 a.m., shortly after the appellant's brother, Ron Evans, had been arrested and taken from the house. Detective Metzgner informed the appellant that: "I am arresting you for trafficking in narcotics". He then gave the appellant the *Charter* warning and the standard police warning in the following terms: "It is my duty to inform you that you have the right to retain and instruct counsel without delay. You are not obliged to say anything but anything you do say may be given in evidence. Do you understand?". To the question: "Do you

understand?", the appellant replied: "No". Detective Metzgner then instructed the appellant that, "You have to come down to the police office with us now for trafficking in narcotics". No attempt was made to explain the *Charter* or police warning to the appellant.

While the appellant was in custody, the following events occurred: Detectives Metzgner and Spring interviewed the appellant on three occasions; an undercover officer was placed in the same cell as the appellant (the "cell plant interviews"); the detectives took the appellant to the scenes of the crimes (the "show and tell expedition"); a police physician interviewed the appellant; and a telephone conversation between the appellant and his oldest brother, Tim Evans, was recorded.

At the commencement of the first interview (10:59 a.m. -- 12:11 p.m.), the following exchange took place:

> JS: Okay Wesley, you understand why you're here, eh?
>
> WE: Yes sir, I do.
>
> JS: I think that to explain the prior, that um . . . . you are not obliged to say anything unless you wish to do so, but anything you do say, may be given in evidence. And ah . . . . I'll also add, we'd like to cancel the delay which was explained to you earlier. You're on a charge of trafficking in soft drugs . . . . . .
>
> WE: . . . . . Yes sir.
>
> JS: . . . . . and ah . . . . it's um . . . . marijuana. Do you know what marijuana is?
>
> WE: Yes sir, I do.
>
> JS: And ah . . . . you've heard the allegations and anything you'd like to say to us with regards to the allegations being made to you.

WE: No sir. [Emphasis added.]

The emphasized portion was the subject of a dispute at trial. Detective Metzgner testified on the *voir dire* at trial that the sentence should read: "I'd like to say you have the right to counsel without delay which was explained to you earlier". However, Crown counsel, Mr. Gillen, stated that he didn't "come close to" sharing Detective Metzgner's interpretation of the sentence and stated that in his view the sentence was correctly transcribed. The trial judge, after listening to the tape himself, ultimately accepted Detective Metzgner's version.

During this first interview, the appellant admitted to involvement in a plan to sell marijuana to a girl known to him. Toward the end of the interview the police's focus began to shift, as the following excerpt demonstrates:

WE: Are you saying that I killed that lady?

BM: Did you Wes?

WE: Nuts . . . . no.

BM: Do you know who did?

WE: No. I don't know. I don't even know why I'm here.

JS: Well, we already explained to you about that earlier on when you were here.

WE: Yeah but . . . . . .

JS: . . . . . This is quite a serious offence (we're talking about).

WE: (Why me)?

JS: (LONG PAUSE) To traffic marijuana, that was originally why we're here. But now that things have taken quite a change.

> WE: Yeah but . . . . why are you asking me this? I never killed no one . . . . I don't know who did. It's none of my business.

The second interview (1:32 p.m. -- 2:27 p.m.) began with Detective Metzgner informing the appellant that he was not compelled to say anything. Referring to a search of the appellant's residence that had occurred between the first and the second interviews, Detective Spring also stated the following at the outset of the second interview:

> JS: And we've come up with a few little things which ah . . . . I feel are um . . . . important in this case and that um . . . . ah . . . . they also um . . . . point to . . . . towards you as possibly being the person who committed that crime that night that we were discussing.

During the interview, the following exchange also took place:

> BM: (LONG PAUSE) Why . . . . can you not explain, or can you give us an explanation as to why your fingerprint would be found inside the house?
>
> WE: (LONG PAUSE) I can't give you an explanation.
>
> BM: No?
>
> WE: Although, all's I can say is I wasn't inside that house. (LONG PAUSE) You said tell the truth right? I'm tellin' the truth.

In suggesting that the appellant's fingerprints were found in the home where Ms. Seto was killed, Detective Metzgner lied to the appellant; none of the fingerprints found matched those of the appellant. Nevertheless, by the end of the second interview the appellant had confessed to the killing of Ms. Seto.

By the end of the third interview (3:14 p.m. -- 4:02 p.m.) the appellant had also confessed to the killing of Ms. Willems. With the possible exception of the disputed passage at the commencement of the first interview, at no time during the three interviews was the appellant informed of his right to counsel.

After the interviews, the appellant was placed in a cell where his conversations with an undercover police officer in the cell next to his were recorded. The appellant had two conversations with the undercover officer, Constable Lee Ryan. The first took place between 4:20 p.m. and 5:25 p.m., while the second lasted from 7:30 p.m. to 8:32 p.m. During these conversations, the following exchanges took place:

LR: You confessed?

WE: Yeah.

LR: Did you do it?

WE: No.

LR: Well why did you confess.

WE: Well they, they wouldn't give me a rest until I confessed.

LR: Oh.

WE: So what else, what else was I gonna do . . . .

. . .

WE: I wonder if they'd give me a chance and let me talk to a lawyer? I hope so. Cause with a lawyer maybe things could go a little better with me, or for me I should say.

. . .

WE: You know it's funny, I don't remember killing them.

LR: No?

WE: Um-um.

LR: Yeah that is funny.

WE: Yeah. Usually I won't forget somein [*sic*] like that.

Prior to the third exchange reproduced above, the appellant had told the undercover officer that he had killed Ms. Willems and Ms. Seto.

Between the two conversations with the undercover officer, Detectives Metzgner and Spring took the appellant to the scenes of the two killings. No evidence was found on this "show and tell expedition", but at one point the appellant did tell the detectives that: "I was going to kill again but I didn't have anyone picked out though".

At approximately 8:30 p.m. that evening the appellant was taken from his cell and asked to provide a written statement. Prior to the writing of the statement the appellant was asked if he wanted to speak to a lawyer. He stated that he did. He was directed to a telephone and provided with a phone book but returned a minute later stating that he was unable to reach a lawyer; he had been advised on the telephone that his lawyer was on vacation and could not be reached at that time. Detective Metzgner then told the appellant that he could either contact his lawyer later or continue with the written statement. The appellant stated that he would proceed with the written statement. During the next hour the appellant then wrote a two-paragraph statement in which he confessed to the two killings.

Later that evening, the appellant was introduced to Dr. Swanney, a general practitioner who had come to take hair and blood samples from him. During this interview, the appellant told Dr. Swanney that he had killed the two women because of his frustration with women in general. This, incidentally, is consistent with a suggestion put to the appellant by Detectives Metzgner and Spring during their interrogation of him. The appellant also informed Dr. Swanney that he expected to receive 25 years in jail for the crimes.

The following morning, the appellant spoke with his brother, Tim Evans, on the telephone. The conversation was recorded, and the following exchanges occurred:

TE: Your rights? Do you know what your rights are?

WE: Yeah, the right to remain silent, I know.

TE: Well tell me. Let, let me hear it. Wha-, what kinda rights do you have?

WE: I have the right to remain silent, if I give up the right to remain silent, anything I can and say will be used against me in a court of law. I have a right to speak with an attorney, or to have an attorney present during questioning.

TE: Yeah?

WE: I know that.

TE: How many times did they say that to ya? How many times? Once?

WE: More than once, a couple.

TE: Yeah?

WE: They didn't ask me if I wanted a lawyer until just before I filled out the ass- the assessment, or statement I mean.

TE: Did you know that you had, you were entitled to a lawyer or?

WE: Oh yeah, I know, I watch T.V. man, I know what's goin' on.

. . .

TE: Are you guilty?

WE: No.

Judgments

At trial, a *voir dire* was held to determine the admissibility of the oral and written statements made by the appellant while in custody. The appellant argued the statements were not freely and voluntarily made and had been obtained in violation of ss. 10(*a*) and (*b*) of the *Charter* and ought to be excluded from evidence pursuant to s. 24(2) of the *Charter*. Callaghan J. rejected these arguments and held that the statements were admissible. In his view, the statements were voluntary, and the appellant's rights under the *Charter* had not been violated. At the time of his arrest, he had been properly advised of the reasons for his arrest and his right to counsel. Moreover, he had offered his knowledge of these rights in the telephone conversation with his brother.

Finally, even if there had been a breach of the *Charter*, Callaghan J. was of the view that admission of the evidence in these circumstances would not bring the administration of justice into disrepute under s. 24(2) of the *Charter*, since the officers had acted in good faith.

The majority of the British Columbia Court of Appeal dismissed the appeal. Southin J.A. wrote the principal judgment of the Court of Appeal. She agreed that the statements were voluntary. While she concluded there had been a breach of s. 10(*a*) of the *Charter* by reason of the failure of the police to advise Evans at the critical juncture that he was under arrest for murder, she found no breach of his s. 10(*b*) right to be advised of his right to counsel. On the assumption, however, that both ss. 10(*a*) and 10(*b*) had been breached, Southin J. concluded that the evidence should be admitted under s. 24(2) since nothing could bring the administration of justice into greater disrepute than freeing a confessed murderer to kill again, notwithstanding a violation of the *Charter*.

Craig J.A. agreed that the appeal should be dismissed and added comments with respect to the voluntariness of statements made by the appellant and the *Charter* issues. He was of the view there had been no breach of s. 10(*b*) and was doubtful whether s. 10(*a*) had been violated. Even if there had been a breach of s. 10(*a*) by virtue of the failure of the police to inform the appellant during the second interview that he was being detained as a suspect in the killings of the two women, Craig J.A. would not have excluded the evidence under s. 24(2), in view of the seriousness of the charges and Evans' statement on the "show and tell" expedition that he would have killed again.

Hutcheon J.A. dissented. He held that the appellant's s. 10(*b*) right had been infringed and that the four statements made by the appellant on the day of his arrest ought to have been excluded under s. 24(2) of the *Charter*, in view of the

serious and deceptive nature of the police violations of the *Charter* and the suspected reliability of the statements, given Evans' immaturity and defective mental capacity.

Relevant Legislation

Canadian Charter of Rights and Freedoms

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> **10.** Everyone has the right on arrest or detention
>
> (*a*) to be informed promptly of the reasons therefor;
>
> (*b*) to retain and instruct counsel without delay and to be informed of that right; . . .
>
> **24.** . . .
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Issues

(1) Were the appellant's s. 10(*a*) rights infringed or denied and if so should the evidence obtained be excluded pursuant to s. 24(2) of the *Charter*?

(2) Were the appellant's s. 10(*b*) rights infringed or denied and if so should the evidence obtained be excluded pursuant to s. 24(2) of the *Charter*?

(3) Were the undercover cell plant statements obtained in a manner that infringed the appellant's s. 7 rights and if so, should the evidence be excluded pursuant to s. 24(2) of the *Charter*?

(4) Were the statements made by the appellant to the police voluntarily made and hence admissible into evidence?

(5) Did the trial judge err by failing to adequately review for the jury the defence and the evidence in support thereof?

Analysis

1. *Section 10(a) of the Charter*

The right to be promptly advised of the reason for one's detention embodied in s. 10(*a*) of the *Charter* is founded most fundamentally on the notion that one is not obliged to submit to an arrest if one does not know the reasons for it: *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 (Ont. C.A.), at p. 424. A second aspect of the right lies in its role as an adjunct to the right to counsel conferred by s. 10(*b*) of the *Charter*. As Wilson J. stated for the Court in *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 152-53, "[a]n individual can only exercise his s. 10(*b*) right in a meaningful way

if he knows the extent of his jeopardy". In interpreting s. 10(*a*) in a purposive manner, regard must be had to the double rationale underlying the right.

The majority of the Court of Appeal inclined to the view that the accused's right to be advised of the reasons for his detention was violated by the failure of the police to advise him when the focus of the investigation changed that he was then suspected of murder.

While serious issue was not taken with this conclusion, I am hesitant to let it pass without comment lest the inference be drawn that police conduct, such as that found in this case, necessarily results in a breach of s. 10(*a*). In fact the police informed the appellant that he was a suspect in the killings shortly after their suspicion of him formed, as the following portion of the interview discloses:

> JS: (LONG PAUSE) To traffic marijuana, that was originally why we're here. But now that things have taken quite a change.
>
> WE: Yeah but . . . . why are you asking me this? I never killed no one . . . . I don't know who did. It's none of my business.

This passage suggests to me that both parties, the police and the appellant, were aware that the appellant was at that point under investigation for murder. Any doubt about that fact is resolved at the beginning of the second interview when Detective Spring states the following:

> JS: And we've come up with a few little things which ah . . . . I feel are um . . . . important in this case and that um . . . . ah . . . . they also um . . . . point to . . . . towards you as possibly being the person who committed that crime that night that we were discussing.

Thus, very shortly after the point where the appellant became the prime suspect in the killings, the police indicated that they were investigating the appellant for that purpose, and the appellant in turn seemed to recognize that the nature of the questioning had altered.

When considering whether there has been a breach of s. 10(*a*) of the *Charter*, it is the substance of what the accused can reasonably be supposed to have understood, rather than the formalism of the precise words used, which must govern. The question is whether what the accused was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to undermine his right to counsel under s. 10(*b*).

The appellant's response to the officer's statement that, while he had originally been arrested on marijuana charges, things had now taken "quite a change", indicates that the appellant was aware that the focus of the questioning had changed and that he was then being questioned with respect to the killings. It might, therefore, be argued that he was given the facts relevant to determining whether he should continue to submit to the detention. Nor can any failure to comply with s. 10(*b*) be attributed to failure to advise the accused of the reasons why his detention and questioning was continuing.

These considerations suggest that the requirements of s. 10(*a*) were met in the case at bar.

2. *Section 10(b)* of the *Canadian Charter of Rights and Freedoms*

The police, on arresting the accused in connection with the marijuana charges, properly advised him that he had the right to retain counsel without delay. When they asked him whether he understood, he answered in the negative. Nevertheless, no attempt was made to clarify his appreciation of his right to counsel. The police proceeded to take him into custody and question him in the absence of counsel. Depending on how a disputed portion of the transcript is read, there may have been a further attempt at the beginning of the first interview to repeat the advice regarding counsel, but again no attempt was made to explain it to the accused. At a certain point, the police became suspicious that the appellant might have committed the two killings. The focus of the investigation changed from a drug offence to murder. Nothing more, however, was said about counsel. Two more police interviews followed, as well as a cell interview by an undercover agent, a "show and tell" expedition to the scenes of the crimes, and an interview by a police physician -- all without the benefit of counsel. In the course of his conversation with the undercover police officer, the appellant, after telling the officer he confessed because "they wouldn't give me a rest until I confessed . . . . So what else, what else was I gonna do . . .", stated:

> I wonder if they'd give me a chance and let me talk to a lawyer? I hope so. Cause with a lawyer maybe things could go a little better with me, or for me I should say.

The next mention of a lawyer by the police came with the request to provide a written statement at approximately 8:39 p.m. The appellant was asked if he wanted to speak with a lawyer. He stated that he did. He was directed to a

telephone and provided with a phone book but returned about one minute later stating that he was unable to reach a lawyer; he had been told on the telephone that his lawyer was on vacation and could not be reached at that time. Detective Metzgner then told the appellant that he could either contact his lawyer later or continue with the written statement. The appellant stated that he would proceed with the written statement. During the next hour the appellant wrote a two- paragraph statement in which he confessed to the two killings. Later, in a telephone conversation with his brother the accused recited a version of his rights suggestive of the United States and to the question of whether he knew he was entitled to a lawyer, said: "Oh yeah, I know, I watch T.V. man, I know what's goin' on."

This evidence must be viewed against the background that the police from the outset were aware that the accused was hampered by a mental deficiency bordering on retardation and that they should take special care to make sure that he understood the warnings required to be given to him. Psychiatric evidence also established that the accused was easily influenceable.

The trial judge rejected the submission that the accused's s. 10(*b*) right had been violated on the ground that the accused had told his brother he understood that he was entitled to a lawyer. The majority in the Court of Appeal declined to interfere with the conclusion of the trial judge.

The jurisprudence establishes that the duty on the police to inform a detained person of his or her right to counsel encompasses three subsidiary duties: (1) the duty to inform the detainee of his right to counsel; (2) the duty to give the

detainee who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay; and (3) the duty to refrain from eliciting evidence from the detainee until the detainee has had a reasonable opportunity to retain and instruct counsel: *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Ross*, [1989] 1 S.C.R. 3; *R. v. Black*, *supra*. In *Black*, the rider was added that the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so, otherwise the correlative duty on the police to refrain from questioning him is suspended.

The right to be advised of the right to counsel arguably arises at three points in the dealings of the police with the appellant. The first is the failure of the police upon arresting the appellant to take steps to assist him in understanding his right after he indicated he did not. The second is the failure of the police to reaffirm the appellant's right to counsel when the nature of the investigation changed. The third is the taking of a written statement after the appellant indicated that he would like to speak to a lawyer.

Dealing first with the initial arrest, I am satisfied that the police did not comply with s. 10(*b*). It is true that they informed the appellant of his right to counsel. But they did not explain that right when he indicated that he did not understand it. A person who does not understand his or her right cannot be expected to assert it. The purpose of s. 10(*b*) is to require the police to <u>communicate</u> the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further (unless the detainee indicates a desire to retain counsel, in which case they must comply with the second and third duties set out above). But where,

as here, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.

This is recognized in *R. v. Anderson* (1984), 10 C.C.C. (3d) 417 (Ont. C.A.), where the Court, *per* Tarnopolsky J.A., stated at p. 431:

> . . . I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it. No such evidence was put forth in this case. [Emphasis added.]

The question is whether the circumstances here indicated that the accused did not understand his right to retain counsel. In my view, they did. Asked whether he understood his rights, he replied in the negative. The police had no reason to assume otherwise, given their knowledge of his limited mental capacity. The only question is whether his subsequent statement to his brother that he was aware of his right to counsel can be reasonably seen as indicating that the appellant, despite his initial indication to the contrary, in fact understood his right. In my view, it cannot. While the appellant had some idea -- based on U.S. television -- that he was allowed to speak to a lawyer, it is far from clear that the appellant understood from the outset when he was entitled to exercise his right to counsel and how he was permitted to do so. In these circumstances, the failure of the police to make a reasonable effort to explain to the accused his right to counsel violated s. 10(*b*) of the *Charter*.

A second violation of the appellant's s. 10(*b*) right occurred when the police failed to reiterate the appellant's right to counsel after the nature of their investigation changed and the appellant became a suspect in the two killings. This Court's judgment in *R. v. Black*, *supra*, per Wilson J., makes it clear that there is a duty on the police to advise the accused of his or her right to counsel a second time when new circumstances arise indicating that the accused is a suspect for a different, more serious crime than was the case at the time of the first warning. This is because the accused's decision as to whether to obtain a lawyer may well be affected by the seriousness of the charge he or she faces. The new circumstances give rise to a new and different situation, one requiring reconsideration of an initial waiver of the right to counsel. On this point I prefer the judgment of *R. v. Nelson* (1982), 32 C.R. (3d) 256 (Man. Q.B.), to the decision in *R. v. Broyles* (1987), 82 A.R. 238 (C.A.). I add that to hold otherwise leaves open the possibility of police manipulation, whereby the police -- hoping to question a suspect in a serious crime without the suspect's lawyer present -- bring in the suspect on a relatively minor offence, one for which a person may not consider it necessary to have a lawyer immediately present, in order to question him or her on the more serious crime.

I should not be taken as suggesting that the police, in the course of an exploratory investigation, must reiterate the right to counsel every time that the investigation touches on a different offence. I do, however, affirm that in order to comply with the first of the three duties set out above, the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the warning.

It remains to consider the appellant's decision to provide a written statement after an unsuccessful attempt to contact his lawyer. Prior to preparation of the written statement, the appellant was asked in terms he could understand whether he wanted to speak to a lawyer. The appellant was then given the choice of contacting his lawyer later or proceeding with the written statement, and he apparently agreed to continue with the written statement. At this point, the appellant both understood that he had a right to counsel and knew that he faced a charge of murder. The Crown argues that this "cured" the earlier s. 10(*b*) violations, with the result that the written confession was obtained in conformity with s. 10(*b*) of the *Charter*.

Such an argument could only succeed if it were concluded that by making the written confession the appellant had waived his s. 10(*b*) right. In *Manninen, supra,* this Court held that a person may implicitly, by words or conduct, waive his or her rights under s. 10(*b*). The Court cautioned, however, that "the standard will be very high" (at p. 1244) and referred to its judgment in *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, where it was held that for a voluntary waiver to be valid and effective it must be premised on a true appreciation of the consequences of giving up the right. In view of the appellant's subnormal mental capacity and the circumstances surrounding his arrest -- the fact that no attempt was made to explain his rights to him after he indicated that he did not understand them, as well as the fact that he was subjected to a day of aggressive and at times deceptive interrogation which apparently left him feeling as if he had "no choice" but to confess -- I am not satisfied that he appreciated the consequences of making the written statement and thereby waiving his right to counsel or, to put it another way, that he waived his right

"with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process": *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, at p. 49, as cited in *Clarkson v. The Queen*, *supra*, at p. 395 (emphasis deleted). Accordingly, I am of the view that the written statement was also taken in violation of the appellant's s. 10(*b*) right.

3. *Other Charter Violations*

In view of the fact that the statements made to an undercover policeman were not put in evidence, it is unnecessary to consider whether they constituted a violation of s. 7 of the *Charter* or whether they were voluntary.

4. *Section 24(2) of the Charter*

I have concluded that the statements of the accused were obtained in a manner that infringed the appellant's right to counsel. Section 24(2) provides that where this is the case, "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

The majority of the Court of Appeal concluded that admitting the statements in evidence at the appellant's trial would not bring the administration of justice into disrepute. Southin J.A. considered the matter on the basis that both ss. 10(*a*) and 10(*b*) had been violated, and assumed further that had the appellant had access to counsel, he would have been advised to remain, and in fact remained silent.

In her view, it was necessary to weigh the appellant's right to "adjudicative fairness" against the s. 7 right to life of possible future victims. Concluding, at p. 563, that something had to be done "to prevent another young woman who has never done Evans any harm [from] being killed by him without a fair trial", Southin J.A. held that the statements should not be excluded. She concluded with the following peroration at p. 564:

> If there be anything more likely, by every rational community standard, to bring the administration of justice into disrepute than letting the accused, a self-confessed killer, go free to kill again on the basis of such infringements, I do not know what it is.
>
> Seventy-five years ago, Wesley Evans would have been hanged for these murders. Twenty-five years ago he would probably have had his death sentence commuted to life imprisonment.
>
> I cannot think that the framers of the Charter intended that today in the name of adjudicative fairness he should by the application of the Charter be let free to kill again. Such a result would not be the act of a civilized, but of an uncivilized, society.

Craig J.A. found that reception of the statements would not bring the administration of justice into disrepute on the ground that the appellant knew about his right to counsel and was likely, if released, to kill again, in view of his statement after the "show and tell" expedition.

Hutcheon J.A., dissenting, held that the evidence should have been excluded in view of the following considerations: (i) the confessions came into existence following a serious breach of the right to counsel; (ii) the police officers lied to the appellant concerning the discovery of his fingerprints in the house; and

(iii) the statements were those of a person who is immature and borderline mentally retarded and there is evidence to cast doubt upon their reliability.

I share the view of Hutcheon J.A. that reception of the written statements would tend to bring the administration of justice into disrepute. In *R. v. Collins*, [1987] 1 S.C.R. 265, this Court identified three broad categories of factors bearing on a s. 24(2) determination:

(a) the effect of the admission of the evidence on the fairness of the trial;

(b) the seriousness of the *Charter* violation; and

(c) the effect of exclusion on the repute of the administration of justice.

The effect of the reception of this evidence on the fairness of the trial is the first matter which must be considered. There can be little doubt that the use of these statements at trial worked an unfairness against the accused. Generally speaking, the use of an incriminating statement, obtained from an accused in violation of his rights, results in unfairness because it infringes his privilege against self-incrimination and does so in a most prejudicial way -- by supplying evidence which would not be otherwise available: *Collins*, *supra*; *Black*, *supra*. For these reasons, Lamer J. (as he then was) stated in *Collins*, at pp. 284-85, that "[t]he use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded."

Admission of the statements taken from the appellant is unfair for the reasons enunciated in *Collins* and *Black*. The statements were obtained in violation of the appellant's rights. They were highly incriminatory. And they provide evidence which was not otherwise available. The Crown concedes that without the confessions, it has no case against the appellant.

This suggests a further reason why it would be unfair to use the statements against the accused. There can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence. Here the appellant's deficient mental state, combined with the circumstances in which the statements were taken, cast significant doubt on their reliability. Consider the record. A young man, borderline mentally retarded, emotionally immature and by his nature subject to suggestion, after being denied his right to counsel, is interviewed at length. The police falsely suggest to him that they have real evidence linking him to the murders. They tell him that his fingerprints place him at the house where one of the victims was killed, when none of his fingerprints has been found there. Asked why he cannot explain why his fingerprints were found inside the house, his response is simple: "... all's I can say is I wasn't inside that house." Nevertheless, by the end of the second interview he has admitted to killing Ms. Seto and by the end of the third interview, to killing Ms. Willems. A little while later in the cells, he denies his involvement to the undercover officer. Asked why he had confessed, he alludes to police pressure -- ". . . they wouldn't give me a rest until I confessed . . . So what else, what else was I gonna do . . . ." And then, most significantly, the following exchange occurs, suggesting that the accused has no memory of the matters he has just confessed to:

WE: You know it's funny, I don't remember killing them.

LR: No?

WE: Um-um.

LR: Yeah that is funny.

WE: Yeah. Usually I won't forget somein [*sic*] like that.

Later, in a taped telephone call to his brother, the appellant once more denies his guilt.

In all the circumstances, the appellant's statements must be regarded as highly unreliable. It would be most unfair to convict him entirely on their strength. I note in passing that significant portions of the evidence which undermines the reliability of the statements was not before the jury.

The second factor relevant to a s. 24(2) determination is the seriousness of the *Charter* violation. In my view, the violation of the accused's right to counsel in this case was highly serious. The police, despite knowledge of the appellant's deficient mental status and despite his statement to them that he did not understand his right to counsel, proceeded to subject him to a series of interviews and other investigative techniques. Moreover, they lied to him in the course of the interviews, falsely suggesting that his fingerprints had been found in the house where Ms. Seto died. One can appreciate the pressure the police were under to find a suspect in these two terrible killings. But that did not justify their conducting repeated and dishonest interrogations of a weak person in violation of his *Charter* rights.

It is argued that the police conduct should not be considered serious since the accused himself stated in his conversation with his brother after the interviews that he knew he had a right to counsel. The strength of this argument is undercut, however, by the fact that the same conversation reveals that the appellant's notion of his rights was confined to a garbled version based on American television. The argument is also weakened by the appellant's initial assertion to the police that he did not understand what his right to counsel entailed.

I turn finally to the third factor outlined in *Collins* -- the effect of exclusion on the repute of the administration of justice. To Southin J.A.'s mind, the admission of the statement would not bring the administration of justice into disrepute; on the contrary, its admission was required since nothing could be more detrimental to the repute of the administration of justice "than letting the accused, a self-confessed killer, go free to kill again on the basis of such infringements . . . ."

The fallacy in this reasoning, with the greatest respect, is that it rests on the questionable assumption that the confessions were reliable and true. More fundamentally, it rests on the assumption that the appellant is guilty. But the very question before the Court of Appeal was whether the appellant was, in fact, guilty -- that is, whether the jury, after a trial conducted in accordance with the law, had properly found him guilty. The appellant was entitled not to be found guilty except upon a fair trial. To justify the unfairness of his trial by presuming his guilt is to stand matters on their head and violate that most fundamental of rights, the presumption of innocence. Few things could be more calculated to bring the administration of justice into disrepute than to permit the imprisonment of a man

without a fair trial. Nor, as a practical matter, can it be said that such imprisonment would achieve the end sought by Southin J.A., namely, the prevention of further murders by the killer of Ms. Seto and Ms. Willems. Only a conviction after a fair trial based on reliable evidence could give the public that assurance.

I conclude that the admission of the accused's statements obtained in violation of his *Charter* rights would bring the administration of justice into disrepute.

5. *Other Issues*

The appellant contends that the charge to the jury failed to sufficiently emphasize the unreliability of the statements put in evidence. In view of my conclusion that the statements should never have been admitted, nothing turns on this allegation, and I need not consider it further. For the same reason, it is unnecessary for me to consider the appellant's argument concerning the voluntariness of the statements made to the police.

Conclusion

I would allow the appeal. The conviction should be set aside and an acquittal entered.

//*Stevenson J.*//

The following are the reasons delivered by

STEVENSON J. -- I have had the advantage of reading the judgment of my colleague, Justice McLachlin, and agree with her disposition of the appeal.

I restrict my agreement to the principal ground, namely that the police violated s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* in failing to make a reasonable effort to explain to the accused his right to counsel. In my view, this is not a case in which to decide whether there is an obligation to reiterate the right to counsel when the course of the investigation takes some change.

Counsel for the accused properly distinguished *R. v. Broyles* (1987), 82 A.R. 238, a decision I gave for the Alberta Court of Appeal. He correctly distinguished it on the basis that it was "not dealing with somebody who did not understand his rights". Counsel thus staked his position on the "understanding" question and we did not, therefore, have the benefit of full argument on the reiteration question.

In *R. v. Black*, [1989] 2 S.C.R. 138, this Court considered the applicability of s. 10(*b*) of the *Charter* to a situation in which the accused, having first been detained for attempted murder was subsequently charged with first degree murder and then gave inculpatory statements. The accused was at that point detained for the purposes of that second charge. These statements were obtained notwithstanding the accused's request to speak to the lawyer she had consulted in relation to the first charge. This Court held that the accused had not fully exercised her *Charter* right to

counsel when she spoke to her lawyer about the first charge. Any waiver in relation to the first charge did not extend to the reiteration of the request for counsel in relation to the second charge.

Section 10 does not apply to police investigations or questioning in the absence of detention. The object of the section is to provide safeguards in the circumstances of detention. On one hand, the police may be found to have detained someone on one charge with the object of questioning on another charge. On the other extreme, there can be cases in which an accused under detention fortuitously discloses information relating to other activities. These raise fact issues not dependent on the nature or seriousness of the other activities. One extreme would be readily characterized as an abuse of the detention and a violation of s. 10(*a*) and (*b*), while the other does not appear to violate the section.

We do not, of course, lay down rules that determine facts and I am not persuaded that this is a case in which we should attempt to formulate rules that will indelibly characterize some changes in the purpose of an investigation as imposing specific new duties, the breach of which are *Charter* violations.

I agree with McLachlin J.'s analysis and application of s. 24 and would allow the appeal.

Appeal allowed.

Solicitors for the appellant: Orris Burns, Vancouver.

Solicitors for the respondent: DuMoulin, Black, Vancouver.