

ARBOUR J.A. (TARNOPOLSKY J.A. concurring) — The appellant was charged in an indictment containing ten counts of robbery. He was tried by a judge and jury and was convicted on all counts. He was sentenced to 20 years' imprisonment to be served concurrently on each of the charges. He appeals his conviction and he seeks leave to appeal his sentence.

I. THE CONVICTION APPEAL

The appeal pertains to: (1) the *voir dire*; (2) the conduct of the trial; and (3) the charge to the jury. The appellant abandoned his ground of appeal based on s. 11(b) of the *Canadian Charter of Rights and Freedoms*.

(1) *The Voir Dire*

The first ground of appeal relates to the ruling made by the trial judge that incriminating statements made by the appellant to the investigating officers were admissible.

(a) *The voir dire evidence*

The appellant was arrested on an outstanding robbery warrant by Constable Brown and Constable Leaver. He was advised that; he was under arrest and informed of his rights, which he understood. He was then taken to 52 Division and his arrival was recorded on videotape, which marked the time as 4:07 p.m.

All witnesses agree, and it is recorded on video, that while in front of the booking officer, and still in the presence of Constables Brown and Leaver, the appellant asked when he could contact his lawyer. He was told that he would have access to a telephone as soon as he was brought upstairs. There was a telephone behind the booking officer's desk. The videotape also reveals that there was a telephone in an adjacent room or booth. As part of the booking procedures recorded on the tape, the contents of the appellant's pockets were placed in an envelope which was handed to Constable Leaver.

The appellant's evidence and that of the police officers differ dramatically as to what happened from the moment the appellant left the area which is under the video camera surveillance.

(i) *The prosecution's evidence*

According to the evidence of Constables Leaver and Brown, and leaving aside some insignificant discrepancies, the appellant was taken upstairs and placed in an interview room, where he was strip-searched by Constable Brown. At that time, Constable Leaver called the hold-up squad to inform them that she had the appellant under arrest. After that telephone call, Constable Leaver's evidence is that she returned to see the appellant and told him that he could now make his telephone call. The appellant asked who was coming and, when he heard that the hold-up squad officers were on their way, he decided to postpone his telephone call to his lawyer and to speak to the hold-up squad officers first. Constable Leaver testified that she telephoned the hold-up squad shortly after 4:00 p.m. She said that the hold-up squad officers, Sgt. Detectives Hanlon and VanDemark, arrived some 15 minutes later.

Detectives Hanlon and VanDemark testified that they received the telephone call at 4:10 p.m. and arrived at 52 Division at 4:15 p.m. The timing of the arrival of the detectives is important. They testified that they obtained a statement from the appellant before he called his lawyer at 5:10 p.m. Both detectives testified that it took them no more than five minutes to travel from their headquarters on College Street to 52 Division, even though it was rush hour in downtown Toronto. After a brief conversation with the arresting officers, the detectives entered the interview room where the appellant was located, at 4:20 p.m. They identified themselves and strip-searched the appellant. They then asked the appellant his name and where his belongings were. The appellant replied: "In there" and produced a locker key. Sgt. Hanlon asked the appellant where the key was from and he answered "Yonge and Bloor". Later in his evidence, Sgt. Hanlon said that the appellant produced the key from his pants pocket.

Detective Hanlon then advised the appellant that he was under arrest for a robbery at Taylor's Cleaners and read him his rights, including his right to counsel. He asked the appellant if he understood and the appellant replied "Yes I do." Detective Hanlon followed with the question: "Do you know Peter Gibbs?" Upon being shown Gibbs' statements, which implicated him in the ten robberies, the appellant appeared shaken. He asked: "What do you guys want from

me?", to which the detectives replied "We would like the same type of statements from you, if you wish." At that point the appellant volunteered to write "I agree" on Gibbs' statements and to sign them. He wrote "I agree", followed by his initials, on each page of the originals of Gibbs' statements. He also answered some additional questions about the robberies, such as what kind of car he was driving. He declined, however, to sign any additional statement. Sgts. VanDemark and Hanlon left the interview room at 5:05 p.m., but remained at 52 Division until 6:50 p.m. to complete their paperwork.

According to Detective Hanlon, at 5:10 p.m. the appellant asked to call his lawyer to see if he could get bail in the morning. The records indicate that the appellant did in fact telephone his lawyer, Mr. Avruskin, at 5:10 p.m. The officers testified that they did not threaten nor apply any physical force to the appellant. Detective Hanlon testified that he noted all of his questions and the appellant's answers as the interview progressed. Detective VanDemark witnessed the interview. Sgt. Hanlon said that he kept the locker key produced by the appellant. The key was used later to open and search the appellant's locker at the Yonge and Bloor subway station. Only his personal belongings were found in the locker and the key was left in the lock.

Constable Brown testified that, after the hold-up squad officers left, he entered the room at around 7:00 p.m. to question the appellant about other matters that he and Constable Leaver were investigating, but the appellant did not wish to talk. At 7:52 p.m., the appellant was brought back before the booking officer, and this is once again visible on the videotape of the booking area. There was no apparent change in the appellant's demeanour. He can be observed on the video, using his right hand to hold his cigarette. The video shows the booking officer verifying the contents of the envelope containing the appellant's belongings. The booking officer asked where the key was. The appellant made no complaint of ill-treatment at the hands of the hold-up squad officers. According to Constable Leaver, he simply complained about a missing key.

On November 18, 1988, the day after his arrest, the appellant was transferred to the Don Jail. On arrival, he complained about a sore hand and he was seen by a nurse at the jail. She admitted him to the Health Care unit because of swelling to his right hand. On November 19, 1988, the appellant was seen by the Don Jail attending physician, Dr. Klar. His notes record a tender epigastrium and tender ribs. Doctor Klar suspected that the appellant's right hand was

broken and he placed it in a cast. Subsequent x-rays revealed that it was not broken. Doctor Klar testified that the appellant admitted that he had been in a fight. The nun recorded that the appellant was unaware of how his hand became red and swollen.

(ii) *The appellant's evidence*

The appellant testified to the events surrounding his arrest and the booking procedures in a manner consistent with that of the arresting officers and with what can be observed on the vide tape. He testified that he was placed in an interview room and strip-searched twice. He said that after the second strip-search, which was conducted by the hold-up squad officers after he had been made to wait for their arrival, he asked again to contact his lawyer. They permitted the telephone call, which he made to his lawyer at 5:10 p.m. The detectives then asked the appellant if his lawyer was coming and he said no. The appellant told them that he would not answer any questions, on his lawyer's advice. He testified that the detectives then started to kick him. He said that Sgt. Hanlon kicked him in the ribs, and that he used his hand to protect his ribs. This is how his hand became injured. The appellant testified that he was then shown Peter Gibbs' statements, but from a distance. He read the statements as Sgt. Hanlon held them in front of him. He signed "I agree", to indicate that he had read the statements, not that he agreed with their content. The appellant testified that the officers then asked him about a motel, but that he did not answer any more questions after signing the statements. The hold-up squad officers left.

The appellant testified that he did not produce a key to Detective Hanlon in the interview room. He said that his locker key was taken by the booking officer and placed in the envelope containing his other belongings. He said that he never saw the key again.

The appellant said that he did not complain to Constables Leaver or Brown about the treatment he received from the hold-up squad because he did not see any sense in complaining to police officers about other police officers. The appellant was kept overnight in a cell at 52 Division. In the morning, he was placed for a few minutes in a "bullpen" and then transported in a paddy wagon to Old City Hall. He spent the day there, in a large cell area for prisoners. Around supper time on November 18, he was transported to the Don Jail and again placed in a "bullpen". He asked to see a doctor because he thought that his hand was broken. Upon being asked how it happened, the appellant told the doctor that the police did it. According to him, the doctor replied: "I hear this all the time. I don't want to hear about any

police. Let's have a look at your hand." The appellant denied speaking to the nurse about how his hand became injured.

(iii) *The notes and the videotapes*

Both the sally port and the booking area at 52 Division are equipped with a video camera which recorded the entire booking procedure. We have had the advantage of reviewing the videotape which, if not of great quality, particularly as to sound, proves immensely superior to the recollection of the witnesses, even of those who took notes, as an evidentiary tool. As should be apparent from the conflict in the evidence summarized above, a videotape of the events which occurred at the crucial time when the appellant is said to have made the incriminating statements now tendered against him, would have been dispositive of most of the issues raised in the *voir dire*. Not only was the useful practice of recording the booking procedures not extended to recording the interviews with the appellant, but the note-taking practices of the hold-up squad officers left much to be desired.

Sgt. VanDemark of the hold-up squad testified that he attended with his partner, Sgt. Hanlon, to interview the appellant. Sgt. Hanlon did all of the questioning and, while doing so, he recorded, in his notebook, every question and every answer provided by the appellant. Meanwhile, Sgt. VanDemark was merely a witness to this interview. He took no active part and made no contemporaneous notes of it, although he had his notebook with him in the interview room. His testimony was assisted by reference to entries in his notebook which he made after the interview was over. He made these notes by reading Sgt. Hanlon's notebook and, since he agreed with the content, he initialled Sgt. Hanlon's notebook and copied Hanlon's notes into his own book. When asked in cross-examination why he did not take his own independent notes while the interview was being conducted, he replied: "That's not the way we conduct our investigations." It is not for me to tell the hold-up squad how to proceed for investigative purposes, but in so far as there are evidentiary consequences to those practices, I can say that they are unsatisfactory. Whenever possible, every officer in attendance at the interview who will want to refer to his or her notes as a memory aid for the purpose of giving evidence should take contemporaneous, independent notes. I would not expect as complete notes from the person conducting the interview and it is surprising here to find that those are the only notes and that they purport to be verbatim.

As for the absence of a video and/or audio recording of the interview, I am not the first one to express concern in that regard. In *R. u. Lim (No. 3)* (1990), 1 C.R.R. (2d) 148 (Ont. H.C.J.), a case also involving the Toronto hold-up squad, Doherty J. who was then the trial judge said, at pp. 152-53:

... I am left with a distinct impression that the statement-taking process used by the hold-up squad and the members of the York Regional Police Department was designed to both minimize the active involvement of the accused and preclude resort to an independent source of information (apart from the accused's testimony, should he elect to testify on the *voir dire*) as to what went on in the statement-taking process. The police appear to have set the stage for a battle of credibility on the *voir dire* and excluded any independent source of information which could have supported one side or the other.

The failure of the police, who were in total control of the interview process — and who, on their evidence, were dealing with a co-operative accused — to have resort to devices which could have provided a video or audio record of the procedure suggests the reasonable inference that the police did not want an independent electronic record of that process, because that record would not have supported their oral evidence as to Mr. Lim's ability to understand and speak English. I draw that inference.

More recently, the practices of the hold-up squad were commented upon by Wren J. in a ruling on a confession *voir dire* delivered on May 10, 1993, in *R. y. Longman and Harrison* (Ont. Gen. Div.) (unreported). Wren J. referred to *Lim (No. 3)* and said:

In cross-examination, counsel drew hesitant admissions from members of the hold-up squad that the criticism of the court in *R. u Lim (No. 3)* had been the subject of some modest discussion among members of the squad. However, their best view of the criticism was that it merely suggested the consideration of electronic means of recording interviews. They considered it sufficient compliance with that suggestion to simply give the accused his choice of recording — video, sound or typewriter.

It should be noted that in the case of Longman, he was first given that choice at the end of his first statement when he was asked whether he would like to read it on video. As to the second series, Jones, when asked to explain the failure to use electronic recording, simply replied that that was the way the interview had proceeded and that, in any event, that's the way he did it and that's the way he would continue to do it.

In Harrison's case, upon the first set of confessions he was not asked, and it did not enter Smith's mind to record the statements although he was using a camcorder. He and Look were not, however, members of the hold-up squad. In the second and repeated series of statements, when it was already too late, Townley offered the choice only after having ostensibly advised the accused of his s. 10(b) rights without having typed that procedure in the statement, and only after he had carried in a typewriter and typed the questions and answers relating to the charge and the caution. He was incensed at the suggestion of commencing the proceedings in the video equipped interview room and advising the accused that the proceedings were being video-taped and advising him of the charge the caution and the rights to counsel and, in the absence of any protest,

continuing with the interview. He considered such a procedure to be a serious invasion of an accused's rights.

I would infer that they had devised a way in which they could be seen to have taken Doherty J.'s criticism to heart and yet at the same time manage to avoid the probing eye of the camera. When this avoidance of the use of electronic recording is taken together with the evidence of interviews by officers in relays and in repetition, and with witnessing officers making no notes, then if I am not quite prepared to go as far as Doherty J. went in his inference, I am prepared to infer that as Doherty J. said: "*The police appear to have set the stage for a battle of credibility on the voir dire* and excluded any independent source of information which could have supported one side or the other."

(Emphasis in original)

Wren J. concluded his comments by noting, as I just did, the degree to which the video recording of the booking desk area, with sound, assisted in determining the credibility of the various witnesses. In the present case, the video proved useful to support some of the contentions advanced by both parties. It recorded the appellant's request for an opportunity to contact his lawyer, and it showed the appellant's physical condition after the interview with the officers from the hold-up squad, which the Crown says is inconsistent with his assertion that he was hurt.

(b) *The issues arising from the voir dire ruling*

The appellant submits that the trial judge erred in failing to give reasons for his ruling, in concluding that the statements had been given freely and voluntarily, and in concluding that the statements had not been obtained in violation of the appellant's right to counsel. The *voir dire* was held to determine the admissibility of the statements, on both *Charter* and common law grounds.

(i) *The absence of reasons*

The *voir dire* lasted four days, following which the matter was, adjourned for approximately six weeks, after the trial judge reserved his decision on the question of admissibility. Defence counsel inquired on a few occasions about the availability of the decision and was eventually informed by the trial judge's secretary that he had ruled the statements admissible, on the basis of credibility. The transcripts reveal a few exchanges about the availability of further reasons, but the trial judge was not pressed by counsel to elaborate on his ruling prior to the resumption of the trial. No further reasons were ever released.

Counsel for the respondent submits that the absence of reasons does not constitute an error of law which, in itself, would require this court's intervention. The Crown relies on *R. a Morin*, [1992] 3 S.C.R. 286, 76 C.C.C. (3d) 193, in support of that proposition. In *Morin*, the Crown appealed from an acquittal on charges of dangerous driving causing death. The sole basis for an appeal, as provided for in s. 676(1Xa) of the *Criminal Code*, was that the trial judge had committed an error of law. The unreasonableness of the verdict, or the fact that it was not supported by the evidence, is not an available basis for a Crown appeal. The Supreme Court held, *per* Sopinka J., that there is no obligation, in law, for a trial judge to record all or any specific part of the evidence in his or her reasons for judgment. Sopinka J. added, at p. 296 S.C.: p. 200 C.C.C.:

A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect.

Morin is unlike the present case where, beyond an indication that the ruling was based on credibility, no reasons were given for the conclusion reached by the trial judge. Even if the failure to give any reasons whatsoever would not, in itself, amount to an error of law so as to open the avenue for a Crown appeal under s. 676(1)(a), the basis for an appeal from conviction is much broader and the absence of reasons in this case must be appreciated in that light.

An accused may appeal his conviction, pursuant to s. 675(1) of the *Criminal Code*, on grounds involving a question of law or, with leave of the court, on grounds involving mixed questions of law and fact or on any ground that appears sufficient to the Court of Appeal. Upon hearing an appeal from conviction, the Court of Appeal may, pursuant to s. 686(1) of the *Criminal Code*, allow the appeal and set aside the verdict on the ground that the verdict is unreasonable or cannot be supported by the evidence, or that it is based on a wrong decision on a question of law, or on any ground that there was a miscarriage of justice. It is immediately apparent that even if the failure of a trial judge to give reasons does not constitute an error of law, the absence of reasons will have a bearing on the appellate determination of the correctness of the ruling, and also, in my view, on whether there was a miscarriage of justice. This is true both for the ultimate decision as to the guilt of the accused and for any evidentiary ruling adverse to the accused's position.

Not every piece of evidence must be examined and subjected piecemeal to the criminal standard of proof: *R. a Morin, supra*. However, the voluntariness of an incriminating statement made by an accused to a person in authority must be proved beyond a reasonable doubt before the statement can be admitted in evidence for consideration by the jury. An unreasonable conclusion as to voluntariness, one that could not be supported by the evidence, or one based on a palpable and overriding error of fact, if it leads to an erroneous ruling of admissibility, constitutes an error of law that would require the intervention of the appellate court, unless it could be said that no substantial wrong or miscarriage of justice occurred (s. 686(1)(b)(iii), known as "the proviso"). I may add that it is difficult to contemplate the application of the proviso in the case of a wrongly admitted confession. Under this branch of appellate review, the real issue is not so much whether the absence of reasons in itself constitutes an error of law, but what is the effect of absence of reasons on the reasonableness of the conclusion with regard to the admissibility of the statements.

The absence of reasons may also require this court's intervention on the basis that, in the circumstances of a particular case, failure to give reasons affected the fairness of the proceedings so as to constitute a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Code*. As this court pointed out in *R. a Richardson* (1992), 9 O.R. (3d) 194 at p. 201, 74 C.C.C. (3d) 15 at F *per* Carthy J.A.:

There is no need that the reasons of a trial judge be as meticulous in attention to detail as a charge to a jury. In moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result. Nevertheless, if an accused is to be afforded a right of appeal it must not be an illusory right. An appellant must be in a position to look to the record and point to what are arguably legal errors or palpable and overriding errors of fact. If nothing is said on issues that might otherwise have brought about an acquittal, then a reviewing court simply cannot make an assessment, and justice is not afforded to the appellant.

The curtailment of the right of appeal that arises when no reasons are given is evident in the contrast between the powers of the trial judge and those of the court of appeal to reach conclusions of fact. The appellant was entitled to have his statements excluded if the trial judge had a reasonable doubt about whether they were voluntarily made. I think that, as a matter of procedural fairness, the appellant was entitled to know, in a meaningful if not very detailed way, why the trial judge had no such doubt in this case. Before this court, the appellant is no longer entitled to the benefit of a reasonable doubt, even if that doubt was shared by two or even all three members of the appellate panel. Rather the appellant must

show that the trial judge made a finding of credibility that was "unreasonable" or "palpably wrong".

Effective access to appellate review is not the only aspect of procedural fairness that is engaged in this case. I do not want to suggest that an absence of reasons would in all cases lead to a miscarriage of justice. But in this case, there were many factors which compelled a reasoned decision. First, the Crown had to prove voluntariness beyond a reasonable doubt and there were troubling aspects to the Crown's case that had to be resolved before credence could be given to the evidence of the police officers. Secondly, the appellant testified in the *voir dire*. Finally, for practical purposes, the ruling that his confessions were admissible made the possibility of an acquittal extremely remote. This was not a discretionary ruling, nor one based on uncontroverted and compelling evidence. It was a ruling adverse to the accused, on a matter central to his defence. I think that even aside from his right to effective appellate review, the appellant was entitled to know the basis upon which the trial judge concluded as he did.

Finally, I note that in civil cases, appellate courts have responded to the absence of reasons by trial courts on a case-by-case basis: *Avco Financial Services Realty Ltd. v. Legace* (1985), 5 C.P.C. (2d) 40 (Ont. C.A.); *426873 Ontario Ltd a Windermere on the Thames Ltd.* (1984), 45 C.P.C. 215 (Ont. Div. Ct.). When no reasons are given for an order which involves an exercise of discretion, an appellate court will proceed *de novo*: *Richmond u Canadian National Exhibition Assn.* (1979), 24 O.R. (2d) 781, 104 D.L.R. (3d) 317 (H.C.J.); *Wagman a Blue Mountain Resorts Ltd.* (1984), 47 C.P.C. 53 (Ont. H.C.J.); *Shadows a Travelers Canada Corp.* (1990), 40 C.P.C. (2d) 118 (Ont. H.C.J.). Otherwise, in the absence of reasons, an apparent conflict in the evidence will require at least a new trial: *Wright a Ruckstuhl*, [1955] O.W.N. 32, [1955] 2 D.L.R. 77 (C.A.). In *Koschman a Hay* (1977), 17 O.R. (2d) 557 at p. 558, 80 D.L.R. (3d) 766 (C.A.), Lacourcière J.A. noted both aspects of the problem that I alluded to earlier:

The parties are entitled to the findings of the trial judge on disputed evidence, and an appellate court cannot properly exercise its function without them.

In *Koschman*, the court ordered a new trial; see also *Mitro u Mitro* (1977), 1 R.F.L. (2d) 382 (Ont. CA.).

In criminal cases, whether or not reasons were given, where the reasonableness of the verdict is at issue, it is incumbent upon an appellate court to review and, to some extent, reweigh the evidence in order to determine whether the conclusion reached by the trial judge was one that was reasonably open on the evidence. This applies to verdicts based on findings of credibility: *R. v. W (R.)*, [1992] 2 S.C.R. 122 at p. 131, 74 C.C.C. (3d) 134 at p. 141. Although here it is not the reasonableness of the ultimate verdict that is at issue, this court must undertake a similar kind of factual review of the basis for the *voir dire* ruling. This analysis is greatly hampered by the absence of any, let alone detailed, reasons, to the obvious extent that this four-day *voir dire* took nearly two days for this court to review.

The appellant submits, in substance, that the bare credibility findings of the trial judge cannot be supported by a review of the totality of the evidence tendered on the *voir dire*. Furthermore, he submits that his s. 10(b) *Charter* challenge survives even the adverse credibility findings. I will address these two issues separately.

(ii) *The voluntariness issue*

In *R. v. Precourt* (1976), 18 O.R. (3d) 714 (C.A.) at p. 721, 39 C.C.C. (2d) 311 at p. 318, Martin J.A., speaking for the court, said:

Whether a statement made by an accused is voluntary is essentially a question of fact, and unless it appears that the trial Judge has failed to consider and weigh the relevant circumstances or has misconceived the governing rule or failed properly to apply it, his conclusion that a statement was made voluntarily ought not, as a general rule, to be disturbed.

In *Precourt*, the accused testified in a *voir dire* that a confession that he made to the police had been extracted from him by the use of force. He said that he was struck in the face and stomach and that he was burned seven or eight times on his back with a cigarette. The Crown advanced a theory that the accused's injuries, for which he was treated while in the Don Jail, had either been inflicted upon him by a fellow inmate, one MacKenzie, or alternatively, that they had been self-inflicted. After commenting on the improper detention of the accused in police custody, which has no significance to the present case, Justice Martin reiterated that disbelieving an accused is not a sufficient basis upon which a trial judge could conclude that a confession was voluntary. It remained incumbent on the Crown to establish, beyond a reasonable doubt, that the confession had been voluntarily given. Referring to the evidence tendered by the Crown on the *voir dire*, Martin J.A. said, at pp. 727-28 O.R., pp. 323-24 C.C.C.:

That onus could not be discharged by merely advancing a theory that the appellant's injuries had been inflicted by MacKenzie. There is no suggestion that the appellant was suffering from any injuries when taken into police custody and it was incumbent upon the prosecution, in view of the appellant's allegations and his condition when he arrived at the jail, to account fully for what occurred in relation to the appellant during the period in which he was held in police custody. The appellant testified that he was with MacKenzie for a brief period only in the holding cells adjacent to the Court prior to being taken to the Provincial Court for the purpose of being remanded. Obviously the injuries could not have been inflicted by MacKenzie at that time since there is no evidence by any of the officers that any injuries to the appellant were observed during the afternoon and prior to the alleged confession. In my view, the onus was not on the appellant to establish that the injuries were not inflicted by MacKenzie. If the prosecution wished to rely on that theory the onus was upon the prosecution to establish, at the very least, that MacKenzie had the opportunity of inflicting them.

The unstable personality of the appellant as evidenced by his inflicting injuries upon himself later, while held in the provincial jail pending trial, lends support to the theory that the injuries which he had when admitted to the jail were self-inflicted. However, there are certain improbabilities which require to be weighed against that theory.

.....

I also have some difficulty in accepting the theory that the appellant evinced a wish to make a confession and so soon thereafter inflicted substantial injuries to himself to support a concocted story that the confession had been extracted from him by violence. Continued adherence to his previous position denying his guilt would appear to have been a much simpler, and certainly less painful alternative. I do not intend to imply that the theory of self-infliction of the injuries which the appellant sustained should necessarily be ruled out as the explanation for the injuries but only that the total circumstances required a much more complete inquiry into all aspects of the appellant's custody than appears in this record.

In *Precourt*, the conviction was set aside and a new trial was ordered.

In the case at bar, since the trial judge ruled the appellant's statements admissible on the basis of credibility, it must be taken that he was satisfied beyond a reasonable doubt that the statements were made freely and voluntarily by the appellant. Even if the trial judge did not believe the evidence given by the appellant on the *voir dire*, it was incumbent upon him to decide whether the appellant's evidence might reasonably be true and whether, in any event, the evidence tendered by the prosecution was sufficient in itself to establish voluntariness beyond a reasonable doubt. There is no indication that the trial judge considered the lacunae and inconsistencies in the evidence tendered by the prosecution on the *voir dire*. In my opinion, although there was evidence which, if believed, could support a finding of voluntariness, the evidence of the police officers does not present itself as obviously and inherently believable.

The appellant did not have to prove the existence of a large conspiracy involving the arresting officers, the detectives from the hold-up squad and the prison doctor, in order to succeed in having the statements excluded. Rather, to conclude that voluntariness was established, the trial judge had to overcome certain troubling aspects of the evidence tendered by the Crown. For one thing, he had to be satisfied that the appellant, who is recorded on videotape, shortly after 4:00 p.m., as having asked when he could contact his lawyer and who did so at 5:10 p.m., chose to first give a full confession to the members of the hold-up squad before actually availing himself of the opportunity to obtain legal assistance. The trial judge had to be satisfied that the hold-up squad officers, once contacted by Constable Leaver, travelled several downtown blocks at a busy time of day and reached 52 Division in five minutes, rather than in the 45 minutes attested to by the appellant.

The trial judge also had to be satisfied beyond a reasonable doubt that the appellant's injuries, which were suffered while he was in police custody, were attributable to a fight, presumably with other inmates. There was no information or record of this fight, except the alleged assertion by the appellant to the prison doctor that he had been in a fight.

Much was made in argument of the evidence respecting the key to the appellant's locker and the manner in which it came into the possession of Detectives Hanlon and VanDemark. The appellant submitted that it was an unavoidable conclusion that the two detectives lied in their evidence when asserting that the appellant retrieved the key from his pocket during the interview and handed it to them. If the officers have lied, the favourable finding of credibility made by the trial judge, without any reasons in support, would have to be viewed as unreasonable. There is considerable difficulty for this court to attempt to resolve that issue. The Crown submits that it is possible either that the key escaped the superficial search conducted at the time of booking and the two subsequent strip-searches, since those searches were directed at weapons, or that a key, even if detected, was deliberately left in the appellant's pockets. Alternatively, if the key was retrieved at the time of booking and placed in the envelope containing the appellant's personal effects, the Crown submits that it is possible that a second key was produced by the appellant and handed to Detective Hanlon. Finally, the Crown submits that the most plausible explanation is that Detective Hanlon was simply mistaken as to where the key came from. The Crown submits that it may have come not from the appellant's pants pocket, as the detective believed, but that it may have been retrieved by the appellant from the envelope containing his belongings, which may have been left in the

interview room by Constable Leaver. All of this, of course, is speculative. At best, the videotape seems to disclose a key being put in the envelope and the envelope being taken by Constable Leaver as she escorted the appellant upstairs. The later video also shows the booking officers reviewing the contents of the envelope and inquiring about a missing key.

The appellant testified that he did not see the key again after it was taken from him during the booking procedures. On the surface, the evidence of the appellant about the key is at least as credible as that of the investigating officers. Nothing turned, for either side, on who took the key and for what purpose. It is not a question of an unreasonable search and seizure, or of an attempt to exclude evidence obtained through the use of the key. The dispute is only relevant to credibility. Is Sgt. Hanlon telling the truth about how he came into possession of that key and, if not, what are the implications for his credibility generally?

With some hesitation, I have concluded that it was open to the trial judge to accept that Sgt. Hanlon's evidence about the key was honest and truthful. I am persuaded, however, that Sgt. Hanlon had to be mistaken in his assertion that the key originated from the appellant's pocket. I cannot say, given the limitations of an appeal, that the only plausible explanation for the discrepancy in the evidence is that the police officer lied.

Overall, however, I think that there were sufficient inconsistencies in the evidence presented by the Crown on the *voir dire* to require the trial judge to indicate the basis upon which he reached his conclusion. As in *Precourt, supra*, very little evidence was offered in support of the Crown's theory that the appellant's injuries had been the result of a fight with other inmates. Moreover, on the Crown's evidence this man, who has a lengthy criminal record, including two convictions for robbery, one of which resulted in a 15-year sentence, and who immediately asked when he could contact his lawyer, apparently declined to do so when offered the opportunity, choosing instead to speak to the hold-up squad, only to resume his request for legal assistance after having voluntarily given a full, signed confession. I have some difficulty accepting that proposition. Although I am not surprised that the police officers who testified appeared more credible than the appellant, I think that the appellant was entitled to know why the trial judge, even if he did not believe his version of the events, was satisfied beyond a reasonable doubt that this somewhat implausible sequence of events occurred as the officers say it did.

(iii) *The right to counsel issue*

Ms. Silver, for the appellant, submits that even if the trial judge was entitled to rule against the appellant on the basis of credibility, that ruling was not responsive to the appellant's position that the statement had been obtained by the police in violation of his right to counsel. She submits that the Crown's evidence discloses that the appellant was not provided with an opportunity to contact his lawyer without delay. As the videotape of the booking procedures discloses, the appellant asked when he would be allowed to call his lawyer. He was told that he would have to wait until he was brought upstairs to the interview room. As I mentioned earlier, it was apparent on the videotape that there was a telephone in the immediate vicinity of the booking area and one located behind the booking officer's desk. The Crown's position is that the telephones available in and around the booking area would not provide the appellant with sufficient privacy to comply with the *Charter* requirement. The police prefer to defer the opportunity for a telephone call until the booking procedures have been completed and the appellant has been strip-searched. At that time, they can safely provide him with the privacy that he requires to contact his counsel.

Although in this part of her submissions, Ms. Silver is not relying on matters requiring a credibility determination, I must once again note the difficulty in operating without the assistance of the trial judge's findings. The main reason advanced by the police for denying the appellant the opportunity to contact his lawyer immediately was the lack of privacy. This conveys the impression that, on November 17, 1988 at 4:00 p.m., the booking area of 52 Division was busy, crowded and noisy. Yet the videotape, which records the 10 minutes it took to book the appellant, shows no activity other than the appellant sitting on a chair, in the presence of the booking officer and the two arresting officers, as paperwork is being processed. The only outside interference is the sound of a telephone ringing in an adjacent room and an unidentified person passing through the recorded area to answer it. It is true, however, that this person's conversation was audible on the tape. If the appellant had been made to use this telephone, his statements to his lawyer might have been recorded, unless the audio portion of the tape was turned off. I am prepared to say that this would have been an infringement of his entitlement to speak privately to his counsel. However, the concern for privacy expressed by the arresting officers is somewhat inconsistent with the manner in which, according to Sgt. Hanlon, the appellant was ultimately provided an opportunity to consult his lawyer. Sgt. Hanlon's evidence-in-chief on that point is as follows:

At 5:10 p.m., there's a knock on the interview room door. I opened the door, and Mr. Barrett stated:

I want to call a lawyer, maybe he can get me bail in the morning. At this time he was laughing.

QUESTION: Who is your lawyer?

ANSWER: Stan Avruskin. He got me fifteen years on my last beef; I might as well try him again, he can't do any worse.

QUESTION: What's his number?

ANSWER: I don't know.

At this point, I looked Mr. Avruskin's number up in the phone book. I dialled the number, 922-4147. At this time I handed the phone to Mr. Barrett. Mr. Barrett was at a desk outside the interview room door. He then spoke on the phone.

When the phone call was completed, he handed me the phone. He was returned to the interview room.

At that point I completed the paper work necessary for court purposes.

Q. How did you provide for privacy for him for his call?

A. We vacated the area. There was nobody in the vicinity to overhear the conversation.

It would seem to me that the accommodation that was made upstairs could have been made in the booking area. This is, however, a question of fact which should have been determined at the *voir dire*. Ms. Silver submits that there was no justification for the delay in providing the appellant with access to a telephone, when one was readily available in the booking area. She further submits that when the appellant asserted his desire to contact a lawyer, the police officers were under a duty to facilitate this contact.

A similar situation arose in *R. v. Yaeck* (1991), 6 O.R. (3d) 293 (C.A.) at pp. 300-08, 68 C.C.C. (3d) 545 at pp. 553-61. In *Yaeck*, the accused had been informed of his right to counsel and had requested the use of a telephone during the booking procedure which, as in this case, took about 10 minutes and was recorded on videotape. When the booking was completed, the accused was taken to a staff sergeant's office to secure him, to provide him with privacy and to keep him out of contact with other officers pending the arrival of the homicide detectives. Upon entering that office, which was equipped with a telephone, and before anyone was seated, the accused asked whether he was charged with murder. He was told that he was. He immediately said that he did it and, over the next several hours, made many incriminating statements and some telephone calls. In *Yaeck*, the trial judge concluded that it was unrealistic to require the police to facilitate the accused's contact with his lawyer in the booking area where little privacy could be provided. However, he found that none of the

officers expressly offered to contact counsel on behalf of the accused and that they had thus fallen short of the standard set by the Supreme Court in *R. v. Manninen*, [1987] 1 S.C.R. 1233, 34 C.C.C. (3d) 385. With some hesitation, Osborne J.A., for this court, accepted the findings of the trial judge that s. 10(b) had been violated. Like the trial judge, Osborne J.A. concluded that the accused's statements should not be excluded under s. 24(2) of the *Charter*.

In the present case, the trial judge did not address the alleged infringement of the appellant's right to counsel. He could have found that the appellant's s. 10(b) rights were violated had he considered, on the facts of this case, that the appellant could have been provided with the same privacy to contact his lawyer in the booking area as was eventually provided to him upstairs a few minutes later. In any event, it is unnecessary for this court to express any view on this matter. Even if there was an infringement of the appellant's *Charter* rights, the statements that were obtained from him were not obtained as a result of that violation.

According to Sgts. Hanlon and VanDemark, before a statement was taken from him, the appellant was asked again whether he wished to contact his lawyer and he declined. On the appellant's own evidence, he did contact his lawyer prior to speaking to the members of the hold-up squad and he attempted to follow his counsel's advice to remain silent. On either version of the events, there was no causal link between the infringement of the appellant's right to counsel, if any in fact did occur, and the confessions.

(iv) Conclusion on the voir dire issues

This is, in my view, a proper case in which this court must interfere with the conclusion of the trial judge that the appellant's statements were admissible. The nature of the evidence tendered by the prosecution in the *voir dire* was such that the conclusion that the statements were voluntarily made cannot be supported in the absence of reasons by the trial judge. Reasons must be given for findings of facts made upon disputed and contradicted evidence, and upon which the outcome of the case is largely dependent.

(2) The Conduct of the Trial

We did not call on the Crown to answer the appellant's submission that the trial judge erred in permitting Crown counsel to cross-examine the appellant on his criminal record, or in not deleting from the record his prior conviction for robbery. The objection to the cross-

examination was raised prematurely by the defence at trial and was not renewed at the appropriate time. The trial judge had therefore no opportunity to determine whether some editing of the appellant's criminal record would have been required under the authority of *R. a Corbett*, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385.

We also did not call on the Crown to answer the submission that a mistrial should have been ordered when bad character evidence was introduced by a Crown witness. I think that this issue was properly handled by the trial judge and, in any event, there was no prejudice in light of the appellant's subsequent testimony which revealed his substantial criminal record. The parole violation which was inadvertently brought to the attention of the jury was not significant against that background.

(3) *The Charge to the Jury*

Although both the Crown and the defence expected the trial judge to warn the jury about the unsavoury character of the main Crown witness, Peter Gibbs, the trial judge decided not to do so. I cannot say that he erred in proceeding in that fashion. A *Vetrovec* warning (*R. a Vetrovec*, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1) would have required the trial judge to review the confirmatory evidence which, in this case, was primarily the appellant's confession. In light of that confession, which adopted most of Gibbs' evidence, it is unlikely that the warning would have been of any assistance to the appellant.

I also think that the trial judge was correct in instructing the jury that there was no real issue that the robberies had been committed. This had the advantage of focusing the jury's attention on the central issue in the case, whether the appellant had participated in the robberies, without taking away from the jury the ultimate decision as to whether the Crown had proved the commission of the robberies beyond a reasonable doubt.

Finally, counsel for the appellant submits that the trial judge erred in repeating large portions of the Crown's address to the jury, particularly the part in which the Crown invited the jury to conclude that the police officers had no motive to lie nor to fabricate evidence against the appellant. This is not a case where, as in *R. a McDonald*, [1958] O.R. 413, 120 C.C.C. 209 (C.A.), Crown counsel was, in effect, giving evidence about the character of the police officers in support of their credibility. Although there is always a danger of the trial judge appearing to endorse a position from which he or she quotes extensively, I do not think that the procedure

followed by the trial judge in this case led to any misconception that he was adopting the position expressed by the Crown.

Conclusion on the appeal from conviction

In the circumstances of this case, the absence of reasons in support of the conclusion reached by the trial judge on the *voir dire* require that the verdict be set aside and that a new trial be ordered.

II. THE SENTENCE APPEAL

In light of this disposition it is unnecessary to consider the sentence appeal.

CARTHY J.A. (concurring):—I concur with the reasons and conclusion of Arbour J.A. and add my words only to isolate and emphasize the issue concerning the use of videotapes during the interview process leading to and through the taking of incriminatory statements.

Universal use of videotapes would obviously be of assistance to judges in weighing evidence and reaching a just conclusion, but beyond that, there is the potential to benefit the entire administration of justice. The case before us is but one of many where the centrepiece at trial is an inculpatory statement. They are centrepieces because their admission so often leads to a conviction. And, in many cases there is a trial simply because the accused has challenged the procedures leading to the confession and the defence lawyer has no choice but to carry the challenge forward and insist upon proof beyond a reasonable doubt of voluntariness. The present case involved a preliminary hearing, a six-day trial, and two days on appeal which may have been avoided altogether if defence counsel had reviewed a tape which confirmed the evidence given by the police officers. On that assumption there were no alternatives to a guilty plea. How many hundreds or even thousands of such cases are presently ongoing across Canada? As many as there may be, there are an equal number of cases that are being delayed in reaching trial while costs accumulate on unnecessary trials, to the detriment of the administration of justice and the general public.

Further, our system of justice treats proof beyond a reasonable doubt as a foundation stone assuring, to the extent possible, that no innocent person be convicted. It is fair comment for a police officer who has secured a written confession to say, "He's as good as convicted." If the statement is admitted as voluntary the observation is probably accurate. On this determinative

issue of conviction the police force has, by its own choice in this case, denied the court the opportunity of an undeniable record of what led to the "conviction". Given the modest cost of videotape equipment, such critical evidence should not, in fairness, be restricted to sworn recollection of two contesting individuals as to what occurred in stressful conditions months or years ago. The evidence is admissible under our present rules, but everyone involved in the criminal justice system should make reasonable efforts to better serve its ultimate ends.

In her reasons, Arbour J.A. refers to her own views and those of other judges as to the motive for the current practice of not recording the whole process. I would add another suggestion. Trained police investigators understand the psychology of criminal behaviour and recognize symptoms of guilt or innocence. They have methods of questioning to reveal one or the other, and to draw confessions from the guilty. These tactics and techniques are described in full in *Criminal Interrogation and Confessions*, 3rd ed., Ingrau, Reid and Buckley. So far as I can see there is nothing offensive in these techniques, but the fact that I have never seen them outlined in *viva voce* evidence on a *voir dire* suggests that the police may be reticent in publicizing their methods. They need not be. The task of the police in pursuing a suspect is different than the task of a lawyer cross-examining at trial, and the skills are different, but one would not suffer more than the other from broader exposure of their talents. The sole criterion is that the statement be voluntary. If, on occasion, the form of questioning arguably impinges on voluntariness this can, and should, be resolved by the courts.

Finally, the administration of justice would benefit by an end to accusations by accused persons of mistreatment by the police. The public perception of police integrity can be assured by the simple expedient of the use of videotape in all reasonable circumstances where controversy may arise.

Appeal allowed.

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