

R. v. Fliss, [2002] 1 S.C.R. 535, 2002 SCC 16

Peter William Fliss

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Fliss

Neutral citation: 2002 SCC 16.

File No.: 27998.

2001: April 23; 2002: February 21.

Present: L'Heureux-Dubé, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Constitutional law – Charter of Rights – Unreasonable search or seizure – Exclusion of evidence -- Accused confessing murder to undercover police officer – Confession recorded on tape pursuant to prior judicial authorization -- Trial judge declaring tape and related transcript inadmissible but admitting officer's testimony of conversation -- Officer's viva voce evidence basically recitation of whole of transcript -- Whether officer's evidence violating constitutional right to be secure

against unreasonable search or seizure -- If so, whether evidence should be excluded -- Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Criminal law -- Admissibility of evidence – Evidence obtained by electronic surveillance -- Accused confessing murder to undercover police officer - Confession recorded on tape pursuant to prior judicial authorization -- Trial judge declaring tape and related transcript inadmissible but admitting officer's testimony of conversation -- Officer's viva voce evidence basically recitation of whole of transcript -- Whether officer's evidence was admissible.

The accused freely confessed to an undercover police officer that he had killed a woman and provided many details during a conversation surreptitiously recorded pursuant to a prior judicial authorization. The next day, the officer reviewed the transcript and made corrections based on listening to the tape supplemented with his recollection of parts of those conversations. The trial judge, having concluded that the authorization ought to have been refused for insufficiency of evidence, declared the tape and related transcript inadmissible but admitted the officer's *viva voce* evidence of the conversation, which was basically a recitation of the corrected transcript. The jury convicted the accused of first degree murder. The majority of the Court of Appeal reduced the conviction to second degree murder. The dissenting judge would have declared inadmissible the officer's *viva voce* evidence and quashed the conviction. The sole issue in this appeal concerns the admissibility of the *viva voce* evidence of the officer's conversation with the accused.

Held: The appeal should be dismissed.

Per Iacobucci, Major, Bastarache and Binnie JJ.: The jury was entitled to hear from the officer about his conversation with the accused, and the officer was entitled to refresh his memory by any means, including inadmissible evidence. The trial judge and the majority of the Court of Appeal erred, however, in concluding that because the officer had a substantial recollection of parts of the conversation he was at liberty to provide the jury with a recitation of the whole of the transcript. First, while the officer clearly remembered the principal elements of the confession, his evidence went well beyond what he could recall at the time of the trial. Second, the officer's testimony did not qualify for admission as "past recollection recorded". He did not testify that the transcript accurately represented his knowledge and recollection at the time he reviewed it. On the contrary, he testified to having corrected the transcript based on a recall of "parts" of it. It is those portions of the conversation that he did not remember, either at trial or at the time he proofread the transcript, but that were nevertheless put into evidence against the accused, that violate the s. 8 *Charter* protection because, as to those portions, the sole basis of the testimony was the unauthorized tape. Third, the deficiencies in the officer's recollection were matters of substance not form. As a result of the trial judge's ruling, 34 pages of the detail of the confession went into evidence sourced not in the officer's recollection but in the unauthorized recording. Where there has been a *Charter* breach with respect to the collection of evidence, the Crown cannot avoid the s. 24(2) analysis by going directly to the proviso in s. 686(1)(b)(iii), which provides that notwithstanding an error of law the appeal may be dismissed if the Court "is of the opinion that no substantial wrong or miscarriage of justice has occurred". The proviso addresses a miscarriage of justice in the particular case. Section 24(2) deals with the balance between individual rights and *Charter* rights and the overall reputation of the administration of justice. The message of s. 24(2) of the *Charter* is that even if admission of such evidence would not create a substantial wrong or miscarriage of justice to a particular accused, the

court must nevertheless consider whether, “having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”. Although the officer gave evidence gathered in contravention of s. 8 of the *Charter*, on the facts of this case s. 24(2) ought not to be applied to exclude the testimony. The admission of the evidence did not affect the fairness of the trial. The evidence put into the record was not conscripted. The confession was freely volunteered. The *Charter* breach neither caused nor contributed to the accused’s statements. The officer heard nothing that the accused did not intend him to hear. The police applied for and received prior judicial authorization for the surreptitious recording. The trial judge disagreed with the authorizing judge about the sufficiency of the allegations but the police officer had acted in good faith. The exclusion of the officer’s testimony of his conversation would itself bring the administration of justice into disrepute. Murder is the most serious of crimes and this one was particularly brutal and senseless. The accused freely confessed his guilt, in an act of misguided self-interest. The key elements of the confession were available at trial from the undercover officer from his own recollection.

Per L’Heureux-Dubé, Arbour and LeBel JJ.: The trial judge ruled that an authorization to intercept a communication, with the consent of the police officer who was a party to it, was unconstitutional and, under s. 24(2) of the *Charter*, he ordered the exclusion of the recording and of the transcript of the recording of that conversation. There is no reason to disturb that ruling.

The ruling, however, did not extend to the right of the police officer to testify as to what the accused said in the course of that conversation, as long as such testimony is otherwise admissible at common law. In such a case, it neither makes

sense, nor would it be feasible, to attempt to preclude the witness from refreshing his memory from the recording.

When the police officer testified, he independently recalled most of the salient portions of the confession. The full transcript itself had been ruled inadmissible by the trial judge as a constitutional matter, and in any event it would have been inadmissible at common law as hearsay unless the police officer testified that it constituted his past recollection recorded. A conversation with an informer, or a police officer, is not a search and seizure; only its recording is. The intercepted conversation was not excluded and the witness was entitled to try to put the fullest possible account of his conversation with the accused before the court. It was an error to allow the officer to read into the record verbatim, almost the full content of the transcript. The error was a trivial one curable by the proviso in s. 686(1)(b)(iii) of the *Criminal Code*. If, on the other hand, the police were to deliberately by-pass the need to obtain a judicial authorization to record a conversation, on the basis that although they could not use the tape at trial, they could always use the transcript in the way it was done here, the proper remedy, in such a different scenario, might well be to exclude the tape, transcript and the evidence being given in any form about the content of the intercepted communication. There is no reason, in this case, to turn again to s. 24(2) of the *Charter* to revisit the issue of the admissibility of the transcript.

Cases Cited

By Binnie J.

Followed: *R. v. Stillman*, [1997] 1 S.C.R. 607; *R. v. Duarte*, [1990] 1 S.C.R. 30, aff'g (1987), 61 O.R. (2d) 385; **referred to:** *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *R. v. Wells* (1996), 107 C.C.C. (3d) 504, aff'd [1998] 2 S.C.R. 517; *Lopez v. United States*, 373 U.S. 427 (1963); *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345; *R. v. McBride* (1999), 133 C.C.C. (3d) 527; *R. v. Eisenhauer* (1998), 123 C.C.C. (3d) 37; *R. v. Salutin* (1979), 11 C.R. (3d) 284; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Wijesinha*, [1995] 3 S.C.R. 422; *R. v. Belnavis*, [1997] 3 S.C.R. 341; *R. v. Wiggins*, [1990] 1 S.C.R. 62; *R. v. Solomon*, [1997] 3 S.C.R. 696.

By Arbour J.

Referred to: *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24.

Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).

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Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999.

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APPEAL from a judgment of the British Columbia Court of Appeal (2000), 139 B.C.A.C. 89, 227 W.A.C. 89, 145 C.C.C. (3d) 353, [2000] B.C.J. No. 1126 (QL), 2000 BCCA 347, reducing the accused's conviction to second degree murder but otherwise dismissing the appeal from a judgment of the Supreme Court of British Columbia. Appeal dismissed.

Richard C. C. Peck, Q.C., for the appellant.

William F. Ehrcke, Q.C., for the respondent.

The reasons of L'Heureux-Dubé, Arbour and LeBel JJ. were delivered by

ARBOUR J. —

1 I have read the reasons of my colleague Justice Binnie and although I agree with his ultimate disposition of this appeal, I come to this conclusion for different reasons.

2 The trial judge in this case found that an authorization to intercept a private communication was deficient and he decided to exclude the recording of it and the transcript of the recording. Since the intercepted conversation was one that a police officer, acting in an undercover capacity, was party to, the trial judge permitted the officer to testify as to the content of the conversation. Although the Crown now seeks a reversal of that ruling and wishes to argue that the trial judge erred in excluding the tape recording and the transcript, I agree with Binnie J. that we should decline to proceed on that basis.

3 This position was not advanced by the Crown in the Court of Appeal and I agree that we should confine our intervention in this appeal as of right by the Crown to the issue on which there is a dissent in the Court of Appeal on a question of law. I say this without suggesting that the exclusionary ruling made at trial was sound. I agree that we should simply proceed as though it were, and tackle the procedural issue that derives from that ruling.

4 The legal issue then presents itself as follows: If a police officer unconstitutionally records a conversation to which he is a party (a *Duarte*-type interception; *R. v. Duarte*, [1990] 1 S.C.R. 30), and both the recording and the transcript of it are excluded from evidence as a s. 24(2) of the *Canadian Charter of Rights and Freedoms* remedy, what use can be made of a transcript of the recording by the police officer when he or she testifies about the content of intercepted conversation?

5 As a preliminary observation, I note that this problem did not seem to have been contemplated in *Duarte, supra*. In that case, this Court found that the interception of a private communication lawfully made upon the consent of one of the

parties to the conversation (under the provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, as they then existed) was nevertheless an infringement of s. 8 of the *Charter* as an unreasonable search and seizure. Turning to the remedy for that constitutional violation, the Court made no distinction between the communication itself and the recording of it. La Forest J. held that the intercepted communication could be introduced in evidence since its admission in the proceedings would not bring the administration of justice into disrepute, within the meaning of s. 24(2) of the *Charter*.

6 At the time, the *Criminal Code* contemplated that a communication that was unlawfully intercepted was inadmissible in evidence unless one of the parties to the conversation consented to its admission (s. 178.16 of the then *Code*). There was no need to distinguish between the communication itself and the recording of the communication: both were inadmissible. This section was subsequently repealed and the current regime is a by-product of the decision in *Duarte* requiring a judicial authorization for an interception made with the consent of only one party to it (a surreptitious intercept as far as the other is concerned).

7 In the current statutory context, therefore, as was the case here, if the authorization is held to be invalid as a violation of s. 8 of the *Charter*, the remedies are to be found in the panoply provided by s. 24 of the *Charter*. Under s. 24(2), the trial judge could conceivably hold that the *Charter* violation was so egregious that not only should the recording of it not be admissible in evidence, but that even the *viva voce* evidence of the person who was a party to it should not be permitted. This was in fact the statutory remedy in the pre-*Duarte* regime. In contrast, when a conversation is intercepted in a case like the present one on the basis of a defective authorization, the recording (and any transcript thereof) may be excluded, but the constitutional violation is held not to affect the right of the witness to testify to what he or she heard the

accused say, as long as that testimony is otherwise admissible by virtue of the common law (see *Duarte, supra, per La Forest J.*, at p. 58).

8 This half-way remedy, if I may call it that, is what led to the procedural difficulty in the present case. It essentially precludes the admission in evidence not of the product of the intercept (the private communication), but of the best evidence thereof (the recording). In light of this, it would neither make sense, nor be feasible to attempt to preclude the witness from refreshing his or her memory from the recording. This simply continues to be a matter governed by the common law. A witness may refresh his or her memory prior to testifying, as long as he or she testifies from present memory revived by the instrument that refreshed it, whatever that instrument may be. In some cases, the witness whose memory at trial cannot be revived can testify as to the accuracy of a past recording of a then existing memory, under certain conditions that are meant to alleviate the concerns arising from the hearsay rule. The past recording, or verification of a recording, must have been made contemporaneously to the event recorded, when the memory of the witness was still fresh, and the witness must swear that the recording represented then his or her accurate recollection.

9 This is in my view precisely what happened in this case. The police officer testified that the day after his conversation with the accused was surreptitiously recorded, he reviewed a transcript of the recording. Not surprisingly, most of the salient facts about the accused's confession to a murder were still fresh in his mind then, and indeed most of them were still fresh at the time of trial. Again not surprisingly, on the sole basis of his then memory of the conversation, the officer could not, the next day, fill in some of the blanks in the transcript. I explain. As is often the case, the transcript contained several entries that simply said "inaudible",

which means that the transcriber could not make out what was said. According to his evidence, in some of these cases, the officer could supply the missing entries, from memory, but in many others he could not. These simply remained marked on the transcript as “inaudible” and they were of course evidence of nothing.

10 In my view, on this record it is fair to say that when the police officer testified, he independently recalled most of the salient portions of the confession. The full transcript itself had been ruled inadmissible by the trial judge as a constitutional matter, and in any event it would have been inadmissible at common law as hearsay unless the police officer testified that it constituted his past recollection recorded, as described above. This, in my view, it was, except for the parts that the officer said he could not remember the day after the intercept so as to supply to the transcriber the content of the inaudible parts. Apart from that, which is of no consequence because the parts marked “inaudible” were therefore not in evidence in any form, nothing in his evidence suggests that when he reviewed the transcript for accuracy at the time that his memory of the conversation was fresh, the transcript contained expressed statements of which he had no recollection.

11 Having said that, in the present circumstances, I think it was an error on both accounts the constitutional exclusion and the common law rule to allow the officer to read into the record verbatim, almost the full content of the transcript. In the face of that error of law, I would not hesitate to apply the proviso in s. 686(1)(b)(iii) of the *Code* on the basis, expressed in *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86, that the error was trivial.

12 As pointed out by La Forest J. in *Duarte, supra*, p. 57, a conversation with an informer, or a police officer, is not a search and seizure. Only the recording of such

conversation is. The intercepted conversation here was not excluded, and in my view rightly so. The witness was entitled to try to put the fullest possible account of his conversation with the accused before the court. There is no doubt that he did the right thing in obtaining an authorization, in having the recording transcribed and in verifying immediately the accuracy of the transcript of a conversation to which he was a party, while it was still fresh in his mind. This was indeed prudent since the tape could have been lost or could have deteriorated before trial. There was, in short, nothing sinister about the creation of the transcript.

13 If, on the other hand, the police were to deliberately by-pass the need to obtain a judicial authorization and wear a body-pack to record a conversation, on the basis that although they could not use the tape at trial, they could always use the transcript in the way it was done here, the proper remedy, in such a different scenario, might well be to exclude not only the tape and the transcript as was done here, but to exclude evidence being given in any form about the content of the intercepted communication.

14 This case illustrates the difficulty with “partial exclusions” of evidence in cases of “consent interceptions” falling under the *Duarte* ruling. If the evidence of the intercepted conversation itself is not ruled inadmissible, all that the exclusion of the tape achieves is to deprive the trier of fact of the best, most reliable evidence of the intercepted conversation. The procedure followed in this case sensibly sought to avoid such a result. All is different of course in third party intercepts, where the exclusion of the illegally recorded conversation deprives the police of the substance of the evidence, not just, as here, of the form in which it was recorded.

15 In light of the above analysis, contrary to my colleague Binnie J., I see no reason to go to s. 24(2) of the *Charter*. In fact, I have difficulty understanding the basis upon which he does. My colleague decided early on not to revisit the original order excluding the transcript, so I assume that that order stands. In order for s. 24(2) to be resorted to again, one would have to conclude that the oral testimony of the officer reading from the transcript constituted an unreasonable search or seizure, amounting to a fresh violation of s. 8. The original violation (the unconstitutional wiretap) was spent and remedied by the exclusionary order. I can find no subsequent violation of s. 8 that would call for a new application of s. 24(2).

16 To the extent that the trial judge should have limited the use of the transcript by not allowing it to be read in as though it was full original evidence, the error was a trivial one curable by the proviso.

17 For these reasons, I would dismiss the appeal.

 The judgment of Iacobucci, Major, Bastarache and Binnie JJ. was delivered by

18 BINNIE J. – This appeal concerns the admissibility of evidence of the appellant’s confession of murder on January 29, 1997 to an undercover police officer who at the time was “wired” with a recording device. The police had obtained prior judicial authorization to make the recording, but at trial the authorization was found to have been improperly granted. The trial judge therefore excluded the tape and the typed transcript (being secondary evidence of what was on the tape). He admitted however the *viva voce* evidence of the officer who “refreshed” his memory in the witness box from the excluded transcript. In fact, his testimony was more or less a

verbatim rendition of the excluded transcript. The jury convicted the appellant of first degree murder. The conviction was reduced to second degree murder by the British Columbia Court of Appeal, but the appeal was otherwise dismissed. On further appeal to this Court, the major controversy was the “indirect” reading of the excluded transcript into evidence by the officer. I agree with the conclusion of the Court of Appeal that this did not vitiate the conviction, though for somewhat different reasons. I would dismiss the appeal.

I. Facts

19 It was alleged that the appellant struck the deceased, Jo Anne Feddema, with his truck while she was riding her bicycle. They lived in a small village in central British Columbia and were acquaintances. The impact threw her, apparently injured, on the hood of his truck and she shouted, “You’re in trouble now.” The appellant told the undercover officer that he panicked and killed her by striking her on the head with a blunt instrument. He provided many details of the killing, including where the killing took place and how he disposed of her body and clothing, and how he had made it look as though she had been the victim of a sexual assault.

20 The Crown conceded that without evidence of the appellant’s statements to the undercover officer, “the prosecution’s case collapsed”.

21 The alleged confession came about because skillful police work persuaded the appellant over a period of months that undercover officers were all part of a very well-run criminal enterprise which the appellant might care to join. Early in the operation, the appellant advised one of the officers that the police did not like him. When asked why, the appellant said, “They think I did a murder, they think I killed this

broad.” He continued to deny his involvement until towards the end of January 1997. In the interim, he became ever more entangled in the supposed crime organization.

22 The police officer’s evidence was that on January 29, 1997, in a room at the Landis Hotel in Vancouver, he told the appellant that through underworld contacts he could find someone suffering a terminal illness to make a false confession to the murder of Jo Anne Feddema provided the appellant supplied sufficient detail to make the confession believable. (This was similar to the police work discussed recently in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, and *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77.) At that point the appellant freely confessed to the murder, and on the following day took him to the various locations associated with the crime and described the events in detail. The conversation of January 30th was also recorded but, unlike the tape made in the hotel room, it was of poor quality.

23 The police had applied for and obtained an authorization under Part VI of the *Criminal Code*, R.S.C. 1985, c. C-46. By its terms, the authorization permitted the police surreptitiously to record the conversations between the appellant and the officer. The conversations of January 29 and 30, 1997 were recorded pursuant to the authorization. Transcripts were prepared. The undercover officer reviewed the transcripts the day after each conversation took place, and made corrections based on listening to the tape supplemented with his recollection of those conversations.

A. The Evidentiary Rulings

24 The trial judge having concluded that the authorization ought to have been refused for insufficiency of evidence, and the tape therefore having been obtained in

violation of s. 8 of the *Canadian Charter of Rights and Freedoms*, the tapes and related transcripts were declared inadmissible.

25 The appellant then moved to suppress the evidence of the undercover police officer because he said it was inextricably bound up with the transcripts of the tapes that had been ruled inadmissible. The trial judge ruled that the officer could give evidence “as to his present recollection of what occurred in that hotel room on January 29th” and, for that purpose, he could make use of the corrected transcripts (euphemistically described as his “notes”) to refresh his memory. He had not in fact made notes of the conversation, believing that the tape itself, having been authorized, would be admissible.

26 This appeal, and the disputed ruling, relate only to the January 29th conversation at the Landis Hotel.

B. The Officer’s Evidence on the Voir Dire

27 In the witness box, the officer’s evidence followed closely, often word for word, the corrected transcript of the January 29th conversation. When challenged by the defence, he explained in a *voir dire* that, within a day of the original conversation, he had received a typed transcript of the tapes. He took the tape and the transcribed copy of the tape “and I proofread the transcribed copy with the tape and I made changes on it. Also adding comments of my own. I then sent that back to be retyped with my corrections and my comments and I received back the corrected copy”. The original document showing his handwritten changes and corrections was not entered in evidence. The retyped “corrected” version is 49 pages in length, double-spaced. The cross-examination continued:

Q. -- what you did was you listened to the voices on the tape?

A. Yes.

Q. And you identified certain of the voices, for example, as your own, as those of Peter William Fliss and as that of [a third person]?

A. Yes.

Q. And there would be some, presumably, areas where you felt you could make out words and you wrote those in?

A. Yes.

Q. And that was from the tape?

A. The tape as well as my memory of the conversation itself.

28 Later, when it was suggested to him by defence counsel that the officer's present recollection of the January 29th conversation was "inextricably bound" up with his subsequent review of the tape and the transcript, he responded:

A. No, I have a definite independent recollection of the meeting between myself and Mr. Fliss on January 29th, '97.

Q. Do you have any notes of that independent recollection?

A. Well, no.

...

Q. ... the only note you have of the content of the conversation is what you have referred to as your notes which you have been reading from and which are a transcript from the taped cassette of a wiretap of the conversation, correct?

A. Yes.

29 The trial judge found that the officer created a corrected transcript that could properly be described as his "notes". He permitted the officer to give in testimony what was "basically a recitation" of the corrected transcript.

C. *The Verdict*

30 The jury, apparently accepting some evidence that death was caused while the appellant was committing or attempting to commit an aggravated sexual assault, returned with a verdict of first degree murder.

31 On appeal, because of the conflicting evidence of the Crown's experts with respect to the alleged sexual assault, a verdict of second degree murder was substituted. The appeal was otherwise dismissed, Southin J.A. dissenting. In her view, the *viva voce* evidence of the officer was inadmissible and the conviction ought to have been quashed. The appellant now appeals as of right to this Court on the question of law raised by Southin J.A.'s dissent, namely whether the trial judge erred in admitting the *viva voce* evidence of the police officer of his conversation with the appellant on January 29, 1997, having previously ruled that evidence of the transcript of that same conversation was inadmissible.

II. Relevant Constitutional Provisions

32 *Canadian Charter of Rights and Freedoms*

8. Everyone has the right to be secure against unreasonable search or seizure.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(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.

III. Judicial History

A. *British Columbia Supreme Court*

33 Stewart J. held that the police had provided insufficient evidence to support the surreptitious body-pack recording of the conversations with the accused and that his rights under s. 8 of the *Charter* had thereby been violated. He then rejected the Crown's submissions that the evidence should nevertheless be admitted pursuant to s. 24(2) of the *Charter*.

34 Stewart J. subsequently explained that his ruling excluding the tapes and transcripts related only to the "form of evidence then proffered in evidence by the Crown" (emphasis in original). That ruling, he suggested, would also exclude the *viva voce* evidence of a witness who, *without* being a party to the conversation, was able to overhear it only because of the unauthorized recording. To admit such evidence would simply be to allow the Crown to do indirectly what it was prohibited from doing directly.

35 Here, however, the officer *had* participated in the conversation with the appellant, and did have a present recollection of at least part of it, although certainly not all of the verbatim detail. The trial judge commented:

Common sense would say that certain things would remain with the listener forever, simply from having sat in the hotel room with the accused and heard his confession of a savage killing. But other things would not

now be available to the witness from his memory, absent his having played the tape and corrected the transcript, as above. Where an unaided memory would leave [the officer], 17 months after hearing the confession, no one, including [the officer], can say.

36 In his view, the officer was entitled to give the evidence of the conversation to which he had been a party, and for that purpose to rely on the corrected transcript. This was because the corrections were made on January 30, 1997 on the basis of his then fresh memory of what had passed between him and the accused on January 29th in the hotel room.

37 The defence then followed up with a request that the officer first be required to testify entirely from memory, and, only after present memory was “exhausted”, should he be allowed to refer to the corrected transcript. The trial judge ruled that there was no such legal principle as “exhaustion of memory” and that in this case it would be “a bootless journey” to require the witness to follow such a course of action.

In the result, I am not going to direct the witness to give his evidence in two parts. It is up to the Crown now to ask the questions in such a way that appropriate use is made of the notes. If, in the result, what occurs is basically a recitation to the jury of what is in the notes, nothing has, as a matter of law, gone wrong. [Emphasis added.]

38 The trial judge ruled that the undercover policemen, being themselves considered “crooks” by the appellant, were not persons in authority for purposes of the confessions rule: *R. v. Wells* (1996), 107 C.C.C. (3d) 504 (B.C.C.A.), subsequently aff’d [1998] 2 S.C.R. 517.

39 The trial judge accordingly permitted the officer to provide what was
“basically a recitation” of the corrected transcript.

B. *British Columbia Court of Appeal* (2000), 145 C.C.C. (3d) 353, 2000 BCCA 347

1. Hall J.A. (Hollinrake J.A., concurring)

40 Hall J.A., for the majority, stated that the confession which the police
obtained from the appellant was not dependent upon the existence of the invalid
authorization. The police had embarked on and would have proceeded with the
undercover operation with or without the recording device.

41 In the view of Hall J.A., the statements made by the appellant to the
undercover police officer were freely given, and would have been available as
evidence irrespective of the wiretap that was later found to be improperly authorized.
Referring to *R. v. Stillman*, [1997] 1 S.C.R. 607, he concluded that the testimony was
not conscripted, was supported by the officer’s present “substantial recollection”
(para. 101) or “fairly detailed recollection of this conversation” (para. 100), and was
therefore admissible.

2. Southin J.A., dissenting

42 Southin J.A. held that if the trial judge was correct in ruling that the
officer’s evidence of the conversation of January 29th was admissible, then no purpose
would be served by a peace officer seeking an authorization to “wear a wire” when
interviewing a suspect. All he would need to do is to testify, as here, about the
conversation from a transcript which would have been somehow transmuted in the eye

of the law from secondary evidence of an illegal electronic record to a peace officer's *aide-mémoire*. She held this to be "legal alchemy". Failure to suppress the evidence once the tape itself was ruled inadmissible, she contended, would make a mockery of the authorization process. She invoked this Court's judgment in *R. v. Duarte*, [1990] 1 S.C.R. 30, and the subsequent enactment of s. 184.2 of the *Criminal Code*. She concluded, at para. 80, that

a peace officer who has surreptitiously recorded a conversation with a suspect, even with a judicial authorization, should make, without hearing the tape, the best notes he can from his unaided recollection. He should not listen to the tape unless and until it is clear at the trial that no attack will be made on the authorization.

In her view, the appeal should be allowed.

IV. Analysis

43 There is no doubt that the jury was entitled to hear from the undercover police officer about his conversation with the appellant on January 29, 1997. The officer had at the time a present recollection of the "gist" of all of the important elements of the conversation.

44 As the officer pointed out, rather convincingly:

Well, it's not every day that someone comes to you in a hotel room and sits down and has a one-on-one conversation with you explaining how they killed someone, disposed of their bike in the bush, hit them with a crowbar while they were still alive, drove down a road with the deceased in the truck, dragged her into the bush, took her spandex shorts off to make it look as though it might be a rape, purposely throw those spandex shorts across the road behind some logs and then go home. It's not every day someone will sit down and tell you that.

45 There is also no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection – not the tape – would be admissible.

46 The problem in this case is that what was given in evidence went beyond what the officer could recall – aided or not – either at the time of trial or at the time he proofread the transcript on January 30, 1997. The *Charter* problem arises with respect to those parts of the testimony that the officer could not recall *either* at trial *or* during the earlier “proofreading” exercise he undertook on January 30, 1997, but which he was nevertheless permitted to read into the record verbatim from the excluded transcript. The result was to allow the prosecution to put into evidence indirectly what the exclusion order forbade it from doing directly.

A. Inadmissibility of the Tape and Transcripts

47 In *Duarte, supra*, the Court established the principle that the secret recording of a conversation by one of the participants who is an agent of the state is a violation of s. 8 of the *Charter*. It intrudes on a reasonable expectation of privacy and annihilates the very important right to choose the range of our listeners (pp. 44 and 51). In that case, the accused and others discussed a cocaine transaction with an undercover officer and an informer. The conversations were secretly recorded. The officer made

notes of the relevant conversations based on his review of the recordings which had not been judicially authorized. The Ontario Court of Appeal, *per* Cory J.A. (as he then was), held that, because the witness was himself a participant in the conversations, there was no violation of s. 8 (reported at (1987), 61 O.R. (2d) 385 (*sub nom.* *R. v. Sanelli*)). The agent of the state had heard nothing that the accused did not intend him to hear. A similar position had been adopted by the United States Supreme Court in *Lopez v. United States*, 373 U.S. 427 (1963).

48 This Court took a different view. The expectation of privacy depended on whether in the circumstances “it was reasonable for that person to expect that his or her words would only be heard by the persons he or she was addressing” (p. 47). The law, observed La Forest J., at p. 48,

recognizes that we inherently have to bear the risk of the “tattletale” but draws the line at concluding that we must also bear, as the price of choosing to speak to another human being, the risk of having a permanent electronic recording made of our words.

49 Over the lone dissent of Lamer J., as he then was, this Court in *Duarte* made it clear, at p. 53, that its disagreement with the Ontario Court of Appeal was with the “policy implications” of allowing the police to conduct warrantless surveillance on private citizens. It was no answer that only criminals have something to hide. In a free country, social discourse should not be inhibited by a concern that conversations are being secretly recorded and transcribed without lawful independent prior authorization.

50 The incentive of the police to seek authorization in a *Duarte*-type situation would be diminished, of course, if the resulting exclusion order could be sidestepped

by the participant officer simply reading the excluded transcript verbatim into the record.

B. The Authorization Order

51 In this Court the Crown sought a reversal of the trial judge's initial ruling that the authorization for the body-pack had been granted on the basis of insufficient evidence. The reasons for that order are perhaps vulnerable but the Crown declined to raise it before the Court of Appeal as an alternative support for the admissibility of the evidence. No satisfactory explanation was given for this omission.

52 This is an appeal as of right and the parties properly joined issue on the question of law on which Southin J.A. dissented, namely:

Whether the trial judge erred in admitting the *viva voce* evidence of Sgt. Haslett of his conversation with the Appellant on January 29, 1997, having previously ruled that evidence of the intercept of that same conversation was inadmissible.

53 The Crown's alternative argument (that the original authorization was valid) would render moot this issue. While the Court has jurisdiction to entertain the Crown's argument, I do not think it is in the interests of the orderly administration of justice to do so on the facts of this case. The Crown, having declined to make that argument in the Court of Appeal, should not be allowed to change its position in an effort to scuttle the appellant's appeal as of right. I think that for the purposes of this appeal we should address the issue raised by Southin J.A. on its merits.

C. Objectionable Portions of the Officer's Evidence

54 The officer's actual evidence of the conversation at trial covers 34 pages of single-spaced court transcript (as compared with 49 double-spaced pages of the original corrected transcript). An individual blessed with a prodigious memory would not likely claim total recall of such a lengthy discussion and the officer here did not claim a prodigious memory. In the end, his evidence was, as the trial judge anticipated, "basically a recitation to the jury" of what was in the corrected transcript. Much of it purported to be a direct quotation at a level of detail that suggested encyclopaedic recall, including pauses and punctuation:

I said, "Do you want me to explain to you exactly how this is going to work or not?" And there was a pause, and he said, "Yeah, I do." I said, "Huh?" And he said, "Yeah."

55 The account of the murder was put into evidence word for word from the excluded (or "suppressed") transcript:

He said, "Well, yeah, where we live and where it happened, it's quite -- it's quite out of the way." He said, "I hate to say anything." I said, "What's that?" And he said, "I hate to say anything." I said, "Just say it and let's get the deal with, so we can get on with it."

He said, "Well, it was -- it was an accident when it happened." I said, "Great." He said, "The lady was riding a bike and I came around the corner with the truck and she just swerved out and I ran into the back of her. She fell down on the ground. She started fucking rambling on about a whole bunch of stuff and I got fucking scared and had a piece of, I think it was crowbar. And I hit her on the back of the head with it. I threw her in the back of the truck and I threw the bike off into the ditch. And I drove about a mile down the road and then I took her down another side road and threw her into the trees. Took her pants off, just left her laying there so it would look like somebody raped her or something. But I never touched her."

I said, "Well, great." I said, "I don't give a fuck if you touched her or not." I said, "Great, okay, that's good." He said, "My wife -- my wife never knew I even left the yard. It was just a matter of a couple of minutes. I went -- just went down to the dump to check on something." He said, "She'll swear on a stack of bibles that I never left the yard because she didn't know I left."

56 In my view, with respect, the courts in British Columbia erred in the conclusion that because the officer had a *substantial* recollection of *parts* of the conversation of January 29th, therefore he was at liberty to provide the jury with what was “basically a recitation” of the whole of the corrected transcript.

57 I reach this conclusion for the following reasons.

58 Firstly, the officer’s evidence went well beyond his current recollection at the time of the trial. He clearly remembered the principal elements of the confession, but the wealth of detail recounted in the 34-page recital of his exchanges with the appellant was itself adduced to persuade the jury of the truth of the confession. The police had set aside some of the details of the crime as “hold back” evidence that only the actual killer could be expected to know. As the trial judge noted in his ruling on *voir dire*:

The evidence in question has potential probative value, ranging from significant to overwhelming, depending on what the trier of fact makes of the relationship, if any, between the detail of what the accused had to say as he confessed and evidence tending to reveal, perhaps, what was known only to the killer. [Emphasis deleted.]

59 Understandably enough, the officer’s present recollection could not provide that level of detail:

A. . . . I can say here today that I have an independent recollection of what Mr. Fliss told me in that hotel room on January 29th regarding the situation I was there to investigate.

Q. Without any mental reference to any of the transcripts?

A. Yes.

Q. Completely without it? You can give us a pure, individual memory without reference to this thing?

A. Not the exact wording, no. But I could give you the gist of what transpired and what was said to me. I may naturally leave some out, however, I can give you the general situation. [Emphasis added.]

60 The prosecution obviously wanted more than “the gist of what transpired” on January 29th or “the general situation”. The officer was quite entitled to attempt to “refresh” his memory by an out-of-court review of the corrected transcript, but in the witness box his testimony had to be sourced in his “refreshed” memory, not the excluded transcript.

61 In short, the problem with the corrected transcript as a stimulus to memory is not that it was itself inadmissible but that it failed to stimulate.

62 Much of the desired detail would not have been available to the prosecution but for the officer’s recitation verbatim of the bulk of the excluded transcript of the unauthorized recording.

63 Secondly, the officer’s testimony does not qualify for admission as “past recollection recorded”. This doctrine would apply only if the prosecutor could satisfy the four *Wigmore* criteria, usefully summarized by the Alberta Court of Appeal in *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345, *per* Kerans J.A., at p. 352:

The basic rule in *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, c. 28, §744 *et seq.* provided:

1. The past recollection, must have been recorded in some reliable way.
2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.

3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he “knew it to be true at the time”.

4. The original record itself must be used, if it is procurable.

To the same effect see *R. v. McBride* (1999), 133 C.C.C. (3d) 527 (Ont. C.A.), at p. 530; *R. v. Eisenhower* (1998), 123 C.C.C. (3d) 37 (N.S.C.A.), at p. 74; *R. v. Salutin* (1979), 11 C.R. (3d) 284 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 928; *McCormick on Evidence* (5th ed. 1999), vol. 2, § 279; and P. K. McWilliams, *Canadian Criminal Evidence* (3rd ed. (loose-leaf)), vol. 2, at para. 36:20221.

64 Here, the third of *Wigmore*’s requirements was not met. The undercover officer read the transcript the day after the recording, and one would anticipate that at that time he would have had a good recollection of it. Perhaps he did, but the appellant was entitled to hear him swear to it. The result, after all, was that the appellant was confronted with very damaging evidence the detail of which, due to the officer’s lack of present recall, could not be effectively cross-examined upon. *Wigmore* gives an example of the sort of explicitness with which his third requirement should be met.

If the witness can say, “I distinctly remember that when I made or saw this memorandum, about the time of the events, I was then conscious of its correctness,” his verification is satisfactory.

(J. H. Wigmore, *Evidence in Trials at Common Law*, vol. 3 (Chadbourn rev. 1970), p. 98)

McCormick states “the witness must acknowledge at trial the accuracy of the statement” (p. 246 (emphasis added)). Obviously no particular form of words is required, but the court should not be left to speculate that because the witness *ought*

to have remembered whether the record was accurate, therefore the witness *did* so remember, despite his silence as to whether he did so or not. The admission of past recollection recorded but no longer remembered is an exceptional procedure and the conditions precedent to its reception should be clearly satisfied.

65 While the officer clearly recalled more on January 30th than he did at trial 17 months later, his evidence was that on January 30th he “corrected” the transcript based only on *partial* recall:

I could recall parts of it and put corrections in it that may have been inaudible on the tape. [Emphasis added.]

Counsel for the appellant argues that the reference to only “parts” is confirmed by his analysis of the excluded transcript:

[T]here are 89 places throughout the 50 page transcript where the word “inaudible” appears, none of which were filled in. Throughout the transcript, there are 20 editing revisions, 16 of which relate to actions, and 4 of which relate to statements. Of those 4 revisions, none relate to a specific statement by either party.

66 It is those parts of the conversation that he did *not* remember on January 30, 1997 but that were nevertheless put into evidence against the appellant that violate the *Charter* protection because, as to *those* parts, the sole basis of the officer’s testimony was the unauthorized tape and excluded transcript.

67 In the third place, I do not agree, with respect, that the issue here is one of “form”. It is true that in his initial ruling the trial judge excluded evidence about the confession in the “form” of a tape or transcript, and this ruling did not preclude the

Crown from establishing the same facts by another route. However, the only other route suggested was the recollection of the officer. The deficiencies in that recollection, which the officer conceded with candour and forthrightness, precluded him from reading into the record 34 pages of damaging detail from the excluded transcript. These were matters of substance, not form.

68 Accordingly, on the facts of this particular case, a significant portion of the detail that was recited by the officer into the record cannot be considered to be his recollection (either refreshed, revived or recorded) but the corrected transcript of the January 29th conversation that, for the reasons given in *Duarte, supra*, was obtained in breach of s. 8 of the *Charter*.

D. *Can the Wrongful Admission of the Evidence Be Cured by Application of the s. 686(1)(b)(iii) Proviso?*

69 In *Duarte* the Court proceeded directly from a finding of the s. 8 breach to a consideration under s. 24(2) of the *Charter* of whether the evidence ought nevertheless to be admitted.

70 The Crown on the other hand raises the proviso in s. 686(1)(b)(iii) of the *Criminal Code* “if necessary”. I do not think that where there has been a *Charter* breach with respect to the collection of evidence, the Crown can avoid the s. 24(2) analysis by going directly to the proviso which provides that notwithstanding an error of law the appeal may be dismissed if the Court “is of the opinion that no substantial wrong or miscarriage of justice has occurred”. The proviso addresses a miscarriage of justice in the particular case. Section 24(2) deals with the balance between individual rights and *Charter* rights and the overall reputation of the administration of justice.

71 My colleague Arbour J. contends that this was a “trivial” error (para. 11) in an evidentiary ruling by the trial judge. In my view, the issue is not whether the error was trivial or colossal. The issue is that in the result the jury heard details of a confession that covered 34 pages of damaging transcript sourced not in the officer’s memory but in the excluded tape recording.

72 While I would not revisit the trial judge’s decision to set aside the authorization order, for the reasons already mentioned, I do not feel any such inhibition about revisiting his subsequent s. 24(2) exclusion order with respect to the transcript because the exclusion of the evidence, as distinguished from the validity of the authorization order, was the subject matter of Southin J.A.’s dissent.

73 The message of s. 24(2) of the *Charter* is that, even if admission of evidence obtained in breach of the *Charter* would not create a substantial wrong or miscarriage of justice to a particular accused, the court must nevertheless consider whether, “having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute”. The appellant says the disrepute arises because the officer did indirectly what the *Charter* says he could not do directly, and thereby rendered both the *Charter* protection meaningless and prior judicial authorizations superfluous.

74 Following the path laid out in the *Charter* and in *Duarte* (p. 59), I think we are obliged to consider under s. 24(2) whether the detailed rendition of the body-pack evidence ought to have been excluded on *Charter* grounds. If so, the conviction would have to be quashed as urged in Southin J.A.’s dissent.

E. *Application of Section 24(2)*

75 The conclusion that the officer’s evidence contravened s. 8 of the *Charter* does not, of course, render it inadmissible: *Duarte, supra*; *R. v. Collins*, [1987] 1 S.C.R. 265; *Stillman, supra*. Section 24(2) provides that evidence obtained in violation of the *Charter* “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”. While the constitutional direction is to balance *all* of the circumstances, these circumstances are generally grouped around three primary considerations:

1. Does the admission of the evidence affect the fairness of the trial?
2. How serious was the *Charter* breach?
3. What would be the effect of excluding the evidence on the reputé of the administration of justice?

76 On the first question, the Court has held that “[a] fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused”: *R. v. Harrer*, [1995] 3 S.C.R. 562, *per* McLachlin J., as she then was, at para. 45. The proper balance in respect of the first question was further analysed in *Stillman, supra*, which set out a two-stage approach. The first stage requires courts to classify the evidence as either conscriptive or non-conscriptive. If the evidence is classified as conscriptive, the second stage then requires the party seeking to admit the evidence to prove on a balance of probabilities that the evidence could have been discovered by alternative, non-conscriptive means. In explaining how to differentiate between conscriptive and non-conscriptive evidence, Cory J. rejected

the importance earlier attached by some judges to the difference between real evidence and *viva voce* evidence. He stated, at para. 77:

The crucial element which distinguishes non-conscriptive evidence from conscriptive evidence is not whether the evidence may be characterized as “real” or not. Rather, it is whether the accused was compelled to make a statement or provide a bodily substance in violation of the *Charter*.

77 *Stillman* established that the key issue on the first branch of the test is “the manner in which the evidence was obtained” (para. 119).

Evidence will be conscriptive when an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples. [*Stillman*, para. 80]

78 The proper focus at this stage is therefore on the actions involved in obtaining the evidence rather than on the form in which the evidence exists.

79 Applying the above principles to this case, it is clear that the appellant was not detained nor was he compelled to confess to the murder. Instead, the confession was freely volunteered to someone the appellant thought was just another influential crook. The *Charter* breach (the secret recording) neither caused nor contributed to the appellant’s statements. The appellant may, from his point of view, reflect with hindsight that he chose his friends unwisely, something which the *Charter* cannot purport to protect him against (*Duarte, supra*, at p. 41), but the officer heard nothing that the appellant did not intend him to hear. Moreover, as noted by Hall J.A., the existence of the statements was not contingent on the grant of the impugned authorization since the police would have proceeded with the undercover operation

with or without the recording device, and the officer would, in either event, have heard what the appellant had to say.

80 In a similar case involving the unauthorized recording of a conversation by a police participant, *R. v. Wijesinha*, [1995] 3 S.C.R. 422, the full Court, *per* Cory J., found the recorded evidence to be non-conscriptive. In that case, the accused, a lawyer, initiated a scheme in which he would pay police officers to refer impaired driving cases to him. The evidence against the accused included statements he had made to an undercover officer wearing a hidden recording device. As the officer had failed to obtain prior authorization to record the conversation, the recording contravened s. 8 of the *Charter*. In concluding that the admission of this evidence would not affect the fairness of the trial, Cory J. observed, at para. 55, that the accused “could not by any stretch of the imagination be said to have been conscripted into incriminating himself in these conversations” (emphasis added).

81 *Wijesinha* was cited with approval by the majority in *Stillman*, at para. 96, as being “an example of a situation where evidence obtained in violation of a *Charter* right was admitted because there was no compulsion”.

82 It is not entirely clear from the report of *Wijesinha* how much independent recollection of the conversation the policeman retained at the time of the trial. Here, it is important to remember, the undercover officer to whom the statements were volunteered recalled at the time of trial all the most significant elements of what was said. The officer’s evidence on that point at trial, previously reproduced at para. 44, was so striking as to warrant repetition:

Well, it's not every day that someone comes to you in a hotel room and sits down and has a one-on-one conversation with you explaining how they killed someone, disposed of their bike in the bush, hit them with a crowbar while they were still alive, drove down a road with the deceased in the truck, dragged her into the bush, took her spandex shorts off to make it look as though it might be a rape, purposely throw those spandex shorts across the road behind some logs and then go home. It's not every day someone will sit down and tell you that.

With respect to the additional detail provided by verbatim recitation from the transcript, we cannot now know (because the officer did not know) precisely what “parts” the officer recalled when he looked at the transcript the day after the confession and what “parts” he did not recall at that time. What is important is that all of the essential elements of the confession were still present in the officer's mind at the date of the trial.

83 I therefore conclude, on the first question, that the admission of the additional detail, despite its 34-page length, did not affect the fairness of the trial.

84 On the second question, the seriousness of the *Charter* breach, it is beyond dispute that the police officers acted in good faith. They applied for and received prior judicial authorization for the surreptitious recording. The authorization was not quashed because of false statements or misstatements in the supporting affidavit. The trial judge simply disagreed with the authorizing judge about the sufficiency of the allegations. This is a stronger case for the Crown than *Duarte* itself where the evidence gathered in violation of s. 8 of the *Charter* was nevertheless admitted because the breach “stemmed from an entirely reasonable misunderstanding of the law by the police officers who would otherwise have obtained the necessary evidence to convict the accused in any event” (p. 60). Here the officers correctly understood the law and, in the opinion of the authorizing judge, they had complied with it.

85 Moreover, the appellant's act of volunteering these statements to the officer indicates a low expectation of privacy. A greatly reduced expectation of privacy in a s. 8 case should have "a significant impact on the trial judge's assessment of the seriousness of the breach": *R. v. Belnavis*, [1997] 3 S.C.R. 341, at para. 40. Here the appellant intended disclosure of the facts of the victim's murder (though not, of course, his identity). His expectation was that the information should eventually be disclosed in the courts through the mouth of a substitute accused. Disclosure of his identity was achieved not through the unauthorized recording but by the undercover officer himself based on his unaided present recollection.

86 On the third question, I believe that *exclusion* of the officer's testimony of his conversation of January 29th would itself bring the administration of justice into disrepute. Murder is the most serious of crimes. This murder was particularly brutal and senseless. The appellant freely confessed his guilt to someone he thought was a partner in crime in what he thought was an act of enlightened self-interest. The exclusion of the tape and transcript did not make the confession disappear and nor should it have done so. The key elements of the confession were available from the undercover officer with or without the benefit of the corrected transcripts. He would have been unshakeable on the most damaging points in the confession, corroborated by his January 30th visit to the crime scene with the appellant as his guide. In short, the appellant has not established that, having regard to all the circumstances, admission of the truthful, accurate and complete details of his voluntary statements into evidence would bring the administration of justice into disrepute.

87 *Duarte* established an important aspect of privacy rights which must not be undermined by allowing the state to introduce unauthorized "participant" wiretaps

under the guise of an undercover policeman's "notes". We should affirm the s. 8 protection laid down in *Duarte*, but acknowledge that where the issue is the admissibility of evidence, s. 8 rights are not to be read in isolation from s. 24(2), as the Court affirmed in *Duarte* itself and in *R. v. Wiggins*, [1990] 1 S.C.R. 62, *R. v. Solomon*, [1997] 3 S.C.R. 696, and in other cases.

88 It must be remembered that *Duarte* was decided on very broad policy grounds. At a time when participant surveillance using body-packs was not regulated by the *Criminal Code*, this Court's concern was with the inhibition of social discourse amongst Canadians generally, and not particularly amongst those with criminal proclivities, as is evident in some of the judicial dicta adopted in that case (at pp. 50, 52 and 54):

Few of us would ever speak freely if we knew that all our words were being captured by machines for later release before an unknown and potentially hostile audience. No one talks to a recorder as he talks to a person.

[T]he relevant question is not whether criminals must bear the risk of warrantless surveillance, but whether it should be imposed on all members of society.

Were third-party bugging a prevalent practice, it might well smother that spontaneity -- reflected in frivolous, impetuous, sacrilegious, and defiant discourse -- that liberates daily life.

89 The Ontario Court of the Appeal in *Duarte* was gently admonished for having put the focus too narrowly on those people engaged in "illegal activities" (p. 53). This Court acknowledged the force of the Crown's argument that it might be seen to be anomalous to allow the participant to give *viva voce* evidence from memory of the conversation but exclude an accurate tape recording of the same conversation. Nevertheless, the Court adopted the view that the risk of unauthorized electronic

recording is not part of our common experience “and it should not be thrust upon us” (p. 50 (emphasis deleted)). This broader policy focus puts *Duarte* in proper perspective when it comes to exclusion of evidence in a criminal trial. Section 24(2) requires a balancing exercise on the facts of each particular case. In *Duarte* itself, the evidence obtained in breach of s. 8 was ultimately admitted after consideration under s. 24(2). On the facts of this case as well, s. 24(2) ought not to be applied to exclude the testimony. This does not nullify the s. 8 protection. It gives it the measured effect in terms of the admissibility of evidence which the *Charter*, read as a whole, intended it to have. In another case, the s. 24(2) hurdle may not be so readily surmounted.

V. Conclusion

90 The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Peck and Company, Vancouver.

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