ONTARIO COURT OF JUSTICE

Old City Hall - Toronto

BETWEEN:	)	
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HER MAJESTY THE QUEEN	)	**K. Aird** **For the Crown**
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	)	
— AND —	)	
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[redacted]	)	**A. Stastny** **For the Defendant**
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	)	**Heard: August 18 and 19, 2014**

REASONS for DISCHARGE

MELVYN GREEN, J.:

A. INTRODUCTION

[1] Members of the Toronto Police Service executed a *Controlled Drugs and Substances Act* search warrant at a residential premise in Toronto in the evening hours of April 9, 2013. They seized approximately an ounce of

cocaine and some marijuana, scales and baggies. The defendant, [redacted], was in the house at the time the police entered. So were a woman and very young boy. Only the defendant was arrested. He was charged with possession of cocaine, both *simpliciter* and for the purpose of trafficking.

[2] The defendant elected to be tried by judge and jury, preceded by a preliminary inquiry. In support of the defendant's committal, the prosecution relies on circumstantial evidence said to tie the defendant to the seized drugs and, in addition, two statements made to the police during which the defendant is said to claim possession of the cocaine found in the house. The first statement was taken in the basement of the house during the execution of the warrant. The second was video-recorded at the police station about an hour later. The defence position is that neither statement may be received in evidence as they are both involuntary and, further, that the remaining circumstantial evidence is insufficient to support the defendant's committal to trial.

[3] The preliminary inquiry proceeded by way of a blended proceeding, the same evidence being led on the merits as on the *voir dire* dedicated to the voluntariness of the challenged statements. The only witnesses were the six police officers called by the Crown. It is agreed, as between the parties, that the seized drug that grounds the two charges faced by the defendant is cocaine, that the amount seized supports an inference of constructive trafficking, and that the defendant is the man who was in the house when the police entered. Exclusively for purposes of the voluntariness determination, it is further agreed that the woman who was then present is the defendant's common law wife and that she was pregnant at the time of the police entry.

[4] Committal is conceded if either statement attributed to the defendant is found voluntary and consequently admitted. If both statements are excluded, the remaining issue is whether the circumstantial evidence supports such

reasonable inferences of the defendant's knowledge and control of the seized cocaine as to permit a jury to properly convict the defendant, as directed by the standards fixed by the Supreme Court in *U.S. v. Shephard, infra,* and *R. v. Arcuri, infra*.

B. EVIDENCE

(a) Introduction

[5] The evidence of the six police witnesses is inconsistent and, at times, directly contradictory. Some of this confusion is undoubtedly attributable to the dynamic nature of the entry and subsequent search. A core sequential narrative nonetheless emerges, from entry and arrest to the defendant's first statement to his transport to 11 Division and, finally, to the taking of the second statement.

(b) The Entry, Search and Arrests

[6] The search warrant was executed at 8:55pm. The targeted house is a semi-detached, suburban back-split with doors on the front and side. Entry was gained by way of a battering ram through the side door. The defendant was immediately located, standing in the kitchen area.

[7] Det. Marc Cioffi was the officer in charge of the execution of the warrant. He and Det. Dodds immediately took the defendant to the floor and cuffed him. Based on information from a confidential informant, Cioffi charged the defendant with possession of cocaine. He then read the defendant his rights to counsel and the conventional post-arrest cautions. [redacted] (the defendant's partner) and a small child were also located in the house. To avoid impeding the search, Cioffi parked Taylor and the child in the living room. There was a bag of marijuana in plain view on the living room table.

[8] The evidence is conflicting as to whether the defendant was ever escorted to the living room and, if so, for how long. Cioffi's recall is that the defendant was seated in the living room when he, Cioffi, soon learned of the police discovery and seizure of a bag of cocaine. Cioffi then re-arrested the defendant for constructive possession of cocaine and for possession of the marijuana found in the living room. He also reiterated the defendant's rights to counsel in "lay terms". Although Cioffi could not recall if the defendant ever asked to speak to a lawyer, he could not deny the possibility. Cioffi passed the marijuana found in the living room to PC Ma after he re-arrested the defendant. At some point, he handed off the defendant to PCs Lee and Raspberry for transport to 11 Division. Cioffi had no recall of the defendant ever being taken to the basement of the house.

[9] PC Jeffrey Ma was detailed to search the master bedroom, one of three bedrooms on the second floor of the house. He was not directed to any specific location and conducted a systematic clockwise sweep of the room. Midway through his rotation Ma found a purple Crown Royal bag in the bottom drawer of a white dresser. Inside were scales, zip lock bags, some pills and a white bag containing powder cocaine. Ma later processed the seized cocaine at the station. It weighed 27.74 grams, or approximately one ounce. The master bedroom was the only room Ma searched. It contained male and female clothing. No evidence was led as to the contents of the other bedrooms.

[10] PC Jason Raspberry followed Cioffi into the house. Raspberry knew that [redacted] was pregnant. He read [redacted] her rights to counsel and then sat her in the living room where her five-year-old son soon joined her. Raspberry remained with Taylor until Cioffi detailed him to collect outerwear for the

defendant before escorting him to the station. He had no recall of the defendant ever being in the living room.

[11] Raspberry located jeans and a sweater on a chair in the master bedroom. The defendant, who had been wearing a tank top and short pants, was standing in the kitchen when Raspberry came back downstairs. The defendant dressed in the kitchen or, as Raspberry allowed in cross-examination, he may first have taken him to the basement.

[12] PC James Lee was detailed to clear the basement. There was no one there. The defendant was standing in the kitchen when Lee came back upstairs. Lee could not recall his dress. Lee then stood by to escort the defendant to the station.

(c) The Basement Statement:

[13] DCs Les Dodds and Shane Ladner were the last officers to enter the house. Although not certain, the officers "believed" the defendant was placed in the living room for a couple of minutes. Then, at Dodd's initiative, they took him downstairs to the basement around 9pm to separate him from his wife and child. The defendant was cuffed and wearing shorts and a tank top. Ladner conducted a brief, cursory search of the one small room in the basement and then returned to the couch on which the defendant was seated. He knew the defendant's partner, Taylor, was pregnant.

[14] The defendant, says Dodds, was very helpful. Upon Dodds advising him of the search warrant and its objects, the defendant volunteered that there was cocaine in a bottom dresser drawer in the bedroom, that his wife [redacted] did not know about it, and that he would provide a video statement to the police. Dodds testified that he or Ladner passed the information as to the drug's location to other officers. He did not know which officer or whether the

officer was dressed in uniform or plain clothes. No witness officer testified to ever receiving this information from either Dodds or Ladner.

[15] Dodds first testified that no threats or inducements emanated from the police. In cross-examination, he conceded he had told the defendant he would turn the house upside down if he did not tell the police the location of the drugs. Ladner denied hearing Dodds utter these words. If said, he agreed they could have prompted the defendant's admission.

[16] According to Dodds, the defendant repeatedly inquired about what would happen to his wife. Told by Ladner that his wife could be charged, the defendant offered to provide a video statement accepting ownership of the drugs. Ladner, in response, told the defendant that "chances are his girlfriend won't be charged" if he gave such a statement. Dodds agreed that this was an offer of "leniency".

[17] Ladner had a somewhat different account of his exchange with the defendant in the basement. Ladner testified he had already heard an announcement from an upper floor that cocaine had been located when the defendant, entirely unprompted, told him that it was his cocaine and that his wife didn't know about it. Ladner told the defendant that his wife would not be charged if he provided a video statement owning the drugs. The defendant, he says, agreed to this course of action.

[18] Ladner remained with the defendant in the small family room during the approximately 15 minutes he was in the basement. Dodds was up and down the stairs. Ladner helped the defendant dress in the basement, but he was not sure who provided the clothing. The two officers returned the defendant to the kitchen and handed him off to Lee and Raspberry for transport to the station. Sometime after the defendant's admission and before the defendant was transported to the station, Dodds was informed by another officer that cocaine

had been found in the house. Ladner, as earlier noted, testified he learned that cocaine had been discovered before the defendant's first incriminatory utterance.

[19] There was no change, said Dodds, in the defendant's demeanour; he was "calm throughout". In cross-examination, Dodds allowed that the defendant was "very concerned" about his wife [redacted]. Ladner described the defendant as "clearly upset".

(d) Transport and Processing

[20] PCs Raspberry and Lee drove the defendant to 11 Division. Lee read the defendant his rights to counsel from his notebook just before they left the house. The defendant said he understood, that he wished to contact a lawyer, and that he had nothing to say in answer to the charge. Lee assured the defendant they would call a lawyer when they got to 11 Division. They boarded the cruiser at 9:13pm, less than 20 minutes after the initial execution of the warrant. Raspberry, Lee's partner, re-advised the defendant of his rights to counsel on the trip to the station. The defendant said he understood. Raspberry could not recall if the defendant asked to speak to counsel, but agreed it was very likely he did.

[21] The defendant was paraded at 9:33pm. Following an unproductive Level 3 search, the defendant was placed in an interview room. He was quiet and upset, visibly so according to Lee. He had nothing to say about the offences with which he was charged. Neither Raspberry nor Lee called duty counsel or otherwise facilitated the defendant's implementation of his rights to counsel.

(e) The 11 Division Statement

[22] Dodds and Ladner repaired to 11 Division. Neither spoke with Raspberry or Lee or with the duty sergeant before preparing to interview the defendant. Dodds or Ladner asked the defendant whether he wanted to give a statement

or speak to his lawyer. The defendant elected the former option. A video camera was set up and a brisk taped interview, lasting about four minutes in total, began at 10:06pm. Ladner conducts the interview while Dodds makes notes. The defendant appears lucid and responsive throughout.

[23] The interview begins with a "KGB caution", the reading of ss. 139 and 140 of the Code, and the defendant confirming that he understands that he has a right to choose whether to give a statement and the criminal consequences of giving a false statement. The material portions of the ensuing exchange, to the best of my ability to transcribe them verbatim upon repeated viewings of the DVD recording of the video, follow:

Q: Do you want to give a statement?

A: Yes.

Q: I don't know if you've had the opportunity to speak with a lawyer.

A: No. They told me probably after this. I have to get my [lawyer's] numbers.

Q. You understand, prior to giving a statement you can speak to a lawyer. We can stop the tape right now and take you.

A. No, no … if this isn't going to screw me over then I have to do this. I want my wife.

Q. We talked about what you're going to talk about, I think, just prior and we'll talk about that on camera, but, to make sure, do you want to speak to a lawyer now?

A. No.

Q. OK, why don't I let you speak about what happened tonight.

A. The door was kicked in and they found my cocaine.

Q. OK. And who else was in the house at that time?

A. My wife and my kid.

Q. Your pregnant wife?

A. My pregnant wife, yes.

Q. And what I told you, they're not under arrest right now, right? And what you told me in the basement is that it's your cocaine and not your wife's and not your kid's and that's why they're not under arrest and you are, right?

A. Yes.

Q. Is there anything else in the house that they'll find?

A. No, everything was in a black pouch, a Crown Royal pouch. [Defendant describes cocaine, baggies, scales and some pills stored in a pouch in the bottom drawer of a dresser in "my room".]

Q. And before we left they found a bag of marihuana too?

A. Sorry, yes sir, and a bag of marihuana.

Q. To be clear, we did talk about the fact that we didn't want to arrest your wife and you told me at the scene that it was your cocaine and we never did arrest her. I didn't offer you anything at the time other than that – your pregnant wife and your child, right?

A. Yes.

C. ANALYSIS

(a) Introduction

[24] As noted earlier, the Crown theory of committal rests on two independent evidentiary foundations: the defendant's incriminatory statements and circumstantial evidence said to sufficiently tie the defendant to the seized cocaine. The defence agrees that either statement would ground committal, but challenges their admissibility on the basis that the Crown has failed to prove that either is voluntary. If neither statement is admitted, then, says the defence, the circumstantial evidence is simply inadequate to meet the legal test

for committal. Given the analytical logic of this approach, any inquiry as to committal must begin with the "confessions rule" and its application to each of the defendant's two incriminatory statements in this case.

(b) The Voluntariness Issue

(i) The Governing Law

[25] The confessions rule is creation of the common law. It is premised on concerns for reliability and fairness. The rule, as said in the seminal case of *R. v. Oickle*, [2000] 2 S.C.R. 3, at para. 31, promotes the "twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes".

[26] At bottom, and absent express waiver, no statement made by an accused to a person in authority may be admitted into evidence unless the Crown, in the course of a *voir dire* hearing, first proves beyond reasonable doubt that the statement was voluntarily made. Here, the basement and video statements were both clearly made to persons in authority. Their voluntariness is contested. The burden of establishing the voluntariness of each statement to the requisite standard falls to the Crown. There is no discretion as to remedy. As said in *R. v. Oickle, supra*, at para. 30, "a violation of the confessions rule always warrants exclusion". (See also, *R. v. Singh*, [2007] 3 S.C.R. 405, at para. 38.)

[27] The confessions rule was clarified, if not recast, by the Supreme Court in *R. v. Oickle*. The Court moved beyond reliance on the "hard and fast rules" said to characterize the traditional assessment of voluntariness originally developed in *Ibrahim v. The King*, [1914] A.C. 599 (P.C.) and adopted by the Supreme Court in *Prosko v. The King* (1922), 63 S.C.R. 226. The Court, instead, endorsed a more compendious and contextual approach that, as put at para. 47 of *Oickle*, "consider[s] all the relevant factors when reviewing a confession"

so as to better "account for the variety of circumstances that vitiate … voluntariness". The Court's subsequent decision in *R. v. Spencer*, [2007] 1 S.C.R. 11, affords a relatively succinct summary of *Oickle*'s reach. As put at para. 12,

> In *Oickle* [at para. 63], the Court recognized that there are several factors to consider in determining whether there is a reasonable doubt as to the voluntariness of a statement made to a person in authority, including the making of threats or promises, oppression, the operating mind doctrine and police trickery. Threats or promises, oppression and the operating mind doctrine are to be considered together and "should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule" (*Oickle*, at para. 63).

While the first three of these "factors" or circumstances are to be considered together, it is patent that the current inquiry turns on the allegation that the voluntariness of the statements at issue are undermined by "threats or promises" (often generically styled "inducements") advanced by the police. These fact-patterns, as said in *Oickle*, at para. 48, occupy "the core of the confessions rule". The target of the threat or promise need not be the accused to fall under this head of concern. As recognized in *Oickle*, at para. 81, "a threat or promise with respect to a third person could be an improper inducement".

[28] Addressing such "inducements", *Spencer*, at paras. 13 and 15, continues:

> With respect to promises, … this Court has recognized that they "need not be aimed directly at the suspect . . . to have a coercive effect" (*Oickle*, at para. 51). While Iacobucci J. recognized in *Oickle* that the existence of a *quid pro quo* is the "most important consideration" when an inducement is alleged to have been offered by a person in authority, he did not hold it to be an exclusive factor, or one determinative of voluntariness. On the contrary, the test laid down in *Oickle* is "sensitive to the particularities of the individual suspect" (para. 42), and its application "will by necessity be contextual" (para. 47). Furthermore, *Oickle* does not state that any *quid pro quo* held out by a person in authority, regardless of its significance, will necessarily render a statement by an accused involuntary. … *Inducements "becom[e] improper only when . . . standing alone or in combination with other*

> *factors, [they] are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne"* (para. 57).
>
> ...
>
> Therefore, *while a quid pro quo is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.* [Underscoring and italicization added.]

In *R. v. Belle*, 2010 ONSC 1618, at para. 40, Trotter J. characterizes the last quoted paragraph as imposing "an important gloss on Oickle", one that "requires a more searching inquiry into the nature and strength of the promises or inducements in question".

[29] The somewhat hoary formulation of the appropriate standard as one focused on "*whether the will of the subject has been overborne"* appears on a number of occasions in *Oickle*. The meaning and application of this locution must be contextually mediated, as is helpfully developed in the dissenting opinion in *Spencer*. Fish J.'s analysis (in which Abella J. concurred) does not reflect any disagreement with the majority as to the prevailing law. It rests, rather, on the view that the trial judge, in relying on the Alberta Court of Appeal case of *R. v. Paternak* (1995), 101 C.C.C. (3d) 452 (a case Fish J. characterized, at para. 26, as "related to exclusion of a statement under the 'operating mind doctrine'") had "applied the wrong legal standard". Fish J. went on to explain the use of the language of an accused's "will [being] overborne" in the context of inducement-driven confessions, at paras. 27, 28, 30 and 32:

> In deciding that the free will of the respondent was not *overborne*, within the meaning of *Oickle*, [the trial judge] evidently understood that the influence of any inducement held out by the officer "must be so overbearing that it can be said that the detainee has lost any meaningful[l] independent ability to choose to remain silent, and has become a mere tool in the hands of the police". [Underscoring in original.]

> *Ibrahim* established no such standard for determining the voluntariness of a statement given by the accused *as a result of threats or promises* made or held out by a person in authority. Neither did *Oickle*. [Italicization added.]
>
> …
>
> Nothing in *Oickle* has narrowed the scope of this rule, which presupposes that a statement given by the accused to a person in authority was the product of an operating mind. If the statement is *not* the product of an operating mind, it will be considered involuntary *on that ground*. [Italics in original.]
>
> …
>
> In [cases involving threats or promises], the will of the detainee has not been "overborne" in the sense that he or she "has lost any meaningfu[l] independent ability to choose to remain silent" (*Paternak*, at p. 461); rather, the will of the detainee is said to have been "overborne" only in the sense that he or she would not otherwise have given a statement but was persuaded to do so in order to achieve an expected result — to avoid threatened pain or achieve promised gain. *A statement thus given is the result of a calculated decision by an operating mind; it is nonetheless considered "involuntary" for the reasons set out in both Ibrahim and Oickle.* [Italicization added.]

[30] Police trickery aside, an inquiry into voluntariness is primarily focused on an accused's ability to make a meaningful choice whether or not to confess and on the state's role, if any, in subverting or compromising that choice. In the end, and with one small (and parentheticized) emendation, I am inclined to agree with Clark J.'s plain-English assertion of the appropriate test as set out in *R. v. Williams*, 2013 ONSC 1399, at para. 51: "Speaking generally, for a threat [or promise] to vitiate the voluntariness of a statement, it must be such that it could meaningfully be said that it might have influenced the accused to make the impugned statement".

[31] The relationship between the basement statement, if ruled inadmissible, and that obtained at 11 Division also attracts critical scrutiny. It has long been settled that a finding of involuntariness may contaminate receipt of a subsequent statement from the same accused. Sopinka J. canvassed the

doctrine of "tainting", so-called, on behalf of the Supreme Court in *R. v. I. (L.R.) and T. (E.)*, [1993] 4 S.C.R. 504, at paras. 30-32:

> Under the rules relating to confessions at common law, the admissibility of a confession which had been preceded by an involuntary confession involved a factual determination based on factors designed to ascertain the degree of connection between the two statements. … [Citations omitted.] No general rule excluded subsequent statements on the ground that they were tainted irrespective of the degree of connection to the initial admissible statement. In this regard I adopt the language of Laskin C.J. in *Hobbins* [*v. The Queen*, [1982] 1 S.C.R. 553], at p. 558, when he states:
>
> > There can be no hard and fast rule that merely because a prior statement is ruled inadmissible a second statement taken by the same interrogating officers must be equally vulnerable. Factual considerations must govern, including similarity of circumstances and of police conduct and the lapse of time between the obtaining of the two statements.
>
> In applying these factors, a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement. …
>
> [T]he fact that a caution or warning had been given or that the advice of counsel had been obtained between the two statements was a factor to be considered but it was by no means determinative. While such an occurrence went a long way to dissipate elements of compulsion or inducement resulting from the conduct of the interrogators, it might have little or no effect in circumstances in which the second statement is induced by the fact of the first.

(See, also, *R. v. T. (S.G.)*, [2010] 1 S.C.R. 688, and *R. v. G. (B.)*, [1999] 2 S.C.R. 475.)

[32] And finally: the task of determining "the strength of the inducement, having regard to the particular individual and his or her circumstances" inevitably commands close examination of the record of the exchange resulting in an alleged confession. The integrity of that record may, accordingly, assume considerable significance in the assessment of voluntariness and, in particular, whether the Crown had met it legal obligation. As said by the Court of Appeal in *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493, at para. 67,

"the completeness, accuracy and reliability of the record have everything to do with the court's inquiry into and scrutiny of the circumstances surrounding the taking of the statement".

[33] The advent of recording technology, where utilized, has reduced many of the attendant concerns. While "[t]his is not to suggest", as said in *Oickle*, at para. 46, "that non-recorded interrogations are inherently suspect", it is also the case, the Court continued, that "when a recording is made, it can greatly assist the trier of fact in assessing the confession". Other than an off-camera preliminary exchange, it appears that the police station interview of the defendant is here video-recorded. However, the record of the basement statement is entirely composed of the recall of the two interrogating officers whose testimony is troublingly inconsistent as to content, sequence and moving party. Predictably, the quality of the record of the basement statement factors into its voluntariness evaluation, the matter to which I now turn.

(ii) Applying the Law: The Basement Statement

[34] The defendant was separated from his family and escorted to the basement of the house within five minutes of the police entry. He was cuffed and under arrest. He had already been provided with his rights to counsel by Det. Cioffi. Cioffi had neither a note nor an independent recall as to whether the defendant sought to contact counsel, but he could not deny the possibility. The defendant's removal to the basement was not in aid of implementing his s. 10(b) Charter rights, nor did Dets. Dodds or Ladner reread or remind the defendant of them. I am mindful that claims for constitutional relief cannot be advanced in the course, as here, of a preliminary inquiry. Nonetheless, the police failure to afford access to counsel, like the defendant's isolation in the basement, are part of the atmospherics that bear on the question of voluntariness.

[35] On the initial accounts of Dodds and Ladner, the defendant could not have been more co-operative, more eager to confess to the crime of possession of cocaine or more anxious to assist the police in locating the drug. Only in cross-examination, did Dodds concede that he had first threatened to turn the house upside down if the defendant did not tell him where the drugs were hidden. Dodds also acknowledged that the defendant repeatedly expressed concern about the fate of his pregnant wife [redacted] and that, in response, Ladner effectively negotiated an arrangement with the defendant whereby the latter's wife would not be charged if the defendant provided a video statement admitting ownership of the cocaine. I appreciate that Ladner's evidence as to the evolution of his agreement with the defendant is somewhat different. However, in view of the inconsistencies between his and Dodds' accounts (a matter to which I soon return) I cannot positively determine whether the defendant or the officer instigated this arrangement. I have no doubt, however, that an agreement was reached whereby some consideration would be extended to the defendant's wife in exchange for the defendant providing a video statement accepting ownership of the drugs. This bargain is affirmed in the subsequent videotaped statement. Indeed, the video of the defendant's statement at 11 Division strongly suggests that it was the police who initiated the exchange of spousal leniency for the defendant's confession.

[36] Although claiming not to have heard Dodds' threat to toss the house, Ladner agreed Dodds' words, if spoken, could well have prompted the defendant's confession. And Dodds agreed that Ladner's proposal respecting the favourable treatment of the defendant's wife in exchange for his admission was as an offer of "leniency". Crown counsel fairly concedes that the words employed by both officers in the basement amount to "inducements", and all but concedes the existence of a reasonable doubt respecting the voluntariness of any statements made by the defendant before leaving the house.

[37] There is nothing tentative about my doubt in this regard. Adopting the language of *R. v. Williams, supr*a, it can "meaningfully be said that [the officers' threats and promises] might have influenced the accused to make the impugned statement". Nor does the state of the record of the basement exchanges persuade me that the defendant's resolve was not impacted by the officers' inducements. Ladner's denial that he heard Dodds' threat to tear the house apart is difficult to reconcile with the description afforded of the compact nature of the basement interrogation space. No witness confirms Dodds' assertion that he passed the drug-related information he received from the defendant to other members of the search team. Dodds' claim that he first learned that drugs were located after the defendant's confession and just before he was transported to the station directly contradicts Ladner's testimony regarding both the timing of such knowledge and its sequence in the defendant's "unprompted" admissions. In short, the officers' accounts of whatever occurred in the basement afford me no confidence as to the dynamic of the police interaction with the defendant or that, in the end, his admissions were not the product of his "will being overborne" by the officers' inducements.

[38] In the result, I am not satisfied that the basement statement was voluntary. Accordingly, it will not be admitted into evidence at this trial.

(iii) Applying the Law: The Videotaped Statement

[39] The video-recording of the defendant's interview at the police station puts to rest any real concerns respecting the accuracy or completeness of the record of the taking of that statement. Although preceded by some "off air" discussion, its content appears to have been incorporated into the taped exchange and attracts no complaints from the defence.

[40] There remains, however, a legitimate concern respecting the close nexus between the police station statement and the basement statement I have ruled inadmissible. The two statements are taken within an hour of each other, in similar circumstances and by the same officers. The focus of the inquiry is identical and the second interview repeats the inducements and references the contents of that earlier conducted in the basement. Crown counsel argues, in effect, that any "tainting" impact of the first interview is purged by the police offer to interrupt the second to afford the defendant access to counsel.

[41] I am not persuaded, however, that, in the totality of circumstances, the police offer of access to counsel amounts to more than token nominalism. The defendant had by then been advised of his right to counsel on three or four occasions. On every occasion for which an officer has a note or an independent memory, the defendant indicated he understood the s. 10(b) advisory and accompanying cautions, that he had nothing to say, and that he wished to speak to counsel. The defendant was assured by the transporting officers that contact with counsel would be facilitated when he arrived at the 11 Division. Despite these assurances, neither the escort officers nor any others then at the station made any effort to implement the defendant's right to counsel – until the defendant found himself in the midst of the very video-taped interview that, on my construction of the global record, is presented to him as the exclusive key to avoiding his wife being charged.

[42] The defendant's waiver of the police offer to first allow him to "speak to a lawyer" is hardly evidence of voluntariness. On my read, it is more likely that the defendant declines the offer because he fears speaking to counsel may imperil realization of the "promise" of "leniency" for his wife that initially influenced his decision to provide an inculpatory statement. As he says, "if this isn't going to screw me over then *I have to do this*. I want my wife." Nor

does Ladner, who conducts the interview, miss any opportunity to underscore what's at stake for the defendant and the contingent relationship between the police indulgence and provision of the defendant's videotaped confession. Asked who else was in the house when the police kicked in the door, the defendant answers, "My wife and kid". Although unnecessary for any purpose other than to reinforce the strength of the inducement, Ladner immediately reminds the defendant, "Your *pregnant* wife?" Upon the defendant agreeing, Ladner then makes clear that the defendant's wife and child are "not under arrest *right now*" and that, in effect, preservation of that position depends on the defendant's acceptance of sole ownership of the cocaine – or, in Ladner's word, "that's why they're not under arrest and you are, right?" Although the defendant had by then satisfied his end of the bargain, Ladner, concludes the taped interview by identifying himself as the moving party in the negotiations and by repeating the inducement that thematically informs the entire interrogative process: "I didn't offer you anything", he says, "other than that – your pregnant wife and your child".

[43] One's "pregnant wife and [one's] child" is no small inducement. This is a linear *quid pro quo* arrangement in which the extension of clemency to a pregnant spouse is to be exchanged for the defendant's confession. In these circumstances, and on its own terms, I am not persuaded that the accused's statement was voluntary. As said in *Oickle*, at para. 49, "An explicit offer by the police to procure lenient treatment in return for a confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances".

[44] Further, and here applying *R. v. I. (L.R.) and T. (E.), supra,* I am of the view that the videotaped confession is also involuntary because "the tainting features which disqualified the first confession continued to be present or the

fact that the first statement was made was a substantial factor contributing to the making of the second statement". To be clear, I am of the view that both of these contaminating features here obtain but, in particular, the first. As put by the Court of Appeal in *R. v. Caputo* (1997), 114 C.C.C. (3d) 1, at 13:

> [T]he onus is on the prosecution to establish that the effect of any threat or inducement that had rendered the earlier statement inadmissible did not continue to operate at the time of the taking of the subsequent statement.

That onus is not here met.

[45] I appreciate, of course, the eagerness with which the defendant sought to answer his interrogator's questions. I find, however, that this speaks more to the strength of the inducement and the emotional vulnerability of the defendant than any unprompted contrition or desire to confess absent the influence of the police "promise". I also appreciate that in *R. v. Spencer, supra*, the majority of the Supreme Court affirmed the trial court's decision to admit an incriminatory statement in circumstances where the accused sought favourable treatment for his girlfriend. That case, in my view, is clearly distinguishable from the instant matter. Unlike the defendant before me, the accused Spencer was a "mature and savvy participant" in the criminal justice system who endeavoured to manipulate a very lengthy interrogation to his own advantage. Further, as found by the trial judge, there was simply "no offer of leniency" made in that case. As said by the learned authors of the 4th Edition of *The Law of Evidence in Canada* (S.N. Lederman, A. W. Bryant and M.K. Fuerst, LexisNexis Canada, 2014, at 455), "voluntariness is to be assessed contextually, and each judgment is fact specific". At the risk of repetition, the police here exploited the defendant's anxiety about the fate of his pregnant wife through an express inducement that may well have caused him to incriminate himself. In these circumstances, I am not satisfied to the

requisite standard that his videotaped confession was voluntary. Accordingly, it too is excluded from evidence at this trial.

(c) The Sufficiency of the Circumstantial Evidence

(i) Introduction

[46] Given my rulings respecting the inadmissibility of the two statements taken from the defendant, the prosecution's theory of committal rests entirely on circumstantial evidence. The defendant was not found in physical possession of the cocaine. Nothing he said (at least nothing admissible) ties him to the drug. At simplest, the defendant is located in the same house in which cocaine is found. The question, then, is whether any additional threads of circumstantial evidence connecting the defendant to the prohibited drug are sufficient, as a question of law, to leave his fate to a trier of fact.

(ii) The Governing Law

[47] The venerable test for committal following a preliminary inquiry is set out in *U.S.A. v. Shephard*, [1977] 2 S.C.R. 1067: "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty." There is little room for judicial discretion. A judge presiding at a preliminary inquiry "must", as said in *R. v. Arcuri*, [2001] 2 S.C.R. 828, at para. 21, "commit the accused to trial 'in any case in which there is admissible evidence which could, if it were believed, result in a conviction': *Shephard*, at p. 1080". The assessment of witness credibility is not part of a presiding judge's task.

[48] The *Shephard* standard – generally abbreviated as the "any evidence" or "some evidence" test – obtains whether the evidence is direct or circumstantial. In the latter case, however, a limited weighing of the evidence is required because of the inferential gap between the evidence and the matter to be established. In other words, there must be a determination by the justice

presiding at the preliminary hearing as to whether the circumstantial evidence is reasonably or rationally capable of supporting the incriminatory inferences the Crown invites: *R. v. Arcuri, supra*, at para. 23. If it does, a committal must follow for the offence or offences charged or those arising from the same transaction. On the other hand, the accused must be discharged if "no sufficient case is made out to put the accused on trial": s. 548(1) of the Criminal Code. (See, generally, *R. v. Arcuri, supra,* and *R. v. Magno* (2006), 210 C.C.C. (3d) 500 (Ont. C.A), at para. 15, and *R. v. Munoz* (2006), 205 C.C.C. (3d) 70, at paras. 18-22 (Ont. S.C.).)

[49] Not infrequently, and as here, there is a legitimate dispute as to the permissible scope of the inferences available on a circumstantial evidentiary record. The law, at bottom, is that any reasonably and logically available inference consistent with guilt mandates committal. (See *Munoz, supra*, at paras. 23-31.) Even robust benign inferences must yield to committal where a rational inculpatory inference also lies. As said by the Court of Appeal in *R. v. Magno, supra*:

> [I]t is jurisdictional error … for a justice presiding over a preliminary inquiry to discharge where there are competing inferences in the evidence and one of those inferences supports the charge before the court.

[50] However, incriminatory inference-drawing is not infinitely elastic. While the line is sometimes obscure, the principle is well recognized: inferences that neither rationally or logically flow from the evidence or which, put otherwise, are speculative cannot ground committal. (See, in addition to the earlier-cited authorities, *R. v. Figueroa* (2008), 232 C.C.C. (3d) 51 (Ont. C.A.), at para. 41.)

[51] Further, the question of sufficiency of evidence must be assessed by reference to the ultimate burden on the Crown to prove the case beyond reasonable

doubt. As said by McLachlin J. (as she then was) in *R. v. Charemski*, [1998] 1 S.C.R. 679, at para. 35:

> "[S]ufficient evidence" must mean sufficient evidence to sustain a verdict of guilt beyond a reasonable doubt; merely to refer to "sufficient evidence" is incomplete since "sufficient" always relates to the goal or threshold of proof beyond a reasonable doubt. This must constantly be borne in mind when evaluating whether the evidence is capable of supporting the inferences necessary to establish the essential elements of the case.

Although writing in dissent, this passage from now-Chief Justice McLachlin's opinion was quoted approvingly by the Court of Appeal in *R. v. Turner,* (2012), 292 C.C.C. (3d) 69, at para. 16.

(iii) Applying the Law

[52] The question of sufficiency here relates to the evidence said to support the inference that the defendant was in constructive possession of the cocaine seized on April 9, 2013. Unlike many cases involving the execution of a search warrant and subsequent drug seizure, other than his presence in the targeted house there is little or no evidence connecting the accused to that house, let alone the drugs located therein. There is, for example, no evidence from which it can be inferred that the defendant was the owner or lessee of or a tenant at the property. Nor is there evidence of any documents in the house – such as correspondence, identification or prescriptions – bearing the defendant's name. Two cars were apparently located in the driveway but, again, no evidence connects them to the defendant and, in turn, the searched residence. Nor is there any evidence directly connecting the defendant to the master bedroom, let alone the cocaine found in that room. Further, no evidence of proceeds of crime was located, and certainly none attributable to the defendant. All that said, what must be borne in mind is that the critical focus for purposes of a sufficiency assessment at the conclusion of a preliminary hearing is not what connections, however conventional, are absent

but whether those that do exist support committal. The appropriate inquiry requires consideration of the "whole of the evidence".

[53] The Crown's position is that, viewed cumulatively, the defendant's presence in the house (albeit in the kitchen), his mode of dress (short pants and a tank top), the location of the drugs in a master bedroom containing both male and female clothing, the retrieval of the defendant's change of clothes from the same room and the marijuana sitting in plain view in the living room support the inference of the defendant's constructive possession of the cocaine.

[54] With all due respect, I am simply not persuaded that the requisite inferences – that is, that the defendant had knowledge and control of the seized drugs – are reasonably, as opposed to speculatively, available on the record before me. While I appreciate that a holistic assessment is mandated, scrutiny of the primary facts lends no comfort to the Crown's position. The defendant was found nowhere near the bedroom in which the drugs were secreted. His dress, while fairly described as casual, does not suggest an intimate association with the residence and, even if it did, none that speaks to his being a resident or occupant of those premises. The presence of male (as well as female) clothes in the master bedroom adds nothing significant to the calculus absent, as here, any basis to conclude that the male clothing belonged to the defendant. Similarly, the collection of male outerwear for the defendant from that same room is of no probative moment given that it was the police who retrieved the clothing without, on the admissible evidence before me, any indication that the defendant participated in this exercise or otherwise identified the room as his. Finally, the presence of marijuana in the living room, no matter how physically proximate to the defendant, is an entirely neutral fact. Even if the defendant had knowledge of that marijuana (a supposition, at best), there is no evidence from which it can be reasonably inferred that he had any control of it

or, more importantly, that even constructive possession of marijuana can properly support inferences of knowledge and control of cocaine hidden in a bag in the bottom drawer of a cabinet on another floor.

[55] I find the above-noted case of *R. v. Turner, supra*, of particular assistance in resolving the matter before me. The accused in *Turner* was found just inside the doorway of a bedroom as the police forcibly entered an apartment. His driver's license was found on the floor of the same bedroom. Substantial amounts of cash were found on the night table and between mattresses in the same room, and in the pockets of two pairs of jeans in the room's closet. A loaded handgun was located in the same closet. The justice presiding at the preliminary inquiry discharged the accused of the five charges he faced arising from the finding of the gun. On Crown application for *certiorari* and *mandamus*, a judge of the Superior Court of Justice quashed the discharge and ordered the accused's committal. On further review, the Court of Appeal quashed the Superior Court orders and reinstated the preliminary inquiry judge's order discharging the accused. Armstrong J.A., writing for the Court of Appeal, concluded, at para. 26:

> I now turn to the question whether the combination of the appellant standing alone in the bedroom at 5:00 a.m. with his driver's license on the floor leads to the conclusion that there was sufficient evidence to establish knowledge and control of the gun. I am satisfied that the combination of those facts does not change the conclusion reached by the preliminary inquiry judge.

[56] My conclusion, like that ultimately affirmed in *Turner*, is that a reasonable and properly instructed jury could not return a verdict of guilty on a charge of possession of the seized cocaine. Accordingly, the defendant is discharged.

D. CONCLUSION

[57] For the reasons just recited, the defendant is discharged respecting the two charges on which he was arraigned.

Released on October 8, 2014.

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Justice Melvyn Green