Citation: R v F (JM), 2022 MBCA 52
Date: 20220608
Docket: AY20-30-09545

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Marc M. Monnin
Madam Justice Karen I. Simonsen

B E T W E E N :

HER MAJESTY THE QUEEN	)	***E. J. Roitenberg*** and ***K. D. Minuk*** *for the Appellant*
Respondent	)	
	)	***C. R. Savage***
- and -	)	*for the Respondent*
	)	
J.M.F.	)	*Appeal heard:* ***December 14, 2021***
(Young Person) Appellant	)	
	)	*Judgment delivered:* ***June 8, 2022***

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On appeal from 2019 MBQB 57; and 2020 MBQB 161

MONNIN JA

[1] The appellant, a 16-year-old youth at the time of the events leading up to this appeal, appeals his conviction for first degree murder arising from a shooting incident. The appellant also seeks leave to appeal and, if granted, appeals his sentence. The victim was shot in the street not far from the appellant's home. The shooting was recorded on a cell phone but it was not possible to identify the shooter from the video.

[2] After a trial with a judge alone, the trial judge reached the conclusion, based on circumstantial evidence, that the appellant was the shooter. He did so relying, in part, on a number of text messages obtained from a cell phone.

[3] The appellant's cell phone was seized at the time of his arrest at his father's home after he made a statement identifying it. The trial judge held a *voir dire* (see 2018 MBQB 156 (the *voir dire* decision)) with respect to the admissibility of the cell phone and its contents. While he found a breach of section 10(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) to the effect that the statement identifying the cell phone was made without the appellant receiving his rights pursuant to that section, after a section 24(2) analysis, he admitted the statement and the information derived from the cell phone.

[4] While the appellant raises a number of grounds of appeal other than those relating to the admissibility of the cell phone and its contents, I am of the view that the trial judge erred in his rulings on the admissibility of the statement, the cell phone and its contents. This evidence was material and likely affected the trial judge's reasoning as to why the Crown had met its onus. For the reasons that follow, I am of the view that the appeal should be allowed and the matter remitted back to the Court of Queen's Bench for a new trial.

Background

[5] A brief description of the events will help to place things into context.

[6] From messages obtained from the appellant's and the victim's cell phones, as well as from Facebook records, it appears that the victim arranged to meet with the appellant to fight on the evening in question. In the message exchange, they stipulated that no weapons or backup were to be brought and the police were not to be contacted.

[7] The victim arrived at the scene in the company of two individuals: one, M.P., used her cell phone to record the event. While she was not called as a witness at the trial, the other individual confirmed the accuracy of what was described on the video recording; namely, that the victim exited the vehicle and walked towards an individual whose facial features were not identifiable. Two gunshots can be heard on the video recording. Evidence from the scene and the autopsy confirmed that the victim was shot with a .22-calibre bullet which was consistent with the calibre and make of the ammunition seized at a later time from the appellant's bedroom. No firearm was located, but photographs extracted from the appellant's cell phone and Facebook records showed images of at least three firearms, one of which was a rifle of a calibre and with ammunition which were consistent with the bullet casing found at the scene and which could be used with that type of firearm.

[8] The appellant also sent text messages to M.P. after the events although he made efforts to delete them. They included comments which could be interpreted to place the appellant at the scene and the appellant admitting being involved in the shooting. As well, the communications on the appellant's cell phone between the appellant and his sister after the events detail what was happening at the home when the police arrived and amount to attempts by the appellant to hide his involvement.

Police Investigation and Seizure of the Cell Phone

[9] As a result of Facebook messages found on the victim's cell phone, the police suspected the appellant. They obtained information about the appellant's devices and telephone numbers from his mother and, using this information, obtained a search warrant for her residence where the appellant resided to authorize the seizure of those devices. The appellant obtained legal advice and his counsel told police that he wished to turn himself in. Arrangements were made for him to do so at his father's home and that counsel would be present at the police station for his statement to the police (see the *voir dire* decision at para 12).

[10] Two police officers arrived at the appellant's father's home, were invited inside into the foyer and, in the presence of the appellant's parents and sister, told him that he was under arrest. At that time, he was not advised of his right to counsel or of his right to remain silent. The police officers testified that their decision was motivated by the confines of the foyer, the number of people present and a concern for the appellant's privacy. They believed the enhanced safety and control in the police vehicle would be a better place to do so (*ibid* at para 55). One of the police officers asked the appellant if he had all his personal property and, specifically, if he had his cell phone. The police officers testified that this enquiry was according to standard practice. In response to the enquiry as to his cell phone, the appellant stated at first that he had disposed of it but, a few seconds later, stated that it was actually within his father's home but would not be turned over. At that moment, the appellant's sister took a cell phone out of her pocket and the appellant stated, "That's my phone", and said that his sister would hold onto it. When one of

the police officers approached the appellant's sister, she turned away but the officer took the cell phone from her hand.

Evidence on the Voir Dire

[11] The *voir dire* disclosed that the cell phone was owned by the appellant's mother who also paid the phone bill. However, she never used the cell phone, did not know the password and was of the view that the cell phone belonged to the appellant (see para 14). The cell phone was password protected and the trial judge found that the appellant was the principal user of the cell phone and had a direct interest in it (see paras 20, 46).

[12] The appellant was given his full rights and caution after being placed in the police car. He stated that he wanted his lawyer present during questioning. When the appellant attempted to discuss the case during the drive to the police station, the officers reminded him of his right to remain silent. At the police station, in the presence of his mother but prior to the arrival of counsel, one of the police officers reviewed with the appellant in a recorded session the circumstances of the arrest. During that review, the police officer asked the appellant to confirm that he had identified the seized cell phone as his, which the appellant did (see para 17). The officers testified that this review of the circumstances of an arrest is standard procedure and the trial judge accepted it as such (see para 56).

[13] A warrant was obtained to search the contents of the appellant's seized cell phone and it was agreed by the Crown on appeal that the Information to Obtain (ITO) included the appellant's statement that the cell phone was his.

Voir Dire Decision

[14] Defence counsel moved to exclude the statement as to ownership, the cell phone and the information contained on it on the grounds that the statement and cell phone were obtained in breach of the appellant's rights under sections 8 and 10(b) of the *Charter*.

[15] The trial judge concluded that the appellant's right to counsel was breached. He did so noting that the police understood that the cell phone and other electronic devices were of significant interest in the investigation. While he accepted that the request to gather the cell phone may be standard practice in many cases, he was of the view that it was not in this situation given that the police knew of the appellant's request to have counsel present, that the cell phone was likely an important piece of evidence and that there was no immediate danger to the police. He concluded that it would therefore have been prudent to inform the appellant of his right to counsel at the time of detention notwithstanding the view of the police officers that the use of the police car was a better location for the formal charge and caution. The trial judge was of the view that the police officers did not act maliciously or in bad faith.

[16] As to the seizure of the cell phone, the trial judge concluded that the seizure of it, while warrantless, was nevertheless reasonable. He further found, on the basis of the Supreme Court of Canada decision in *R v Marakah*, 2017 SCC 59, that the subject matter of the search was the electronic information contained on the cell phone and not the cell phone itself. As a result, since a warrant was obtained to search the contents, there was no breach of section 8 of the *Charter*. He also concluded that, while the appellant was

the principal user of the cell phone and had a direct interest in it, his interest was not exclusive or governing. The appellant's mother ultimately retained a right to deal with the cell phone. He noted that, while the appellant may have had a subjective expectation of privacy regarding the cell phone, it was not clear whether that was with respect to the cell phone itself or the information contained on it. Similarly, he was of the view that the objective expectation of privacy only related to the contents of the messages and not the cell phone itself. Given that the focus was on the informational content of the cell phone and not the cell phone itself, he found that there was no unreasonable seizure of the cell phone.

[17] Having found that there was a breach of section 10(b) of the *Charter*, the trial judge proceeded to conduct a section 24(2) analysis as to whether the admission of the evidence would bring the administration of justice into disrepute. For the purposes of his section 24(2) analysis, he assumed that the cell phone seizure was an unreasonable search in breach of section 8 of the *Charter*. On the question of the seriousness of the *Charter* breach, he held that, while there was no bad faith or malice, he did not believe the enquiry specifically about the cell phone was appropriate on the particular facts of this case. While not saying so directly, it would appear that he did not consider the breach as very serious.

[18] In his section 24(2) analysis, although raised by defence counsel as a basis for the exclusion of the statement, the trial judge did not appear to consider the provisions of section 146 of the *Youth Criminal Justice Act*, SC 2002, c 1 (the *YCJA*), which govern the taking of statements from youth who are detained or in custody. While he made allusion to the statement

not being part of the *res gestae* (an exclusion to the applicability of section 146) in his analysis, no mention is made of the fact that the statement was obtained without regard to the provisions of the *YCJA.*

[19] As to the impact of the breach on the appellant, the trial judge noted that Crown counsel's argument that the cell phone would likely have been discovered was not as strong as they invited him to find and, while of some weight, it was not, of itself, determinative. Finally, as to society's interest in adjudicating the case on its merits, he noted that the fact that the cell phone was identified by the appellant appeared to be important to the Crown's case since identification would be an issue, and concluded, from a societal point of view, that the truth-seeking function of the trial process was better served by admitting the evidence—not excluding it.

[20] After balancing the three factors, the trial judge concluded that, in all of the circumstances, admitting the statement, the cell phone and the information seized from the cell phone would not bring the administration of justice into disrepute.

Trial Decision

[21] Without reviewing at length the evidence relied upon by the trial judge to conclude that it, as a whole, satisfied him that the appellant shot the victim and did so in a manner which satisfied the requirements of a first degree murder charge, it is clear that the trial judge relied, in part, on the information from the cell phone to do so. He specifically mentioned the pre-shooting messages between the appellant and the victim setting up the encounter, and the compatibility between the bullet casing found at the scene and the firearm

depicted in the evidence extracted from the cell phone, as evidence supporting that conclusion. As well, he referred to the post-shooting conduct of the appellant, including his exchanges with M.P. and the deliberate deletion of text messages, as evidence which he considered in reaching that conclusion.

Appeal Proceedings

[22] The notice of appeal filed by the appellant raises a number of grounds of appeal. The first two grounds, which, in my view, are the salient ones for the purposes of the appeal, are that:

(1) the trial judge erred by admitting the contents of the appellant's cell phone following a finding that they were seized in relation to a breach of section 10 of the *Charter*; and

(2) the trial judge erred in ruling that no violation of the appellant's rights under section 8 of the *Charter* occurred pertaining to a search where the grounds of the search were obtained in violation of section 10 of the *Charter*.

[23] The balance of the grounds of appeal relate to the admission of prejudicial evidence and failing to properly deal with *R v Villaroman*, 2016 SCC 33, pertaining to circumstantial evidence and inferences or failing to address and apply the law as to planning and deliberation on a charge of first degree murder. In my view, only the first two grounds need to be addressed for the purposes of this appeal.

[24] As to the first ground relating to the section 10(b) *Charter* breach, at the hearing of the appeal, defence counsel (not the same counsel as at trial)

took a stronger position on the failure of the police to abide by the requirements of section 146 of the *YCJA* as a reason for the inadmissibility of the statement as to ownership made at the time of arrest. Defence counsel's argument was that the failure of the trial judge to recognize this fact prevented him from recognizing the significant impact it had on the section 10 *Charter* breach and the subsequent section 24(2) analysis. In the submission of defence counsel, without the statement, there was no basis for the seizure of the cell phone and, therefore, no likelihood of the contents of the cell phone being made available for the purposes of trial since there would have been no ability to connect the cell phone to the appellant and, therefore, no basis for the issuance of the warrant.

[25] At the hearing of the appeal, counsel for the Crown (also not the same counsel as at trial) explained that it had not fully addressed the argument on the impact of the breach of section 146 of the *YCJA* because the appellant's notice of appeal and factum did not focus upon that aspect of the argument. Nevertheless, the Crown took a principled and, in my view, commendable approach by conceding that, given the trial judge's findings as to *res gestae*, there was a likelihood that the statement was inadmissible as it did not meet the requirements of section 146 of the *YCJA* (see *R v LTH*, 2008 SCC 49). Crown counsel also admitted that, without the statement, there was no basis for the seizure of the cell phone and it was therefore an unreasonable search contrary to section 8 of the *Charter*. As well, without the cell phone, there would be no basis for the issuance of a warrant and the obtention of the contents was also therefore an unreasonable search under section 8 as a warrantless search.

[26] The Crown conceded that the failure to abide by the *YCJA* made the breaches that much more egregious. Given those concessions, the section 24(2) analysis performed by the trial judge was likely flawed and would have to be redone by this Court, taking into consideration the failure to abide by the requirements of section 146 of the *YCJA*. It was the Crown's position that, in doing so, this Court would have to consider the fact that the Crown did seek a warrant as an indication of its good faith on the issue of the seriousness of the breach. As well, the Crown argued that discoverability was a factor that militated in favour of the admission of the cell phone and the evidence flowing from it.

Standard of Review

[27] As this appeal has developed, the two grounds of appeal which need to be addressed, namely, grounds (1) and (2), deal with breaches of sections 8 and 10(b) of the *Charter*. The standard by which this Court is to review the issue of whether there was a *Charter* breach was discussed in *R v Farrah (D)*, 2011 MBCA 49 as follows (at para 7):

> By which standard is this court to review the issue of whether there is a *Charter* breach? There are several components to this question. They are as follows:
>
> a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
>
> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether there was an error. On this part of the

> review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant* [*R v Grant*, 2009 SCC 32] at para. 129).
>
> c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).
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> d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant* at para. 86, and *R. v. Beaulieu*, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).

[28] The issue of whether the trial judge properly applied the provisions of section 146 of the *YCJA* in his determination of the breach of section 10(b) of the *Charter* and the consequences that flowed as a result is a question of whether the proper legal principles were applied. That would be determined on a standard of correctness.

Analysis

The Appellant's Statement: "That's my phone" and Section 146 of the YCJA

[29] In his *voir dire* reasons, the trial judge found that the statement of the appellant, "That's my phone", was obtained in breach of his right under section 10(b) of the *Charter* to be advised, immediately upon his arrest, of his right to counsel. While it was alluded to by defence counsel in their

submissions to him, the trial judge did not refer to the provisions of section 146 of the *YCJA*, which deal with the admissibility of statements of a young person (the relevant provisions of section 146 are reproduced in the appendix attached to these reasons).

[30] In *LTH*, Fish J, writing for the majority, provided an overview of section 146 of the *YCJA* and stated (at paras 2-4):

> Section 146 gives statutory expression to common law rules and constitutional rights that apply to adults and to young persons alike. It provides, for example, that no statement by a young person to a person in authority will be admissible in evidence against that young person unless it is voluntary. And it reaffirms the right to counsel enshrined in s. 10 of the *Canadian Charter of Rights and Freedoms*.
>
> Parliament has recognized in this way that the right to counsel and the right to silence are intimately related. And that relationship is underscored in s. 146 by the additional requirements that must be satisfied in order for statements made by young persons to be admissible against them at their trials. Parliament has in this way underscored the generally accepted proposition that procedural and evidentiary safeguards available to adults do not adequately protect young persons, who are presumed on account of their age and relative unsophistication to be more vulnerable than adults to suggestion, pressure and influence in the hands of police interrogators.
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> Accordingly, s. 146 provides that statements made by young persons are inadmissible against them unless the persons who took them "clearly explained to the young person, <u>in language appropriate to his or her age and understanding</u>", the specific rights conferred by s. 146. This condition of admissibility has been referred to as the "informational requirement" of s. 146 and it raises two questions that, again, are intimately related.

Fish J also confirmed the standard of proof required to satisfy a court that the provisions of section 146 had been met was that of beyond a reasonable doubt.

[31] In addition, Fish J noted the difference between the concept of exclusion of otherwise admissible evidence and the question of the admissibility in the first place of the evidence contained in the statement (at paras 44, 46):

> We are not concerned in this case with the exclusion of otherwise admissible evidence, as, for example, on an application by the accused under ss. 10*(b)* and 24(2) of the *Charter*. On the contrary, our concern is with the admissibility, at the Crown's behest, of incriminating evidence which Parliament has subjected to mandatory conditions set out in s. 146 *YCJA*.
>
> Parliament has considered it right and necessary to afford young persons rights and procedural safeguards which they alone enjoy. Young persons should not lightly be found to have relinquished this enhanced level of protection they were found by Parliament to require. Where a trial judge is not satisfied that the young person understood his or her right to consult counsel and a parent and to have those people present during the statement, or, is not satisfied that the young person appreciated the consequences of waiving those rights, the statement should not be admitted.

[32] In the more recent case of *R v Joseph*, 2020 ONCA 73, the Ontario Court of Appeal confirmed the obligation of satisfying section 146 of the *YCJA*, failing which the statement is not admissible. Fairburn JA discusses section 146(2) as follows (at paras 21-22):

> Section 146(2) makes a young person's statement presumptively inadmissible unless the Crown dislodges that presumption: *R. v. N.B.*, 2018 ONCA 556, 362 C.C.C. (3d) 302, at para. 86. To this end, the provision has been described as an admissibility rule that is "exclusionary by nature, but inclusionary by exception": *R. v. M.D.*, 2012 ONCA 841, 293 C.C.C. (3d) 79, at para. 44. It places the onus on the Crown to demonstrate beyond a reasonable doubt one of two things: (a) why the provision does not apply; or, (b) if the provision applies, that its statutory requirements were met.

> There are three statutory prerequisites to the operation of s. 146(2): (a) the youth is arrested; (b) the youth is detained; or (c) the "peace officer or other person has reasonable grounds for believing that the young person has committed an offence".

[33] As to the inter-relationship between the protections provided under section 146 of the *YCJA* and those provided under section 10(b) of the *Charter*, the Ontario Court of Appeal, in *R v NB*, 2018 ONCA 556, confirmed that section 146 was broader than the section 10(b) *Charter* rights and should be considered prior to the section 10(b) analysis. Pepall JA stated (at para 159):

> Although the appellant also relies on a breach of his right to counsel under s. 10(b) of the *Charter* to show that the trial judge erred in admitting his statements to police, I have focused my analysis on s. 146(2). As the appellant was entitled to rely on the protections under s. 146(2), and as the special protections afforded to young persons under this provision are broader than those afforded under s. 10(b) of the *Charter*, recourse to s. 10(b) is unnecessary.

[34] At the trial, the Crown argued that the statement made by the appellant was made spontaneously and, therefore, met the requirements of section 146. The trial judge disagreed as he found that the statement was not a spontaneous utterance but, rather, a response to an external stimulus to the actions of the appellant's sister and the totality of the events occurring around the arrest.

[35] The statement did not occur in a situation which could be described as a "technical irregularity". There was a definite enquiry by the police as to the whereabouts of the cell phone. While explained as being an adherence to protocol, the trial judge was of the view that there was a deliberate attempt to

locate the cell phone. In my view, this would not fall within the definition of a "technical irregularity" as found in section 146(6).

[36] As noted by Pepall JA in *NB*, this section is much more restricted in scope than the analysis that takes place under section 24(2) with respect to the admissibility of evidence after a *Charter* breach (see para 151). Pepall JA goes on to state the following: "Therefore, judicial discretion to rely on s. 146(6) to admit a statement obtained in contravention of 146(2) is significantly confined, reflecting the need to vigorously guard against the diminishment of the protections provided by s. 146(2) and the need for fair treatment for young persons" (at para 156). In *R v H (TJ) and C (ADW)*, 2021 MBQB 245, Martin J states (at para 40):

> . . .
>
> It would be inconsistent with the objectives and protections mandated by Parliament under the *YCJA*, if an officer's failure to inform a detained youth of a right, in its entirety, was rendered a "technical irregularity". The right is substantive, the requirement to inform the youth is also substantive not merely procedural. See ***R. v. S.S.***, 2007 ONCA 481 at para 46.

[37] In summary, where the violation of section 146(2) is serious and results in a young person not being informed of their rights under the *YCJA*, section 146(6) would not appear to be applicable.

[38] The only conclusion to be reached, based upon the wording of section 146 and the jurisprudence explaining it, is that the trial judge should have considered the failure of the Crown to prove beyond a reasonable doubt that the *YCJA* provisions had been met before ruling on the admissibility and use of the statement under section 24(2) of the *Charter*. In short, the statement

was inadmissible and the trial judge erred in not considering that fact in his analysis of the seizure of the cell phone and the validity of the warrant obtained to be given access to its contents.

The Section 10(b) Breach

[39] The trial judge did find that the appellant's right to counsel was breached. He also found that the practice of reminding the appellant to bring his cell phone, while maybe standard practice, does not suit all situations. He found as well that, where the detectives knew of the appellant's desire to have counsel present, the cell phone was likely an important piece of evidence and there was no immediate danger, prudence would dictate informing the detainee of the right to counsel at the time of detention. That finding is not under challenge in this appeal.

Derivative Evidence: The Seizing of the Cell Phone and the Warrant to Obtain Its Contents

[40] As a result of the appellant's statement, the police seized the cell phone. As I have set out above, given that the statement was unlawfully obtained—either as a result of a breach of section 146 of the *YCJA* or section 10(b) of the *Charter*—the cell phone is physical evidence discovered as a result of that statement and is derivative evidence as described in *R v Grant*, 2009 SCC 32.

[41] At the *voir dire*, the appellant challenged the validity of the seizure of the cell phone, arguing that it was in breach of section 8 of the *Charter* as an unreasonable search and seizure. The trial judge was of the view that, while the appellant may have had an expectation of privacy with respect to the

contents of the cell phone, he did not with respect to the device itself. He also was of the view that the appellant's mother retained the right to deal with the cell phone given that the contract was in her name and that she paid the bills for its use. He also found no objective expectation of privacy, relying upon the decision in *Marakah*.

[42] The trial judge's decision was issued shortly before the Supreme Court's release of its decision in *R v Reeves*, 2018 SCC 56. In that case, the Crown had argued that there was a distinction between the physical hardware and the subsequent warranted search of the data. Karakatsanis J, for the majority, specifically rejected this approach, stating (at paras 29-31):

> . . . [T]his Court has held that the subject matter must not be defined "narrowly in terms of the physical acts involved or the physical space invaded, but rather by reference to the nature of the privacy interests potentially compromised by the state action" (*Marakah*, at para. 15, citing *Ward* [*R v Ward*, 2012 ONCA 660], at para. 65). The guiding question is "what the police were really after" (*Marakah*, at para. 15, citing *Ward*, at para. 67).
>
> Here, the subject matter of the seizure was the computer, and ultimately the data it contained about Reeves' usage, including the files he accessed, saved and deleted. I acknowledge that the police could not actually search the data until they obtained a warrant (see *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 3 and 49). Nevertheless, while the privacy interests engaged by a seizure may be different from those engaged by a search, Reeves' informational privacy interests in the computer data were still implicated by the seizure of the computer. When police seize a computer, they not only deprive individuals of *control* over intimate data in which they have a reasonable expectation of privacy, they also ensure that such data remains *preserved* and thus subject to potential future state inspection.
>
> Thus, I disagree with the Court of Appeal's assertion that "[s]eizing the computer did not interfere with Reeves' heightened

> expectation of privacy in its informational content; it did not imperil any of his legitimate interests, beyond mere property rights" (para. 61). Clearly, the police were not after the physical device (to collect fingerprints on it, for example), but rather sought to preserve and permit access to the data it contained. To focus exclusively on the property rights at issue (that is, on Reeves' interest in *the computer*) neglects the important privacy rights in *the data* that are also engaged by the seizure.

[43] In *Reeves*, with respect to the accused's direct interest and subjective expectation of privacy in the computer and the data it contained, Karakatsanis J was quickly satisfied that these factors had been met, noting that he used the computer, which was password protected, and stored personal data on it (see para 32).

[44] With respect to whether the accused's subjective expectation of privacy was objectively reasonable, Karakatsanis J explained that, because privacy includes "control over, access to and use of information" (at para 33), the seizure of a computer engages important privacy interests when the purpose of the seizure is to gain access to the computer's data. She stated that "[p]ersonal computers contain highly private information", "act as portals — providing access to information stored in many different locations" (at para 34), and can retain information that users may have believed deleted. Karakatsanis J further explained that, "[b]y seizing the computer, the police deprived Reeves of control over this highly private information, including the opportunity to delete it. They also obtained the means through which to access this information. Indeed, these are the reasons why the police seized the computer" (*ibid*).

[45] Karakatsanis J concluded that "[t]he unique and heightened privacy interests in personal computer data clearly warrant strong protection, such that specific, prior judicial authorization is presumptively required to seize a personal computer from a home" (at para 35).

[46] While the *Reeves* decision related to the seizure of a personal home computer, the Supreme Court made it clear in the earlier case of *R v Fearon*, 2014 SCC 77, that it considers "smart phones" to be the "functional equivalent of computers" (at para 54) and that "[c]ell phones — locked or unlocked — engage significant privacy interests" (at para 53). It is therefore logical to conclude that Karakatsanis J's statements of law in *Reeves* apply equally to cell phones.

[47] The reasonable application of *Reeves* and *Fearon* suggests that the trial judge was in error when he determined that the appellant's privacy interests lay solely in the informational contents of the cell phone and, therefore, the seizure of the cell phone itself did not implicate any of the appellant's privacy interests (see the *voir dire* decision at para 49).

[48] As the trial judge erred in this regard, it is now necessary to perform a new analysis of the appellant's reasonable expectation of privacy. This requires, as indicated in *Reeves*, a review of four elements: "(1) the subject matter of the alleged seizure; (2) whether the claimant had a direct interest in the subject matter; (3) whether the claimant had a subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable" (at para 28).

[49] The subject matter of the seizure in this case is the appellant's cell phone and, ultimately, the data it contains.

[50] The trial judge accepted that, as principal user of the cell phone, the appellant had a direct interest in it (see the *voir dire* decision at para 46).

[51] With respect to the appellant's subjective expectation of privacy in the cell phone and its contents, the trial judge noted that the appellant's own statement that the cell phone was his was "perhaps . . . evidence of a subjective expectation of privacy in the cell phone . . . or the information contained in it" (*ibid* at para 47). The threshold for establishing this type of expectation of privacy is low and, ultimately, the fact that the appellant's mother testified that she considered the cell phone as his, that he was the sole user of the cell phone and that it was password protected, undoubtedly establishes the appellant's subjective expectation of privacy in both the cell phone and its contents (see *Reeves* at para 32).

[52] Finally, with respect to whether the appellant's subjective expectation of privacy was objectively reasonable, *Fearon* clearly indicates that cell phones, like computers, have unique and heightened privacy concerns associated with them. The seizure of the cell phone by the police effectively denied the appellant control over this highly private information, including the opportunity to delete it, and, in addition, they obtained the means through which to access his private information. Although the appellant's mother legally owned the cell phone, this does not automatically render the appellant's subjective expectation of privacy objectively unreasonable. Her evidence was that the appellant's control over the cell phone and its contents was essentially complete. She had given the cell phone to the appellant, had

never used it, was unaware of the password, considered it to be his, and had never taken or attempted to take the cell phone away from him. There was no evidence that anyone other than the appellant used the cell phone. The overall weight of the evidence in this case establishes that his subjective expectation of privacy was objectively reasonable. As established in *Reeves*, the apparent consent to the seizure of the cell phone by the appellant's mother could not waive his privacy rights in the cell phone.

[53] Therefore, the appellant had a reasonable expectation of privacy in the cell phone and the police seizure of it constituted a seizure within the meaning of the *Charter*. As there was no warrant to seize the cell phone at that location and the appellant had not provided informed consent to its seizure, it was presumably unreasonable and it fell to the Crown to rebut the presumption in this case.

[54] At trial, the Crown argued that the seizure of the cell phone could be justified either as authorized by section 489(2) of the *Criminal Code* (the *Code*) or as a search incident to arrest.

[55] However, on appeal, counsel for the Crown took the position that it was not relying on either of those arguments to justify the seizure. In Crown counsel's view, the findings of fact made by the trial judge on the circumstances of the seizure made reliance upon either of those avenues unavailable. There is no suggestion that the police were obtaining the cell phone as a result of a search incident to arrest. The arrest was complete and there was no security or evidence gathering occurring. This was not the appellant's residence. It was only as a result of the question posed by one of the police officers that the cell phone was produced by the appellant's sister.

The trial judge found that questioning inappropriate and in breach of the appellant's section 10(b) *Charter* rights. I agree with the Crown's position on appeal that section 489(2) of the *Code* is not engaged on the facts of this case and that it was not a search incident to arrest.

[56] The circumstances surrounding the arrest suggest that the police officers had no intent to search the home or any individuals present prior to leaving the home. Immediately prior to the appellant's statement about the cell phone being present in the home, the officers had no subjective belief that an incidental search of the appellant or the home would reveal any evidence relative to the murder. Their intention to seize was only formed after the appellant made his statement.

[57] Without deciding the issue, it is of concern that, if the seizure would be incidental to the arrest, it is directly attributable to a statement made in violation of section 10(b) of the *Charter*. As such, it is unlikely that it can be considered to be reasonable or to have been conducted reasonably.

[58] In summary, I am of the view that the seizure of the cell phone was unreasonable and, therefore, in breach of section 8 of the *Charter*.

[59] As conceded by Crown counsel on appeal, the warrant to search the cell phone was obtained as a result of the inclusion in the ITO of the statement that this was the appellant's cell phone. That statement was not admissible against the appellant for the purposes of the ITO. Without that statement, the cell phone was not subject to seizure. That seizure was unreasonable. The basis for the issuance of the warrant was therefore questionable. The

admissibility of the cell phone and its contents are therefore subject to a review under section 24(2) of the *Charter*.

Analysis Under Section 24(2) of the Charter

[60] Given that I am of the view that the trial judge erred in failing to give proper consideration to the effect of section 146 of the *YCJA* on the admissibility of the statement, as well as not considering the seizure of the cell phone as a breach of section 8 of the *Charter*, the trial judge's conclusions under section 24(2) as to the admissibility of the cell phone and its contents need not be subject to deference. However, the trial judge's underlying factual findings must be respected absent palpable and overriding error (see *Grant* at para 129).

[61] The proper approach to the exclusion of evidence under section 24(2) was set out in *Grant*. It requires a court to analyze the effect of admitting the evidence having regard to:

(1) the seriousness of the *Charter*-infringing state conduct;

(2) the impact of the breach on the *Charter*-protected interests of the accused; and

(3) society's interest in the adjudication of the case on its merits.

[62] It requires a balancing of the assessments under each of these enquiries to determine whether, considering all the circumstances, "admission of the evidence would bring the administration of justice into disrepute" (*Grant* at para 71). None of these factors should be permitted to consistently trump other considerations (see *R v Côté*, 2011 SCC 46 at para 48).

[63] The first breach is the violation of the appellant's section 10(b) *Charter* right to counsel by failing to immediately advise him of his right to counsel and to remain silent upon his arrest, and failing to ask him if he wished to speak to counsel and then asking questions of him. That breach was also compounded by the police conduct in not respecting the provisions of section 146 of the *YCJA*.

[64] There was also a violation of the appellant's section 8 *Charter* rights as the cell phone was seized without a warrant and it was not otherwise reasonable. The discovery of the cell phone was both temporally and causally connected to one or both of these infringements. It follows that the cell phone was obtained as a result of one or more *Charter* breaches and, as it was seized as a result of a statement made in breach of the *Charter*, it is derivative evidence, as discussed in *Grant* (see paras 131-32).

The Seriousness of the Breach(es) (or Conduct)

[65] In my view, both of these breaches were of a serious nature and as a result of police conduct which needs to be commented upon. The following factors should be taken into account respecting the seriousness of the violations:

(a) the failure to provide the appellant with his right to counsel without delay;

(b) although the police provided an explanation as to why they chose not to do so (given the space limitations and privacy concerns), it was in contravention of the longstanding law requiring police officers to provide section 10(b) *Charter* rights

to detainees immediately absent police officer safety concerns (see *R v Suberu*, 2009 SCC 33 at para 42);

(c) the officers not only failed to provide the appellant with his rights, but continued to question him and elicit information from him about an important piece of evidence they knew they were looking to obtain—the cell phone;

(d) while it was suggested by the police officers that it was "standard procedure" to ask detainees about their phones, the trial judge determined that the utilization of this procedure in these circumstances was inappropriate;

(e) such behaviour would suggest a cavalier attitude towards the *Charter* obligations under section 10(b) and the requirements of the *YCJA*;

(f) this was compounded at the police station where the officers had the appellant confirm on a video recording that he had identified the cell phone as belonging to him even though he had asked for counsel and it had been agreed that counsel would be present during his questioning, again contrary to the requirements of the *YCJA*;

(g) while the trial judge found that the police officers had not acted in bad faith when asking about the cell phone, but acted inappropriately, it should be remembered that an absence of bad faith does not equate to a positive finding of good faith (see *R v Le*, 2019 SCC 34 at para 147);

(h) the breach of the appellant's right to counsel should also be considered particularly serious given the nature of the offence, the serious consequences of a conviction and the concurrent failure to comply with section 146 of the *YCJA* when those requirements had been around for a very long time (see *R v LaFrance*, 2021 ABCA 51 at para 79); and

(i) as to the section 8 *Charter* violation, it has been established by the Supreme Court in the decisions of *Reeves* and *Fearon* that the breach is a serious one as the police officers should have been aware of the unique and heightened privacy interests in cell phones—similar to computers.

In summary, given those factors, I would find that the two breaches of the *Charter* are of a serious nature and the conduct of the police, in failing to provide the appellant with his *YCJA* and section 10(b) *Charter* protections, is of concern.

Impact of the Breach on the Charter-Protected Interests of the Appellant

[66] This analysis requires an evaluation of the extent to which the breach actually undermined the interests protected by the appellant's section 10(b) *Charter* rights and his section 8 *Charter* protections. The more serious the impact on the appellant's protected interests, the greater the risk to the public confidence in the administration of justice if the evidence is admitted.

[67] While derivative evidence, which could have been discovered without the appellant's unlawfully obtained statement, may attenuate the

impact of *Charter* violations, discoverability is not determinative (see *Grant* at para 122).

[68] In the present case, the following factors should be taken into account with respect to the impact of the *Charter* breaches on the appellant's *Charter*-protected interests:

(a) The initial section 10(b) *Charter* breach completely undermined the appellant's right to counsel and silence. Despite the fact that he did not intend or want to hand his cell phone over to the police, the first section 10(b) *Charter* breach led the appellant to tell the police that the cell phone was presently in the home and then to tell them that it was in his sister's hands. He did this without having been told of his right to counsel or being asked if he wanted to speak to counsel, which would have stopped any questioning by the police since subsequent events indicated that he would have invoked his right to speak to counsel (i.e., when given his rights in the police car, he said he wanted to speak to counsel and he had his lawyer's telephone number written on a piece of paper, not in his cell phone).

(b) Subsequent questioning at the police station further undermined his section 10(b) *Charter* rights as the police started video recording him and asked him to confirm that the cell phone they had seized was his even though he had asked for counsel to be present during questioning.

(c) As to discoverability, the trial judge gave some weight to the Crown's argument that the cell phone could have been discovered through its identification number; however, this represents a misunderstanding of the evidence as the identification number of the cell phone could only be ascertained if the cell phone was found by the police. There was doubt that the cell phone would have been seized during a search of the mother's home; thus, it cannot be said with any confidence that the cell phone would have been discovered in the absence of this statement. Discoverability was not a significant factor.

(d) The fact that the trial judge considered only discoverability when considering the impact of the breach on the appellant's *Charter*-protected rights suggests that he failed to properly consider all of the factors in this part of the analysis.

(e) As to the section 8 *Charter* breach, there is no doubt that the appellant had a reasonable expectation of privacy which was not reduced as he did not share his cell phone or its contents with anyone.

(f) While it is relevant to consider the fact that the police had sought a search warrant for the cell phone, thereby indicating good faith and an attempt to abide by the requirements of the *Charter*, this is only relevant to the extent that inappropriate information was used to obtain the warrant and it was unlikely

the warrant would have been issued without confirmation of the ownership of the cell phone.

[69] In short, the two breaches had a significant impact on the appellant's *Charter*-protected interests.

Society's Interest in Adjudication of the Case on Its Merits

[70] As indicated in *Grant*, this line of enquiry requires a consideration of whether the truth-seeking function of the criminal trial process would be better served by the admission of the evidence or by its exclusion. This enquiry reflects society's interest in ensuring that criminal cases are adjudicated on their merits (see para 79). The reliability of the evidence, the importance of the evidence to the prosecution's case and the seriousness of the offence are important factors to consider.

[71] The following factors are relevant with respect to this part of the analysis:

(a) The evidence is highly reliable as it consisted of a cell phone and its contents and there is no danger that this evidence could undermine the fairness of the trial.

(b) The trial judge concluded that the evidence appeared important to the Crown's case although there is no indication that it was "critical" (*R v Cole*, 2012 SCC 53 at para 96) or that its exclusion would bring the prosecution to an end or that the exclusion of the evidence "would result in the absence of

evidence by which the appellant could be convicted" (*Marakah* at para 70).

(c) Given the seriousness of the charges, there is great interest to have the case adjudicated on its merits; however, society also has an interest in having the rights under section 10(b) of the *Charter* respected and a justice system that is above reproach.

(d) There is a strong societal interest in the principles of the *YCJA* being followed as Parliament intended (see section 3 of the *YCJA*).

[72] In short, there is a significant interest in the adjudication of this case on its merits. However, it should be noted that there is no indication that the prosecution would not have taken place if this evidence was not obtained. An important witness to the events—the individual who video recorded the events on her cell phone and who was involved in a number of text message exchanges between the appellant and her—was not called as a witness. There was no explanation given and there was no suggestion, one way or the other, whether she would have been available for trial to provide the evidence as to the text messages and the circumstances under which they were made. In other words, the evidence might have been available through other means and may still be available. There is therefore no indication that the prosecution could not take place if the statement and the cell phone were excluded.

Conclusion

[73] I am of the view that the majority of the factors leaned towards exclusion of the cell phone evidence. The breach involved is serious and

underlines the requirement that a right to counsel and a right to silence be explained to the accused—particularly youth—prior to statements being obtained. Discoverability was a non-issue and the impact on the appellant's *Charter*-protected privacy rights was high. Although the charge is serious, the exclusion of the evidence, while significant, does not appear to be fatal to the Crown's case. Overall, I am of the view that the exclusion of the evidence would not bring the administration of justice into disrepute.

A New Trial

[74] Given my conclusion that the statement was inadmissible and obtained in breach of the appellant's section 10(b) *Charter* rights and that it led to the seizure of the cell phone and the obtaining of its contents, I am of the view that they should be excluded as evidence at the trial. Accordingly, the exclusion of that evidence would take away from the trial judge some important evidence which he used for the purposes of reaching his conclusion that the appellant was guilty of first degree murder. The exclusion of the evidence does not mean that there is necessarily a lack of evidence to convict the appellant of either first or second degree murder. It would require a rebalancing of all of the evidence which would be available in a second trial. This may include evidence which was not brought forward as a result of the Crown's reliance upon the improperly admitted statement and the contents of the cell phone. For this reason, I would remit the matter back to the trial court for a new trial.

[75] Given my findings on these two grounds of appeal, I find it unnecessary to deal with the remaining grounds.

Conclusion

[76] The conviction is set aside. Accordingly, the sentence is also set aside. The matter is returned to the Court of Queen's Bench for a trial before a different judge.

Monnin JA

I agree: Steel JA

I agree: Simonsen JA

APPENDIX

Relevant provisions of the *Youth Criminal Justice Act*, SC 2002, c 1:

Evidence

General law on admissibility of statements to apply
146(1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.

When statements are admissible
146(2) No oral or written statement made by a young person who is less than eighteen years old, to a peace officer or to any other person who is, in law, a person in authority, on the arrest or detention of the young person or in circumstances where the peace officer or other person has reasonable grounds for believing that the young person has committed an offence is admissible against the young person unless

(a) the statement was voluntary;

(b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that

(i) the young person is under no obligation to make a statement,

(ii) any statement made by the young person may be used as evidence in proceedings against him or her,

(iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance

with paragraph (c), if any, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult

(i) with counsel, and

(ii) with a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person, as long as that person is not a co-accused, or under investigation, in respect of the same offence; and

(d) if the young person consults a person in accordance with paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

Exception in certain cases for oral statements
146(3) The requirements set out in paragraphs (2)(b) to (d) do not apply in respect of oral statements if they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

Waiver of right to consult
146(4) A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver

(a) must be recorded on video tape or audio tape; or

(b) must be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived.

Waiver of right to consult
146(5) When a waiver of rights under paragraph (2)(c) or (d) is not made in accordance with subsection (4) owing to a technical

irregularity, the youth justice court may determine that the waiver is valid if it is satisfied that the young person was informed of his or her rights, and voluntarily waived them.

Admissibility of statements
146(6) When there has been a technical irregularity in complying with paragraphs (2)(b) to (d), the youth justice court may admit into evidence a statement referred to in subsection (2), if satisfied that the admission of the statement would not bring into disrepute the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and their rights are protected.