COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Schertzer, 2015 ONCA 259
DATE: 20150420
DOCKET: C56396, C56397, C56398, C56399, C56400 & C56558

Watt, Tulloch and Benotto JJ.A

BETWEEN

Her Majesty the Queen

Respondent/Appellant

by way of cross-appeal

and

John Schertzer, Steven Correia, Ned Maodus, Joseph Miched
and Raymond Pollard

Appellants/Respondents

by way of cross-appeal

Alan Gold and Melanie Webb, for the appellant/respondent by way of cross-appeal John Schertzer

Joanne Mulcahy, for the appellant/respondent by way of cross-appeal Steven Correia

Patrick Ducharme, for the appellant/respondent by way of cross-appeal Ned Maodus

Peter Brauti and Maureen Salama, for the appellant/respondent by way of cross-appeal Joseph Miched

Michael Lacy, for the appellant/respondent by way of cross-appeal Raymond Pollard

R. W. Hubbard and M. Lai, for the respondent/appellant by way of cross-appeal

Heard: November 4-7, 2014

On appeal from the conviction entered on June 27, 2012 and the sentence imposed on January 4, 2013 by Justice Gladys I. Pardu of the Superior Court of Justice, sitting with a jury.

Benotto J.A.:

OVERVIEW

[1] The five appellants were members of the drug squad of the Toronto Police Service (TPS) Central Field Command (CFC). All were convicted of attempting to obstruct justice. Three - Pollard, Maodus and Correia – were also convicted of perjury.

[2] The central issue at trial was the timing of the search of an apartment where Ho Bing Pang resided. The Crown alleged that the appellants searched the apartment before the search warrant physically arrived at the premises. The appellants maintained that they did not search the residence until after the warrant arrived.

[3] The attempt to obstruct justice count alleged that all of the appellants practised deception, including by falsifying their notes “and/or” by testifying falsely, in order to conceal that the search of Pang’s apartment had been done without a warrant. The perjury counts particularized that Pollard, Maodus and

Correia gave false evidence at Pang's preliminary inquiry. Miched was charged on a separate perjury count but was acquitted.

[4] The appellants were each sentenced to a 45-day conditional sentence.

[5] The appellants appeal the convictions and the respondent, the Crown, cross-appeals the sentences as unfit. The Crown submits that a three-year sentence was appropriate.

FACTS

The timing of the warrant

[6] On February 18, 1998, the CFC drug squad arrested Pang and Yin Leong Chui for possession of two ounces of heroin. The team was led by Schertzer and was composed of the other four appellants and additional officers.

[7] The team had been conducting surveillance on Chui, a suspected heroin dealer, that day. At around 6:40 p.m., Pang was observed meeting with Chiu in the parking lot of a plaza. After a brief conversation, Pang drove into the underground parking garage of an apartment building next door to the plaza. Chiu drove to the front of the same apartment building and waited with his engine running.

[8] Correia followed Pang into the underground parking and then joined him in the elevator going up. Pang got out at the 14th floor. Correia got out at the 15th floor, ran down the stairs and saw someone go into Unit 1404. Correia waited in

the hallway and observed Pang carrying a white plastic bag. Both men went back down to the underground parking garage.

[9] Pang's vehicle left the underground parking garage and drove to the front of the apartment building. Pang exited his vehicle, carrying the white plastic bag. He got into Chui's car and handed him the bag. Schertzer ordered a take-down.

[10] Just before 7:00 p.m., Pang and Chui were arrested in front of Pang's apartment building. The white plastic bag, containing two ounces of heroin, was seized. On the drive to the police station, Pang told an officer that there was more heroin in a nightstand in his bedroom in Unit 1404.

[11] Schertzer decided not to search Pang's apartment based on exigency. Schertzer testified that anyone inside who saw the arrest would likely have destroyed the evidence by the time the team made it to the apartment. Accordingly, Schertzer decided to get a search warrant.

[12] It was generally accepted that the evidence at trial supported two different scenarios. The appellants either entered Pang's apartment around 7 p.m. without a warrant or around 10:45 p.m. with a warrant.

[13] Miched had been sent to the police station at 53 Division to apply for warrants for Chui's and Pang's residences. Miched submitted documents to a justice of the peace by fax at 10:00 p.m. He then received a transmission at 10:32 p.m. from the justice of the peace authorizing the search of Pang's

apartment. The search warrant had to be photocopied before he left the station. Miched testified that he left the third floor of 53 Division, “skipped down the stairs”, and drove to the apartment building as fast as he could. On cross-examination, Miched said that he ran red lights but admitted that he was not in a marked car and had no siren or flashing lights. He went to the fourteenth floor. Schertzer and Maodus used Pang’s keys to open the apartment door. Miched served the warrant on an occupant inside the apartment. Miched then immediately left to return to 53 Division where, at 10:54 p.m. he faxed an acknowledgment that the Chui warrant had been refused.

[14] The Crown’s theory was Miched could not have done all of the things he said that he did, including making the trip from 53 Division to the Pang residence and back, in the 22 minutes between 10:32 and 10:54 p.m. Therefore the appellants must have entered the premises before the search warrant arrived.

[15] The Crown relied on the testimony of another officer, Detective Kerry Watkins, who conducted two one-way “time trials” from 53 Division to Pang’s apartment. The time trials were conducted more than 14 years after the search of Pang’s apartment, the first starting at 10:03 p.m., with the second starting at 10:55 p.m.

[16] Watkins started timing himself on the third floor of 53 Division. He walked to the parking garage and then drove at the speed-limit, 50 or 60 kilometres per

hour (“kph”) on the various roads, to Pang’s former apartment building. He walked to the building, entered through security, took the elevator to the 14th floor, and then walked to Unit 1404. The first one-way trip took 27 minutes; the second took 20 minutes 31 seconds. The driving distance one-way was about 12 kilometres.

[17] The Crown submitted to the jury in closing submissions that, at the very least, seven of the 22 minutes would have been taken up with non-driving activities, leaving 15 minutes to travel 24 kilometres. This would have required Miched to drive, accounting for some slowing down or stopping at intersections, in excess 100 kph through the city, including through residential neighbourhoods, without lights or siren. The Crown forcefully urged the jury to conclude that it was “nonsense” that Miched actually did something so “ridiculously dangerous”, especially when getting the warrant to the rest of the squad was not an emergency situation.

[18] The Crown relied on the evidence of Pang’s brother Ho Zhong Pang (“Zhong”) and his former sister-in-law Miao Fen Lin (“Fen”). Zhong, Fen, and their seven-year-old daughter lived in Unit 1404 with Pang. Fen testified that officers first entered her apartment after she had prepared dinner but before she and her daughter had eaten. Upon refreshing her memory from the preliminary inquiry transcript, Fen said it was around “seven o’clockish”. Her daughter had not yet gone to bed; that usually happened around 10 p.m. Zhong was not home

at the time. The officers did not present her with a search warrant. Both Fen and Zhong testified that after Zhong returned home, at some time between 11:00 p.m. and 11:45 p.m., one or two officers returned to Unit 1404 and gave Zhong a search warrant. The officer or officers took away a plastic bag that had been left near the front door of the apartment.

[19] The appellants' memo book notes indicated that the search took place after the warrant arrived. Schertzer's, Correia's, and Moadus' notes expressly stated that the search warrant was executed at 10:45 p.m. and that the officers left the apartment at 11:30 p.m. Pollard's notes appeared to state that the search warrant was executed at 8:45 p.m., although he explained at trial that this was a mistake and he had meant to write 10:45 p.m. Pollard's notes state that he left the apartment at 11:30 p.m. This meant that Schertzer, Pollard, Maodus and Correia waited outside of Unit 1404 for well over three hours after the arrest of Pang and Chui. The appellants' notes are consistent in stating that only Fen and her daughter were home at the time of the search.

[20] The trial judge concluded in her sentencing reasons that the jury's guilty verdicts indicated that it was found as fact that the appellants entered the apartment before the warrant arrived.

[21] The Crown alleged that there were other false documents produced by the appellants. Miched prepared a Supplementary Record of Arrest, dated February

18, 1998, at 11:34 p.m., which stated, “A CDSA search warrant was executed on the accused PANG’s residence...” Schertzer signed off on this document as the Officer in Charge. In her sentencing reasons, the trial judge found that with this document Miched and Schertzer intended to conceal from Pang’s defence counsel the warrantless nature of the search. On February 20, 1998, Correia swore an information to obtain (“ITO”) a search warrant for Fen’s safety-deposit box, which the appellants learned of during their search of the apartment. Among other potentially untrue assertions, Correia’s affidavit stated, “At the time the search warrant was executed...” In her sentencing reasons, the trial judge concluded that she was satisfied beyond a reasonable doubt that this statement was deceptive as Correia knew that admitting the search was warrantless would make it unlikely that a further warrant would be granted.

[22] The basis for the obstruction of justice convictions was the misleading statements about the time of the search set out in the memo book notes, the Supplementary Record of Arrest, and the ITO for Fen’s safety-deposit box. The basis for the perjury convictions against Correia, Maodus and Pollard was their testimony at the Pang preliminary inquiry that the search of the apartment occurred after the warrant arrived.

The TPS memo to employees

[23] On November 4, 2010, the TPS, at the request of Crown counsel, delivered a memo to its employees who were named as potential witnesses in the trial. The memo informed the TPS employees that defence counsel could only interview them if they were willing to be interviewed. It required the potential witnesses to advise TPS if they intended to submit to an interview or otherwise provide information to the defence so that arrangements could be made to have an officer from the Professional Standards Special Task Force present to "audio record and/or take notes of the interview".

[24] During the trial, the appellants requested a stay of the proceedings on the basis that this memo was an abuse of process. The trial judge dismissed the application.

THE CONVICTION APPEALS

[25] The appellants raise nine grounds of appeal:

- 1) The trial judge erred in leaving courtroom testimony as a possible mode of committing the attempt to obstruct justice charge in the relevant count, thereby violating s. 13 of the *Canadian Charter of Rights and Freedoms*;

- 2) The trial judge erred in instructing the jury that they could convict the appellants of attempting to obstruct justice by “other means” not particularized in the indictment;
- 3) The admission of the “experiment” evidence of Detective Watkins rendered the trial unfair;
- 4) The trial judge erred in failing to adequately instruct the jury about the corroboration requirement on the perjury offences;
- 5) The Crown’s closing address resulted in a miscarriage of justice as it was unfair and invited the jury to engage in speculative reasoning;
- 6) The trial judge failed to provide the jury with a specific instruction on the law of exigency in relation to searches and seizures;
- 7) The trial judge’s “lost evidence” instruction was in error since it allowed the jury to use the fact of the “lost evidence” as evidence of guilt;
- 8) The guilty verdicts were not ones that a properly instructed jury, acting reasonably and judicially, could have returned; and
- 9) The TPS memo to potential witnesses irreparably compromised the integrity of the proceedings, prejudiced the appellants, and amounted to an abuse of process.

Issue No. 1: Did the trial judge err in leaving courtroom testimony as a possible mode of committing the count of attempt to obstruct justice?

[26] The obstruction of justice count charged all of the accused with attempting to obstruct justice by "making false or misleading entries in their memo books, and/or by lying to the court in their testimony" (emphasis added). All of the appellants, except for Schertzer, testified at the Pang preliminary inquiry.

Appellants' Position

[27] The appellants submit that the trial judge erred when she told the jury they could use the preliminary inquiry testimony as a basis to convict on the attempt to obstruct justice charge. They argue that their testimony at Pang's preliminary hearing was compelled and that they are therefore entitled to the protection of s. 13 of the *Charter*. Section 13 reads:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[28] The offence of attempting to obstruct justice is not listed as an exception to the right against self-crimination in s. 13. The essential elements of perjury and of attempting to obstruct justice are not the same.

[29] The circumstances in which s. 13 was enacted and the legislative history of s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("*CEA*"), confirm that the offences of perjury and giving contradictory evidence are the only exceptions to

the exclusionary rule. Section 5 of the *CEA* is similar to, and predates, s. 13 of the *Charter*. In *R. v. Chaperon* (1979), 52 C.C.C. (2d) 85 (Ont. C.A.), this court held the offence of giving contradictory evidence was not contemplated by s. 5 of the *CEA* in force at the time, which made an exception for prosecutions for perjury only. Section 13 was enacted three years after *Chaperon* and specifically included the offences of perjury and of giving contradictory evidence in the listed exceptions to the exclusionary rule. No other offence was added. In 1997, s. 5 of the *CEA* was amended to include the offence of giving contradictory evidence as the sole additional exception. Therefore, it cannot be said that the offence of attempting to obstruct justice is excluded from the operation of s. 13. The prior testimony cannot be a basis for the obstruction of justice charges, as the evidence was tendered in violation of the appellants' *Charter* rights. This ground of appeal also applies to Schertzer even though he did not testify at the Pang preliminary inquiry. The appellants submit that the jury may have used the evidence against him since "all of the appellants were "joined at the hip" at trial."

Crown's Position

[30] The Crown submits that this ground of appeal cannot apply to Schertzer, as he did not testify at the preliminary inquiry. The other four appellants were also charged with perjury. (Miched was acquitted based on the wording of the indictment.) With respect to the other three appellants, their testimony at Pang's

preliminary inquiry was properly before the jury in relation to the perjury charges against them.

[31] The instruction from the trial judge that their testimony could also be used with respect to the attempt to obstruct justice charges was harmless because they would have been convicted anyway—as was Schertzer—on the basis of their notes. As Schertzer did not perjure himself, his conviction for attempting to obstruct justice means that the jury concluded that his notes were false. Accordingly, since Schertzer's notes were falsified in the same manner as those of the four appellants who did testify, their convictions of attempting to obstruct justice were inevitable on the basis of their false notes. The instruction requested by the appellants would have unnecessarily complicated the already lengthy jury instruction. The attempt to obstruct justice and the perjury counts all relied on the same factual finding: the accused searched Pang's apartment without a warrant and covered this up.

[32] In any event, an obstruct justice conviction may be founded on proof of perjury: *R. v. Simon* (1979), 45 C.C.C. (2d) 510 (Ont. C.A.); *R. v. Moore* (1980), 52 C.C.C. (2d) 202 (B.C.C.A.); *R. v. Staranchuk* (1983), 8 C.C.C. (3d) 150 (Sask. C.A.), aff'd [1985] 1 S.C.R. 439.

Analysis of Issue No. 1

[33] I would reject the appellants' submissions for two reasons. First, s. 13 is not engaged because the testimony itself was the *actus reus* of the offence. Since the evidence was not truthful there was no *quid pro quo* as envisaged by the s. 13 jurisprudence. Second, even if section 13 did apply, the result would not have been affected because, based on the jury's findings, the convictions were inevitable.

The Actus Reus/Quid Pro Quo

[34] In *Staranchuk*, the Supreme Court held that compelled testimony forming the *actus reus* of crimes should be admissible in the prosecution of those crimes. The court endorsed, at pp. 439-40, the following passage from the reasons of the Court of Appeal for Saskatchewan:

> We believe that a distinction must be drawn between those occasions where a person in the course of providing evidence under oath is required, when answering truthfully, to disclose the commission by him, previously, of an offence (in which event, generally speaking, that evidence cannot subsequently be used against him) and those occasions where a person makes false statements, while under oath, as a result of which he is charged with giving false evidence. In the latter case the very essence of the offence, and its *actus reus*, is the giving of the false testimony. In this case the Crown sought to place the two exhibits into evidence to prove the *actus reus* of the offences charged and, if that evidence was otherwise admissible, it ought to have been received.

[35] In its reasons, the Court of Appeal for Saskatchewan stated further, at p. 153:

> Even if … the accused gave “incriminating evidence”, within the meaning of s. 13 of the *Charter*… the section would still be of no avail to the accused … because his allegedly false evidence forms the very substance of the offence with which he is now charged.

[36] That s. 13 is not available to an accused when false evidence forms the substance of the offence charged is consistent with the rationale for the s. 13 protection in the first place. This rationale has been referred to as the *quid pro quo*.

[37] In *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 22, Binnie J. wrote for the court:

> The consistent theme in the s. 13 jurisprudence is that "the purpose of s. 13 ... is to protect individuals from being indirectly compelled to incriminate themselves".... That same purpose was flagged in [*R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433], the Court's most recent examination of s. 13, by Arbour J., at para. 21:
>
> > Section 13 reflects a long-standing form of statutory protection against <u>compulsory</u> self-incrimination in Canadian law, and is best understood by reference to s. 5 of the *Canada Evidence Act*. Like the statutory protection, the constitutional one represents what Fish J.A. called a *quid pro quo*: when a witness <u>who is compelled</u> to give evidence in a court proceeding is exposed to the risk of self-incrimination, the state offers protection against the subsequent use of that evidence against

> the witness in exchange for his or her full and frank testimony.
>
> [Emphasis in original]

[38] Moldaver J. also discussed this principle in his majority reasons in *R. v. Nedelcu*, 2012 SCC 59, [2012] 3 S.C.R. 311, at paras. 3, 6, and 7:

> [T]he Court in *Henry* outlined "a unified approach to s. 13, one based on the historical rationale underlying s. 13 - the *quid pro quo*"….
>
> [T]he "*quid*" that forms the critical first branch of the historical rationale, refers to "incriminating evidence" the witness has given at a prior proceeding in which the witness could not refuse to answer. The section does not refer to all manner of evidence the witness has given at the prior proceeding. It refers to "incriminating evidence" the witness has given under compulsion.
>
> The "*quo*" refers to the state's side of the bargain. In return for having compelled the witness to testify, to the extent the witness has provided "incriminating evidence", the state undertakes that it will not use *that* evidence to incriminate the witness in any other proceeding, except in a prosecution for perjury or for the giving of contradictory evidence. [Emphasis in original.]

[39] The *quid pro quo* is simple: the witness is offered protection in exchange for truthful incriminating testimony. This is not what happened here. The testimony of the four appellants at the Pang preliminary inquiry was not self-incriminatory. Rather, it was an attempt at self-exculpation. When it convicted them of perjury, the jury found that Pollard, Maodus, and Correia lied at the Pang preliminary inquiry. This finding, and any inference that Miched lied at the Pang preliminary inquiry in a manner that was not captured by the problematic

wording of his perjury count on the indictment, was admissible evidence toward the question of whether these four appellants also attempted to obstruct justice.

[40] Section 13 reflects a *quid pro quo* where compelled testimony compels self-incrimination. In these circumstances, the state will not use the self-incriminating, compelled testimony to prosecute the offence revealed. The accused here were not compelled to give the testimony that was subsequently used to incriminate them for attempting to obstruct justice. They were not compelled to lie. In fact, they were required to do the opposite. There is no *quid pro quo* here.

[41] The appellants' interpretation of s. 13 that would render false testimony inadmissible on a charge of attempting to obstruct justice based on that false testimony would undermine the very purpose of the s. 13 protection. Simply put: a witness does not have immunity for lying under oath.

[42] I do not agree with the appellants' submission that attempting to obstruct justice does not fall within the exceptions to s. 13. The exceptions in s. 13 are not explicitly limited to the *Criminal Code* offences of perjury and giving contradictory evidence. "A prosecution for perjury" in the context of s. 13 refers to proceedings related to offences in the nature of giving a false statement under oath; it is not limited to any particular provision of the *Criminal Code*, R.S.C. 1985, c. C-46. The prosecution of a particularized charge of attempting to

obstruct justice by committing perjury is such a proceeding. Not only is this interpretation supported by the use of the word “proceedings”, as opposed to “offences”, in s. 13, this interpretation is the most reasonable. Although the Court of Appeal for Saskatchewan in *Staranchuk* was not required to deal with this issue, it nonetheless condoned this more flexible interpretation when it commented, at p. 153, “…and even if it could be argued that this prosecution is not one, in its nature, for ‘perjury or for the giving of contradictory evidence’ within the meaning of s. 13 (another questionable proposition)”. The drafters of the *Charter* could not have intended to immunize a person who lies under oath from criminal prosecution for that lie.

A conviction was inevitable

[43] Even if the trial judge had instructed the jury to ignore the preliminary inquiry testimony with respect to the attempt to obstruct justice count, in my view, the result would have been the same. The appellant Schertzer was not charged with perjury as he did not testify at the Pang preliminary inquiry. Yet he was convicted of attempting to obstruct justice. The jury must have convicted on the basis of his false notes. All of the appellants made the same assertion in their memo book notes that they waited until after the search warrant arrived to enter Pang’s apartment. It was this assertion that the Crown focused its prosecution on.

[44] The trial judge did not err in leaving the appellants' courtroom testimony as a possible mode of committing the attempt to obstruct justice offence. I would not give effect to this ground of appeal.

Issue No. 2: Did the trial judge err in instructing the jury that they could convict the accused of attempting to obstruct justice by "other means" not particularized in the indictment?

[45] Count 3 of the indictment read:

> JOHN SCHERTZER, STEVEN CORREIA, NED MAODUS, JOSEPH MICHED and RAYMOND POLLARD stand charged that they … did wilfully attempt to obstruct, pervert or defeat the course of justice, by practicing deception, including by making a false or misleading account of events in their memo books, and/or by lying to the court…

[46] The jury instructions in relation to this count included the following:

> If the Crown has not proven beyond a reasonable doubt that the defendant practiced deception by making false or misleading entries in the memo book or by lying to the court or by other means, your final verdict is not guilty. If the Crown has proven that a defendant practiced deception by making false or misleading entries in a memo book or by lying to the court or by other means beyond a reasonable doubt, you go to the next box [in the decision tree]. [Emphasis added.]

Appellants' Position

[47] The appellants argue that where the Crown has particularized the mode of commission of the offence in the wording of the indictment, the Crown must prove those particulars unless the particulars can be regarded as "mere

surplusage": *R. v. Sadeghi-Jebelli*, 2013 ONCA 747, [2013] O.J. No. 5728 (C.A.), at paras. 23-24. The indictment particularized the attempt to obstruct justice charge as making false or misleading entries in their memo books, and/or by lying to the court in their testimony. The appellants defended themselves on this basis. The trial judge erroneously instructed the jury that the attempt to obstruct justice offence could be proven "by other means", when this alternative was not particularized in count 3.

[48] Having given this instruction, the trial judge erred further in failing to instruct the jury as to what "other means" could be relied upon and in failing to relate the evidence to this legal instruction.

Crown's Position

[49] The indictment did not limit the scope of the attempt to obstruct justice charge. The use of the word "including" clarified that the charge was not limited to the particularized examples. The trial judge did not err by drafting jury instructions and a decision tree reflecting this language.

[50] It was not necessary for the trial judge to specify what such "other means" could be because the Crown's position was clear. The Crown's opening address referred to the memo book notes and other records "prepared for the Crown Brief in Pang". The documents upon which the Crown relied at the appellants' trial were bound together and entered as exhibits. The Crown's closing address specifically referenced many falsified documents in addition to the memo book

notes, including the Supplementary Record of Arrest and the ITO for Fen's safety deposit box. Viewed in this context, the trial judge's instructions were sufficient to ensure the jury understood what "other means" on which the Crown was relying.

Analysis of Issue No. 2

[51] The indictment, on its face, alleged in count 3 "including by making false or misleading account of events in their memo books…" The plain meaning of the word "including" indicates that the listed items do not stand alone. The Oxford Dictionary defines "including" as "containing part of the whole being considered."

[52] In addition, the indictment goes on to articulate means in addition to the memo book notes and the false testimony. The jury would have understood that the issue was whether a single lie had been repeated by the appellants in various ways. The phrase in the indictment "by practising deception" is inclusive of the various ways the alleged lie was repeated.

[53] I would not give effect to this ground of appeal.

Issue No. 3: Did the admission of the "experiment" evidence of Detective Watkins render the trial unfair?

[54] As discussed, Detective Kerry Watkins gave evidence about two "time trials" he conducted to recreate the travel time from 53 Division to the door of Pang's apartment. The trials were both conducted on April 4th, 2012. His

testimony was that it took 27 minutes on the first trial and 20 minutes 31 seconds on the second. The distance travelled was 12 kilometres, one-way.

Appellants' Position

[55] Watkins's experiment evidence was not properly admitted.

[56] The experiment evidence was not logically relevant because it did not have a "tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 82, leave to appeal refused, [2010] S.C.C.A. No. 125. It was therefore inadmissible.

[57] The experiment evidence was not legally relevant because its slight probative value was outweighed by its prejudicial effect. The experiment evidence lacked the necessary degree of similarity to the driving conditions in February 1998 to support any reasonable inference as to how long it would have taken Miched to drive from 53 Division to Pang's apartment. The experiment was conducted 14 years after the events it was intended to recreate. The population density, commercial development, and intersections along the route were very different. Also, Miched drove at a high speed and ran numerous yellow and red lights, whereas Watkins drove the speed limit and obeyed all signs and signals. Where Watkins and Miched parked their cars at 53 Division, how they gained access to the apartment building, and the timing of the elevator ride also differed.

Finally, Watkins was involved in the investigation and prosecution of the appellants. He was not an independent, objective party.

[58] The probative value was so slight that its prejudicial effect warranted exclusion. The manner in which the evidence was presented gave it an unwarranted aura of accuracy, authenticity, and scientific validity. There was a real risk that the jury would give the evidence more weight than it deserved.

[59] Even if the evidence was admissible, the trial judge erred by not expressly cautioning the jury about the dangers of relying on the experiment evidence. A strong cautionary instruction was necessary because of the significant risk the jury might misuse the evidence. This risk was heightened because the Crown used the evidence together with other speculative inferences and the evidence was left with the jury as potentially corroborative on the perjury offence.

Crown's Position

[60] Watkins's experiment evidence was both logically and legally relevant. It was one of several pieces of evidence capable of establishing the timing of the search of Pang's apartment. The evidence overall established that the appellants could only have entered Pang's apartment with the warrant, at or after 10:45 pm, if Miched had completed a two-way trip between 53 Division and Pang's apartment in 22 minutes. Watkins's evidence established the distance between 53 Division and Pang's apartment, and approximated the driving time and total time to travel between the two locations.

Analysis on Issue No. 3

[61] Watkins's experiment evidence was relevant. It established distances and benchmark times that, as a matter of everyday experience and common sense, cast doubt on Miched's version of events and made it more likely that the appellants entered Pang's apartment without a search warrant before 10:45 p.m.

[62] There was no risk of reasoning prejudice. The jury knew of Watkins's limited involvement in the investigation and his objectivity was not at issue. The experiment evidence did not have an aura of expertise, scientific or otherwise. Watkins's observations were not complicated and he expressly declined to opine on whether the 12 kilometre drive could have been done in "about seven or eight minutes". Finally, the differences in driving conditions in 1998 and 2012 were made clear to the jury. These were everyday matters suited perfectly to the exercise of common sense and logic by the jury.

[63] One may also infer the lack of prejudice from the tactical decision by several very experienced defence counsel not to object to the admission of this evidence at trial. Rather, the defence chose to argue that it was representative of the prosecution's shoddy police investigation.

[64] The trial judge reviewed Watkins's experiment evidence and its flaws in detail with the jury. These flaws were also exposed by the defence and candidly

acknowledged by the Crown during closing submissions. Accordingly, there was no real risk that the jury would misuse the evidence.

[65] I would not give effect to this ground of appeal.

Issue No. 4: Did the trial judge err in failing to adequately instruct the jury about the corroboration requirement on the perjury offences?

[66] Section 133 of the *Criminal Code* requires that no person be convicted of perjury under s. 132 on the evidence of only one witness, unless that evidence is "corroborated in a material particular by evidence that implicates the accused."

Appellants' Position

[67] The trial judge made two legal errors. First, the trial judge failed to adequately distinguish the "corroboration" requirement under s. 133 from the "confirmatory" requirement for unsavoury witnesses, per *R. v. Vetrovec*, [1982] 1 S.C.R. 811. The trial judge used the word "confirmed" in relation to s. 133 without clarifying that corroboration requires more than restoring "faith" in the fact that the witness was telling the truth. The trial judge also told the jury that documentary evidence or admissions could be corroborative under s. 133. However, no attempt was made to relate such evidence to the legal requirement for corroboration. Indeed, there was no such evidence that could have been corroborative under s. 133.

[68] Second, it was wrong to leave Watkins's experiment evidence with the jury as potentially corroborative of Fen's testimony that the search was warrantless. Given the particularization of the perjury counts on the indictment, to amount to corroboration under s. 133, the purported corroborative evidence had to go to the falsity of the testimony that the appellants "did not enter the premises ... prior to the arrival of a search warrant". Watkins's experiment evidence did not speak directly to this testimony impugned on the indictment. At its highest, Watkins's experiment evidence went to the truth or falsity of the claim that Miched drove the warrant to the apartment after it was issued or to the time the officers entered the residence with the warrant.

Crown's Position

[69] The jury instructions clearly distinguished between the *Vetrovec* instruction and the corroboration requirement under s. 133. The *Vetrovec* instruction was identified in the jury charge as a special instruction that applied to the testimony of complainants unrelated to the Pang investigation. The trial judge expressly stated that Fen's testimony was not subject to a *Vetrovec* warning. The s. 133 requirement was confined to perjury and the only perjury charges related to the Pang investigation. The s. 133 requirement was applied directly to Fen's evidence and the Crown's submission that Fen's evidence was confirmed by the impossibility of Miched travelling as he said he did between 53 Division and Pang's apartment. The trial judge later clarified that the requirement could be

satisfied by oral evidence, documentary evidence, or admissions. In doing so, the judge used the word “confirm” rather than “corroborate”. In the context, the word was not used as a term of art. On the whole, the trial judge’s instructions informed the jury that perjury must be proved by more than one source of evidence.

Analysis on Issue No. 4

[70] There was extensive evidence regarding the timing of the events surrounding the warrant. There was oral evidence, documentary evidence, and there were formal admissions regarding the telewarrant procedure undertaken by Miched. Similarly, there was evidence about the window of time available for the trip to Pang’s apartment. This evidence included Watkins’ experiment evidence. Based on the instructions as a whole, the jurors would have understood that they could consider this evidence to corroborate Fen’s testimony.

[71] This evidence was relevant to Miched’s assertion that –having received the warrant at 10:32 p.m.- he had sufficient time to i) deliver the Pang search warrant by 10:45 p.m. and ii) return to 53 Division to sign and transmit a fax at 10:54 p.m.

[72] There is no dispute that the appellants’ evidence at trial was that Miched delivered the warrant, and then they entered Unit 1404 around 10:45 p.m. If

Miched did not deliver the warrant by 10:45 p.m., then based on the appellants' evidence at trial, Pollard, Maodus, and Correia lied when they testified at Pang's preliminary inquiry that they did not enter Unit 1404 prior to the arrival of the search warrant. This was the prior testimony impugned on the indictment. A lie about one was a lie about the other. It was therefore evidence from which the jury could infer perjury.

[73] I would not give effect to this ground of appeal.

Issue No. 5: Did the Crown's closing address result in a miscarriage of justice as it was unfair and improperly invited the jury to engage in speculative reasoning?

[74] In closing submissions to the jury, the trial Crown referred to Miched's evidence and invited the jury to find that he could not possibly have done all of the things necessary, including driving, in the 22 minute window established by the undisputed telewarrant evidence.

[75] The Crown also made other suggestions, including that Pang's daughter would have been "in bed asleep" by 10:45 p.m., not "on the sofa" as the appellants had testified; that according to Zhong's testimony, and contrary to Correia's testimony, Fen was "frightened" by the search; and that Pang's charges carried a "maximum penalty of life in jail".

Appellants' Position

[76] Using Watkins's experiment evidence as a launch pad, the Crown's closing submissions offered speculative suggestions to the jury as to how long it would have taken Miched to do various things, in addition to driving, in the absence of an evidentiary foundation. For instance, the Crown speculated that it would have taken one minute to photocopy the search warrant. In this manner, the trial Crown improperly narrowed the driving time available to 14 minutes, necessitating average speeds of over 100 kph.

[77] The Crown also made other improper and inflammatory statements to the jury, including:

- There was no evidence that Fen's daughter slept in a bedroom, instead of on the sofa, in the two-bedroom apartment shared with Pang;
- There was no evidence that even a hurricane is not going to wake up a seven-year-old child;
- Fen testified that she was not frightened or worried during the search;
- It was irrelevant and inflammatory to state that Pang's charges carried a maximum sentence of life imprisonment;
- Erroneous suggestions that defence counsel misstated the evidence, particularly in relation to the timing of Miched's delivery of the warrant;

- Reliance on alleged fabrications in the ITOs authored by Miched and Correia, even though this was not a mode of attempting to obstruct justice particularized in the indictment;
- Misstating evidence in relation to other counts in the indictment for which the appellants were acquitted, which undermined their credibility in relation to the counts at issue;
- Using a tone and style that ridiculed the appellants and their defence; and
- Invoking prejudicial rhetoric suggesting that the victims were the administration of justice and the larger community, that the jury should avoid the tendency to be reluctant to convict police officers, and that acquittal would undermine the work of honest police officers.

Crown's Position

[78] The Crown asked the jury to find, using common sense and logic, that Miched could not realistically have completed the necessary tasks in 22 minutes. This submission fairly arises from the evidence and so did not invite speculation. The documentary evidence, the admissions, and the testimony of the justice of the peace, Watkins, and Miched established locations, distances, and times. Miched testified that he was driving as fast as he could on a major Toronto artery, running red lights as he went, in an unmarked rental car with neither lights nor sirens. From this testimony, common sense inferences could be drawn as to how fast Miched could have been driving. It is a matter of common sense and

experience that Miched's non-driving tasks would have consumed time on the order of minutes. Miched was cross-examined on this proposition. His refusal to make reasonable concessions on the issue did not immunize his evidence from the application of the jury's common sense.

[79] The Crown's theory was that Miched's testimony made no sense and was fabricated. It reasonably suggested the evidence was "nonsense", "entirely incredible, and "a big lie". The Crown, like any other advocate, is entitled to advance his or her position forcefully and effectively: *R. v. Daly* (1992), 57 O.A.C. 70 (C.A.), at para. 32.

[80] It was not improper for the Crown to address the seriousness of the charges Pang faced. This was relevant to the Crown's submission that the appellants lied to protect an important drug investigation.

[81] Nor was it improper for the Crown to caution the jury against moral prejudice against the complainants, who were drug dealers, and in favour of the appellants, who were police officers. This was not prejudicial. The Crown did not ask the jury to send a message about police corruption. It merely asked the jury to disregard any extraneous sympathies or prejudices. The appellants' claim that the jury was inflamed is belied by the fact that the jury acquitted on the majority of counts.

Analysis on Issue No. 5

[82] The trial judge cautioned the jury not to speculate, and instructed them to "come to common sense conclusions based on the evidence". She specifically instructed that the trial Crown's "own opinions of the time required" by Miched to complete the "individual steps" of the non-driving tasks were not evidence.

[83] The trial judge also corrected misstatements made by the Crown. She told the jury there was no evidence that Fen's daughter slept in a bedroom. The trial judge also told the jury that Correia's testimony regarding Fen's calm demeanour during the search was supported by Fen's own testimony. Finally, the trial judge corrected the Crown's allegations, where they were mistaken, that the defence misstated the evidence.

[84] I agree with the Crown that the rhetoric in the Crown's closing submissions at trial was not inflammatory or otherwise improper.

[85] The trial judge's corrective actions – which are entitled to deference – reflect no error. I would not give effect to this ground of appeal.

Issue No. 6: Was the trial judge required to provide the jury with a specific instruction on the law of exigency in relation to searches and seizures?

[86] In closing submissions, the Crown suggested to the jury that the appellants had fabricated the time of the search of Pang's apartment because otherwise the

heroin seized in the apartment would likely be inadmissible against Pang at a subsequent trial. The Crown also suggested that it would be unlikely that the appellants' could secure a search warrant for Fen's safety-deposit box if the keys to this box had been seized during an illegal search.

Appellants' Position

[87] The Crown's proposed motive required the trial judge to temper this submission with an instruction about exigency and s. 487.11 of the *Criminal Code*, under which the search could have been legal without a warrant. The trial judge should have also instructed the jury that absent exigent circumstances, evidence obtained without a search warrant may have been admissible under s. 24(2) of the *Charter*.

Crown's Position

[88] The trial judge was not required to provide such an instruction and the appellants did not request one at trial. Exigency did not play a significant role in the case. The Crown's theory was that the appellants obtained an *ex post facto* warrant to conceal their unconstitutional conduct. The appellants argued that there was no warrantless search because they had a warrant, not because the search was exigent. Nevertheless, Schertzer's assertion that warrantless entry might have been justified by exigency was included in the trial judge's review of the evidence. A further instruction would actually have exposed that Schertzer's

understanding of exigency was dubious, and therefore would not have assisted the defence.

Analysis of Issue No. 6

[89] The very experienced defence counsel did not request that the trial judge give an instruction on exigency. This may be explained by the fact that such an instruction had the real potential to weaken the defence case.

[90] Schertzer testified that a warrantless search could have been justified by exigency. In order to establish exigency, Schertzer needed reasonable grounds to believe that: (i) evidence relating to the commission of an indictable offence is present; and (ii) entry is necessary to prevent the imminent loss or destruction of the evidence: Criminal Code s. 529.3. Schertzer had testified that if the occupants of the Pang apartment had seen the arrest, by the time they entered the apartment the drugs would have been gone. An instruction on exigency would have exposed this error. In these circumstances, in light of defence counsel's position, it would have been inappropriate for the trial judge to add an instruction on exigency her own initiative.

[91] I would not give effect to this ground of appeal.

Issue No. 7: Did the trial judge err in the manner in which she instructed the jury concerning the "lost evidence"?

[92] The evidence at trial was that some of the relevant memo books, steno pad notes, search warrant notes, and surveillance notes were no longer in the CFC files. Under cross-examination by the Crown, the appellants denied that they destroyed records, including notes purportedly taken by Correia during the search of Pang's apartment. There was no direct evidence that the appellants had destroyed any records. The defence argued forcefully in closing submissions to the jury that the "lost evidence" created gaps in the Crown's case and raised questions about the Crown's integrity. This created a "fundamental failure to meet its burden". The Crown suggested in response that the appellants destroyed the records to cover their tracks. In pre-charge discussions, the trial judge suggested a "Lost, Destroyed or Unpreserved Evidence" instruction be given.

Appellants' Position

[93] The trial judge instructed the jury that the Crown submitted "that the materials are missing because they would tend to support the Crown's allegations that the defendants are guilty of criminal offences." This language turned what should have been a favourable instruction for the defence into an "after the fact conduct" instruction suggesting that lost evidence could be evidence of the appellants' guilt. There was no evidentiary foundation for such an inference.

Crown's Position

[94] The missing material was the cornerstone of the defence's attack on the quality of the investigation into the appellants' police work. In context, the impugned phrase in the jury instruction on "Lost, Destroyed or Unpreserved Evidence" was actually favourable for the appellants. The phrase was embedded in an instruction that highlighted the flaws in the Crown's evidence and tied those flaws to the Crown's ability to prove its case.

Analysis of Issue No. 7

[95] The trial judge reviewed the relevant evidence with the jury, instructed the jury on how "lost evidence" could raise a reasonable doubt about the appellants' guilt, and related this to the Crown's burden of proof. The trial judge was instructing the jury on the positions of the defence and the Crown on what inferences could be reasonably drawn from the fact that there was "lost evidence" with respect to the appellants' police work.

[96] The "lost evidence" instruction was not specific to the Pang investigation. The appellants were acquitted on all counts, except those related to the Pang investigation. Therefore, the only prejudice stemming from the "lost evidence" instruction that is relevant to this appeal is that related to the counts on the Pang investigation. The appellants have highlighted only one piece of "lost evidence" from that investigation, namely the notes purportedly made by Correia during the execution of the search warrant.

[97] There was no prejudice with respect to the Pang counts. The defence asked the jury to infer that the "lost evidence" meant that the Crown was hiding exculpatory evidence. The Crown asked the jury to consider whether the "lost evidence" was equally consistent with efforts by the appellants to cover their tracks. As I read the charge, the jury was not instructed that it could draw a positive inference of guilt from the fact that some of the records of the appellants' police work were missing. Rather, the jury was presented with the Crown's explanation for why it did not disclose all of the appellants' purported records.

[98] In any event, even if the trial judge erred in law by not instructing the jury that it should draw no positive inference in favour of the Crown from the fact of the "lost evidence", there was no substantial wrong or miscarriage of justice. The Crown assembled a strong case against the appellants with respect to misdeeds during the Pang investigation. There was evidence of a warrantless search. There was extensive circumstantial evidence related to the telewarrant process that the appellants could not have had a search warrant when they entered Pang's apartment. In short, the Crown's case did not turn on the jury drawing a positive inference with respect to any purportedly lost records. Such a pallid inference would add little to the potent evidentiary record asserted by the Crown.

[99] I would not give effect to this ground of appeal.

Issue No. 8: Were the guilty verdicts ones that a reasonable jury, properly instructed and acting reasonably and judicially could have returned?

[100] The appellants present a series of facts and propositions to support the overall position that the verdicts were unreasonable. Some of these allegedly exculpatory facts and propositions have already been discussed in these reasons. The appellants additionally submit:

- There was no motive for the appellants to enter Pang's apartment prior to the arrival of the warrant;
- If the appellants were determined to enter without prior judicial authorization, they could have maintained that exigent circumstances existed, which would have been difficult to review;
- The appellants would have known that the telewarrant process created an objective, independent, and permanent record of the timing of the warrant;
- If the appellants were at the time of their search unsure whether they would successfully obtain a warrant *ex post facto*, they would not have conducted such a disruptive search;
- Fen's evidence confirmed the search warrant was present at the time of the search. It was undisputed that Correia left behind a bag in Pang's apartment and retrieved the forgotten bag later that evening. Fen testified (and Zhong confirmed) that, before leaving for the second time, Correia took the warrant from the forgotten bag and handed it to Zhong;

- If the search started at 7:00 p.m. and lasted two hours, and the warrant drafting process started after the search was completed as suggested by the Crown, it would not have left sufficient time to draft the ITOs before they were sent to the justice of the peace;
- The evidence in relation to the searches conducted by the appellants in other investigations suggested a preference not to enter until the warrant arrived.

[101] The appellants submit further that, with respect to Correia, the jury could not reasonably find guilt of perjury because Correia was never directly asked at the Pang preliminary hearing whether he entered Pang's apartment prior to the arrival of the search warrant.

Analysis of Issue No. 8

[102] It is not necessary to review the Crown's position on this ground of appeal since the appellants' submissions do not come close to meeting the high bar necessary to support a claim that the jury verdict is unreasonable. The test for an appellant court to determine whether the verdict of a jury is unreasonable or cannot be supported by the evidence has been unequivocally expressed by the Supreme Court of Canada. In *R. v. Yebes* [1987] S.C.J. No. 51 at para 25 said this:

> The Court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered.

[103] Here, the evidence supported the convictions. This ground of appeal represents an attempt to re-try the entire case including credibility issues.

[104] With respect to Correia, although he was not directly asked whether he entered the apartment prior to the arrival of the search warrant, he testified that he "stayed out in the hallway with the other officers" "until the search warrant arrived". Logically and semantically this is the same as the lie particularized in count 6 on the indictment, that "he did not enter the premises located at ... prior to the arrival of a search warrant".

[105] I would not give effect to this ground of appeal.

Issue No. 9: Did the trial judge err in dismissing the accused's abuse of process application based on the TPS memo?

[106] The appellants' abuse of process application at trial was based on the TPS memo, dated November 4, 2010, to employees identified as possible witnesses in the appellants' trial. The memo advises the employees that it is their choice whether or not to speak with defence counsel. It also orders the employees to advise a TPS official if they intend to submit to an interview or otherwise provide information to defence counsel so that arrangements could be made to have an officer from the Professional Standards Special Task Force present.

[107] The trial judge dismissed the application.

[108] The trial judge found that there was no evidence that the ability of the appellants to prepare for trial was impaired by the memo. The charges were laid in 2002. The matter had been on the verge of trial in 2007. It was highly likely that any defence interviews with willing TPS employees would have already happened by November 4, 2010. There was no evidence that as a result of this memo, any TPS employee refused speak to defence counsel. Specifically, the trial judge stated, in her reasons:

> I am not persuaded that if a TPS employee wished to participate in an interview with defence counsel, that this memo made such a course less likely, given that the oath of office prohibits such conduct unless authorized.

[109] The trial judge further concluded that the defence's complaint was "entirely hypothetical". It amounted, in her view, to an assertion that the "unfettered private access by defence counsel to members and employees" of the TPS is a "general principle of fundamental justice necessarily inherent in a fair trial". She rejected this submission. Litigation privilege does not prevent a prospective witness from telling anyone else what they disclosed in a pre-trial interview. The TPS has the right to direct the work-related activities of its employees, including requiring that an interview be recorded in some fashion. The effect of the memo was to authorize officers to participate in an interview, notwithstanding their oath of secrecy with respect to information gathered in the course of their employment.

[110] The trial judge concluded that the memo would not prevent a fair trial or undermine the integrity of the justice system. She also concluded that the public interest in a trial on the merits was substantial.

Appellants' Position

[111] The doctrine of abuse of process is broad and flexible in application. Even where the particular fair trial interests of an accused are not in jeopardy, the residual category, as subsumed by s. 7 of the *Charter*, "addresses the panoply of diverse and sometimes unforeseeable circumstances" where a prosecution is so unfair and vexatious that it "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process": *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73.

[112] The memo contravened the fundamental principle that there is "no property in a witness". The Crown cannot dictate the manner in which a witness will be interviewed, the circumstances of the interview, or what type of record will be maintained of any such interview.

[113] The memo also contravened the fundamental principles that the accused has a right not to be forced to assist in his prosecution and to prepare for trial as he or she sees fit without disclosing his or her strategy to the Crown. The memo interfered with the defence's litigation privilege. The accused is entitled to interview any willing witness without fear of being compelled to produce notes of

any such meeting. The Crown is not entitled to know how the defence will meet its case until it unfolds at trial.

[114] The memo had a chilling effect on the defence's ability to meet with potential witnesses who might otherwise have been inclined to meet with the defence by intimidating potential witnesses. This chilling effect interfered with the defence's ability to make full answer and defence. It also explains why it is difficult to establish a direct correlation between the memo and the fairness of the proceeding on a witness-by-witness basis. Nevertheless, there was unfairness, which was compounded by the Crown urging the jury to draw an adverse inference from the defence's failure to call witnesses.

[115] This irreparably compromised the integrity of the proceedings and amounted to an abuse of process.

Crown's Position

[116] The trial judge correctly dismissed the appellants' request for a stay of proceedings for abuse of process. Whether under the main category or the residual category, the test to determine if a stay is warranted is the same: *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at paras. 32-33. There are three requirements to grant a stay of proceedings:

- (1) there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;

- (2) there must be no alternative remedy capable of redressing the prejudice; and
- (3) when uncertainty remains over whether a stay is warranted, the court is to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

[117] These factors have not been satisfied in this case.

Analysis of Issue No. 9

[118] The trial judge did not err in dismissing the appellants' stay application. There was similarly no error in denying the alternative remedy sought, an adjournment and revocation of the memo. Although the doctrine of abuse of process may be broad and flexible in application, it is to be used sparingly – only in the "clearest of cases" – to justify a judicial stay of proceedings: *Babos*, at para. 31.

[119] The threshold for staying proceedings for an abuse of process is a high one. In *Babos*, writing for the majority of the Supreme Court, Moldaver J. reiterated these axioms, at para. 30:

> A stay of proceedings is the most drastic remedy a criminal court can order.... It permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the

> merits. In many cases, alleged victims of crime are deprived of their day in court.

[120] Whether under the main category or the residual category, the test to determine if a stay is warranted for an abuse of process is the same: *Babos*, at paras. 31-33 set out above.

[121] The appellants did not meet this test. Even if I were to assume that there might have been prejudice caused by the memo, and that there might be no alternative remedy to a stay, the appellants' cannot satisfy the third step of the test set out above.

[122] Society had an interest in seeing justice done by having the guilt or innocence of the appellants determined through a full trial on the merits. The interests that would be served by granting a stay must be balanced against the interests society has in having the final decision determined on the merits. The police misconduct alleged was serious and goes to the core of the justice system. Accordingly, society's interest in a decision on the merits was substantial. A stay was not warranted

[123] The interests that would have been served by granting the stay (or, alternatively, an adjournment coupled with revocation of the memo) were minimal. As pointed out by the trial judge, the alleged prejudice to the appellants' right to make full answer and defence was entirely hypothetical. The memo was issued many years after the charges were laid and so any potential witnesses

would already have been approached by the defence. There was also no evidence that the appellants' position would have been improved by rescinding the memo and granting an adjournment. A public decision on the merits was necessary to maintain the integrity of the justice system.

[124] The litigation privilege asserted by the appellants is hypothetical only. The trial judge found that there was no evidence that any employee was reluctant to speak to the defence as a result of the memo. She was "not persuaded that if a TPS employee wished to participate in an interview with the defence counsel, that this memo made such a course less likely."

[125] The trial judge did not misdirect herself in law, commit a reviewable error of fact, or render a decision so clearly wrong that it amounts to an injustice: *Babos*, at para 48. I would not give effect to this ground of appeal.

Disposition of the Conviction Appeals

[126] I would dismiss the appeals against the convictions.

THE SENTENCE CROSS-APPEALS

[127] The Crown seeks leave to appeal the sentences imposed on the respondents (to this cross-appeal). If leave is granted, the Crown seeks to set aside the 45-day conditional sentences imposed on each of the respondents and substitute 3-year custodial sentences.

[128] The sentencing judge agreed with the Crown that offences against the administration of justice are more serious when committed by a police officer because of their duty to uphold the law. She placed substantial weight on the objectives of deterrence and denunciation and concluded that a 45-day conditional sentence was sufficient to satisfy those objectives. She considered the significant deterrent effect of the lengthy and invasive investigation and the prolonged nature of the proceedings. She concluded that ”No other police officer would willingly trade places with any of these accused.” She also accepted that “incarceration would be exceptionally difficult for each of these accused” because their work “has resulted in the incarceration of hundreds of drug dealers.”

[129] The sentencing judge considered mitigating factors relevant to the circumstances of the offence, such as the fact that the appellants had little to gain personally from the warrantless search. She also considered mitigating personal circumstances of each of the respondents. She noted the mitigating effect of delay, as is conceded by the Crown.

[130] In its cross-appeal, the Crown disputes that the reasonable manner in which the search - once initiated - was conducted was a mitigating feature. In addition, the Crown submits that the apparent lack of motive and the fact that the respondents’ had requisite grounds to obtain a search warrant were aggravating, not mitigating, features. But, the Crown’s principal argument is not with the factors considered by the sentencing judge, but rather with their weighing. The

issue is this: does a 45-day conditional sentence reflect the seriousness of the offence when police officers attempt to obstruct justice and perjure themselves?

[131] While deference is owed to the sentencing judge, the objective of denunciation requires that this Court intervene as the sentences were demonstrably unfit.

[132] Public confidence in the honesty of the police is fundamental to the integrity of the criminal justice system. As Moldaver J.A. wrote in *Schaeffer v. Wood*, 2013 SCC 71 at para. 52, citing Sir Robert Peel:

> "'the police are the public and…the public are the police… The wisdom of this statement lies in its recognition that public trust in the police is, and always must be, of paramount concern."

[133] Police officers are sworn to uphold the law. In *R. v. Feeney*, 2008 ONCA 756, 238 C.C.C. (3d) 49, at para. 8, this court endorsed the following passage from *R. v. Cusack* (1978), 41 C.C.C. (2d) 289 (N.S. S.C.(A.D.))::

> [T]he paramount consideration in this case is the protection of the public from offences of this sort being committed by persons who are given special authority by our law to deal with individual members of society, and to deter such persons from acting in breach of their trust....
>
> The commission of offences by police officers has been considered on numerous occasions by the Courts, and the unanimous finding has been that their sentence should be more severe than that of an ordinary person who commits the same crime, because of the position of public trust which they held at the time of the offence

> and their knowledge of the consequences of its perpetration..

[134] The convictions relate to the administration of justice. Civilian offenders who interfere with the proper investigation and prosecution of criminal offences have received significant sentences. As the British Columbia Court of Appeal noted in *R. v. Hall*, 2001 BCCA 74, [2001] B.C.J. No. 560, at para. 12:

> Obstruction of justice or attempting to obstruct justice strikes at our system of a lawful society. The message must be clear that this type of interference with the community system for handling criminal offences will not be tolerated. It is for this reason that the courts must act firmly to express society's disapproval and denunciation of such conduct.

[135] Perjury convictions must attract similar deterrent sentences. Perjury strikes "at the very root of our system of justice." (*R. v. Glauser* (1981), 16 C.C.C. (2d) (Ont. C.A.) Time and time again courts have referred to the fact that perjury undermines the very heart of the administration of justice. (see: *R. v. Turner* (1981), 65 C.C.C. (3d) 487; *R. v. C.D.* [2000] O.J. No. 1668 (C.A.) As stated in *Glauser:*

> The administration of justice is based upon the truthful testimony of those persons who are called to give evidence under oath. The freedom, or on the other hand, the incarceration of accused persons in serious criminal offences depends totally upon the truthfulness of those witnesses. (para. 288)

[136] When the perpetrators of the crime are police officers sworn to uphold the law, the objective of denunciation has heightened significance. Police officers owe a special duty to be faithful to the justice system.

[137] The sentencing judge addressed the objective of general deterrence. However, the 45-day conditional sentences do not reflect society's condemnation of the conduct. Nor do they address the need to denounce the crimes and are thus demonstratively unfit.

[138] I would grant leave and allow the Crown's cross-appeal against the sentences. With respect to each respondent, I would set aside the 45-day conditional sentence and substitute a sentence of 3 years. However, in the light of all of the circumstances, particularly the passage of time since the sentences were first imposed and the fact that the sentences imposed have been served, I would order that the operation of the sentences be stayed.

SUMMARY

[139] I would dismiss the conviction appeals and allow the cross-appeals of sentence on the terms set out above.

Released: "D.W." April 20, 2015

"M.L. Benotto J.A."
"I agree David Watt J.A."
"I agree M. Tulloch J.A."