COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Mann,*
2014 BCCA 231

Date: 20140618
Docket: CA040090

2014 BCCA 231 (CanLII)

Between:

Regina

Respondent

And

Rajan Singh Mann

Appellant

And

British Columbia Civil Liberties Association

Intervenor

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson

On appeal from: Orders of the Supreme Court of British Columbia, dated May 11, 2012 (*R. v. Mann*, 2012 BCSC 1265), Vancouver Registry Docket 24117.

Counsel for the Appellant: P.J. Wilson, Q.C., M. Rankin

Counsel for the Respondent: G.C. Banning

Counsel for the Intervenor: B.B. Olthuis, E.M. Patel

Place and Date of Hearing: Vancouver, British Columbia
January 20 and 21, 2014

Place and Date of Judgment: Vancouver, British Columbia
June 18, 2014

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Neilson

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Summary:

Appeal from conviction by a judge without a jury of multiple charges related to a kidnapping. The appellant was charged as the third kidnapper in a kidnapping that occurred in 2006. He appeals his conviction on three grounds.

Ground one, mode of trial: *The appellant claims the trial judge erred by ruling his election to be tried by a judge without a jury survived the recommencement of proceedings within one year of the Attorney General entering a stay of proceedings on a direct indictment.*

In February 2007, the Crown preferred a direct indictment that was set to commence as a jury trial. The appellant re-elected to be tried by a judge without a jury, with the Crown's consent. The Crown entered a stay of proceedings in April 2008 when the complainants failed to attend to testify. The proceedings were recommenced on the first direct indictment in September 2008, and the trial was scheduled to begin in September 2009 before a judge without a jury. In June 2009, the Crown preferred a second direct indictment which was substantively identical to the first direct indictment. The trial did not proceed in September 2009, and was subsequently split into two parts. Prior to the commencement of the trial in February 2010, the appellant objected to the trial proceeding without a jury. The Crown proceeded on the first direct indictment, which remained outstanding. The appellant argued that the recommencement of the stayed proceeding meant the proceeding started over, giving him new rights as to mode of trial. The trial judge ruled that he was not entitled to be tried by a judge with a jury, and the trial proceeded without a jury.

Held: *There is no statutory provision that provides an accused who has elected a trial by a judge without a jury the right to re-elect a trial by a judge with a jury when a proceeding under a direct indictment that has been stayed is recommenced within one year. The appellant has neither an historical nor an inherent right to choose to be tried by a judge with a jury when stayed proceedings on a direct indictment are recommenced. In the absence of a new direct indictment or express statutory authority providing the appellant the right to re-elect under the recommenced indictment, the appellant was neither required nor entitled to be tried by a judge with a jury. In this case, the appellant had waived his right to be tried by a jury when he elected under the first direct indictment to be tried by a judge without a jury.*

Ground two, BlackBerry searches: *The appellant claims the trial judge erred in finding the searches of two BlackBerry devices seized during his arrests were valid under the common law power of search incident to arrest. The police downloaded the full contents of the BlackBerrys without obtaining a search warrant. The appellant argued these warrantless searches violated his right to be free from unreasonable search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms.*

Held: *The warrantless searches of the BlackBerrys violated the appellant's s. 8 right. The law as it stands today no longer permits police to conduct warrantless searches*

of the entire contents of an individual's cell phone. The admission of the evidence obtained from the searches of the BlackBerrys would not, however, bring the administration of justice into disrepute. Accordingly, the evidence is not excluded.

Ground three, misapprehension of evidence: *The appellant submits the trial judge misapprehended key aspects of the evidence in concluding he was the third kidnapper.*

Held: *The appellant has failed to establish the high threshold required to overturn the trial judge's findings of fact based on a misapprehension of evidence. The trial judge considered all of the evidence, and concluded the case against the appellant was overwhelming. To the extent the trial judge may have misapprehended any evidence, it was not material to his decision.*

Result: *Appeal dismissed.*

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Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The appellant, Rajan Singh Mann, was convicted on May 11, 2012, by a Supreme Court justice sitting without a jury, of multiple charges relating to a kidnapping that occurred on June 7, 2006.

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[2] He appeals the conviction on three grounds:

(a) the trial judge erred in ruling that the appellant's election to be tried by a judge without a jury survived the recommencement of the proceedings within one year of the Attorney General entering a stay of proceedings on a direct indictment;

(b) the trial judge erred in finding that searches of two BlackBerry devices seized during the appellant's arrests were valid under the common law power of search incident to arrest and did not violate s. 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11;

(c) the trial judge misapprehended key aspects of the evidence in concluding the appellant was the third kidnapper.

[3] For the reasons that follow, I would not accede to any of the appellant's grounds of appeal. It follows that I would dismiss the appeal.

[4] In these reasons, I will first outline, for context, the events that gave rise to the charges. I will then deal with each of the grounds of appeal.

The Kidnapping

[5] On June 7, 2006, three men – two Caucasians and one described as "East Indian" – forced the victim into his Ford Ranger pickup truck and took him to

his apartment. The two Caucasian men escorted the victim into the apartment, where his wife was present.

[6] After several hours, the victim was removed from the apartment and confined to his Dodge Caravan. His wife was released to gather the ransom demanded. She called a friend. The victim's wife and friend reported the kidnapping to police and thereafter acted under police direction. During the evening of June 7 and the early morning of June 8, there were numerous communications concerning the ransom among the kidnappers, the wife and the friend.

[7] No ransom was ever paid. The kidnappers abandoned the kidnapping and released the victim after holding him for 13 hours.

[8] Three men were charged with the kidnapping and other offences. After the trial commenced, one of the co-accused pleaded guilty, and the other died. The trial continued with the appellant as the sole accused: *R. v. Mann*, 2012 BCSC 1265 at para. 8 ("RFJ").

[9] There was no issue at trial that the events described by the victims/complainants had not occurred, and that the co-accused who pleaded guilty was one of the kidnappers (RFJ at paras. 10-11).

[10] The principal trial issue was whether the appellant was the third kidnapper; that is, the driver of the victim's truck after the victim was forced into it. The trial judge summarized the Crown's evidence and the defence position (RFJ at paras. 12-15):

> [12] ... This third kidnapper was a person previously unknown to [the victim], and after the kidnapping began [the victim] was only briefly in his presence. The sole opportunity [the victim] had to observe the third kidnapper was as he was being pushed into the rear seat of the Ford Ranger. The third kidnapper was in the driver's seat at the time. [The victim] described this person as follows: an East Indian man in his twenties, wearing sunglasses, and speaking with a "Punjabi" accent.
>
> [13] The brief and limited opportunity to see the third kidnapper left [the victim] in a compromised position for the purpose of identifying this man. The security camera at the entrance to [the victim's] apartment captured images of [the victim] being escorted into the building by the two Caucasian

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> kidnappers at 5:03 p.m. The videotape was seized and tendered as trial evidence. It shows that approximately two minutes after Mr. Scott entered the lobby, he returned to the glass entry door, apparently to open it for a tall, slim, young, dark-featured young man wearing sunglasses. This man remained at the door and held it open for approximately 30 seconds. The Crown says that this tall, dark man is the third kidnapper, and that the video images show, by identity of physical features, the third kidnapper to be the accused, Rajan Mann.
>
> [14] In support of the video identification evidence, the Crown tendered a substantial body of evidence intended to establish links between Mr. Mann and the kidnapping. This evidence includes various things attributed to Mr. Mann, including:
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> (a) intercepted communications;
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> (b) associations with the other known kidnappers;
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> (c) links to certain vehicles and communications devices;
>
> (d) [the victim's] identification of Mr. Mann as the person he encountered at a Richmond intersection one week after the kidnapping; and,
>
> (e) a post-charge attempt to dissuade [the victim] and others from testifying.
>
> [15] The essence of the defence position is that the Crown's case on the identity of the third kidnapper is a circumstantial one which does not establish, as the only reasonable inference, that Mr. Mann was the third kidnapper.

[11] The trial judge found the case against the appellant "overwhelming". He said (RFJ at para. 115(a)):

> To the extent that it is a circumstantial one, I am satisfied that there are no other rational inferences or conclusions which may be drawn from (i) the evidence, (ii) any absences of evidence, or (iii) any frailties within the evidence.

[12] The appellant challenges this conclusion, arguing the trial judge misapprehended key aspects of the evidence. I will deal with this ground of appeal, and the details of the challenged evidence, later in these reasons for judgment.

Mode of Trial

[13] The appellant claims that he was entitled to be tried by a judge and jury when he was tried on a direct indictment that was stayed and recommenced within one year. The trial judge ruled otherwise, and he was tried by a judge without a jury.

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[14] The trial judge made his ruling on February 2, 2010, and released his reasons for his ruling on August 20, 2012: *R. v. Mann*, 2012 BCSC 1248 ("Mode of Trial Ruling" ("MOTR")).

[15] The proceedings giving rise to this ground of appeal were described by the trial judge as having "a chequered history before the courts" (MOTR at para. 6). I will first summarize that background, and then turn to the appellant's arguments and my analysis.

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Background

[16] The trial judge summarized the history of the proceedings (MOTR at para. 6):

- The kidnapping and related charges were initiated by an Information sworn in the Provincial Court of British Columbia in June 2006. In February 2007, the Crown preferred a Direct Indictment and on this indictment a jury trial was set to commence on April 21, 2008. On April 10, 2008, the three accused re-elected to be tried by a judge without a jury, with the Crown's consent. The trial commenced, as scheduled, before a judge sitting alone.
- On April 29, 2008, the trial was aborted by a stay of proceedings entered by the Crown because the complainants failed to attend to testify as required. By September 5, 2008, the Crown had addressed its witness problem and the proceedings were recommenced on the existing (first) Direct Indictment, pursuant to the provisions of s. 579(2) of the *Code*. September 1, 2009 was set as the start of the new trial. This trial was set as a trial by judge alone by all parties, without objection.
- On June 2, 2009, the Crown preferred a second Direct Indictment, for the sole purpose of broadening the dates of the alleged obstruction of justice charge captured in count 12; otherwise, the second Direct Indictment was substantively identical to the first one. Bail was addressed in relation to the new Direct Indictment, as was required given the substantive change to count 12.
- The trial did not proceed on September 1, 2009. Scheduling conflicts in the calendars of counsel for the defence resulted in several adjournment applications and great difficulty in re-scheduling the trial. To overcome these difficulties, it was agreed by all parties to split the trial into two parts. This was regarded as a sensible solution because it was a non-jury trial, the trial was expected to be lengthy, and there remained lingering doubts about whether the complainants would testify at all, let alone in a manner that would support the prosecution. It was understood that if the complainants did not cooperate then the lengthier second phase might not be needed.

- The first phase of the trial was set to commence on January 4, 2010, as a judge alone trial, by agreement of all parties. The mutual understanding was that the second phase would be set, if needed, upon the conclusion of the first stage.
- The January 4, 2010 trial date was adjourned due to an unanticipated conflict in the calendar of one defence counsel. A new trial date of February 2, 2010 was set, as a judge alone trial.

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[17] On January 29, 2010 counsel for the appellant notified Crown counsel that he objected to the trial proceeding without a jury. On February 2, 2010, the morning the trial was to commence, counsel for the appellant stated that because the Crown was proceeding on the second direct indictment, the appellant was deemed to have elected to be tried by a judge and jury: *Criminal Code*, R.S.C. 1985, c. C-46, s. 565(2). All three accused stated they did not wish to re-elect to be tried by a judge without a jury.

[18] The Crown chose to proceed on the first direct indictment which remained outstanding, having been stayed on April 29, 2008, and on which proceedings had recommenced within one year on September 5, 2008. She argued that recommenced proceedings on the stayed first direct indictment within one year of the stay, as permitted by s. 579(2) of the *Code*, did not give rise to a right of the accused to re-elect the mode of trial. The Crown's position was that the accused's re-election on the first direct indictment in April 2008 to be tried by a judge without a jury survived the stay.

[19] The defence argued, as the appellant argues on appeal, that the "recommencement" of a stayed proceeding means that the proceeding starts over, with new rights as to the mode of trial.

[20] After hearing three days of argument, the trial judge overruled the defence objection to proceeding by judge alone. He reasoned as follows (MOTR, at paras. 16-21):

> [16] In relation to stays of proceedings and recommencement, s. 579 is the applicable provision of the *Code*. It states as follows:
>
> > **579.** (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an

> accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.
>
> (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

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> [17] It is evident from a plain reading of s. 579(2) that a recommencement is not a new proceeding. The wording used expressly distinguishes recommencement from the process of laying a new information or preferring a new indictment. No purpose would be served by the differentiation if a recommencement was, for all intents and purposes, the same as starting afresh with a new charging document.
>
> [18] In the instant context, a Crown-entered stay of proceedings is clearly not an end to the proceedings. It is, rather, a temporary suspension. The stay is defined by a one-year period, after which the proceedings end if notice of recommencement has not been given; thus, it is *temporary*. The proceedings do not end unless and until one year has expired without notice to recommence; thus, the stay cannot be reasonably characterized as anything other than a *suspension*.
>
> [19] A suspension of proceedings, whether criminal or otherwise, is a mechanism generally intended to preserve existing proceedings. In other words, when the stay is lifted, the proceedings resume where they left off, to the extent that justice and procedural fairness permit. This is contrary to any notion that a stay brings an end to the proceedings and that a resumption of them requires reversion to their beginnings. I regard the analogy the Crown draws between re-trials and recommencements as apposite.
>
> [20] In view of the foregoing, I conclude that the election of the accused to be tried by a judge without a jury on the first Direct Indictment survived the stay of proceedings and subsequent recommencement.
>
> [21] The defence objection is over-ruled. This matter may proceed to trial before a judge without a jury, as scheduled, upon the first-filed Direct Indictment.

The Appeal

[21] The appellant claims the trial judge's ruling that he was not entitled to be tried by a judge and jury when his trial proceeded on the first direct indictment deprived

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him of his "historic and fundamental right" to a trial by judge and jury. His argument focuses on the interpretation of s. 579(2) of the *Code*. Specifically, the appellant says that "s. 579(2) does not give the Crown authority to resume a proceeding where the proceeding left off." He says: "This is the only interpretation of s. 579(2) that is consistent with its plain meaning, its history, the case law and the surrounding statutory language."

[22] In my opinion, the appellant's argument focuses too narrowly on the history of the Attorney General's power to stay a proceeding, and the word "recommence" in s. 579(2) of the *Code*.

[23] The issue on this aspect of the appeal is whether the appellant had the right to be tried by a judge and jury when the stayed proceedings on the first direct indictment were recommenced. The *Code* is silent on this issue. The answer must be found within the law and the principles applicable to an accused person's right to elect and re-elect the mode of trial. When the issue is examined in that context, it is clear the appellant had no right to be tried by a judge and jury.

Statutory Provisions

[24] It is useful in understanding the issue on appeal to set out the statutory provisions that are relevant to how this case proceeded.

[25] The Crown preferred two direct indictments, on February 1, 2007 and June 2, 2009, under s. 577 of the *Code*:

> **577.** Despite section 574, an indictment may be preferred even if the accused has not been given the opportunity to request a preliminary inquiry, a preliminary inquiry has been commenced but not concluded or a preliminary inquiry has been held and the accused has been discharged, if
>
> (*a*) in the case of a prosecution conducted by the Attorney General or one in which the Attorney General intervenes, the personal consent in writing of the Attorney General or Deputy Attorney General is filed in court; or
>
> (*b*) in any other case, a judge of the court so orders.

[26] The appellant was deemed to have elected to be tried by a judge and jury, and was entitled to re-elect to be tried by a judge without a jury, under s. 565(2) of the *Code*:

> **565.** (2) If an accused is to be tried after an indictment has been preferred against the accused pursuant to a consent or order given under section 577, the accused is, for the purposes of the provisions of this Part relating to election and re-election, deemed both to have elected to be tried by a court composed of a judge and jury and not to have requested a preliminary inquiry under subsection 536(4) or 536.1(3) and may re-elect to be tried by a judge without a jury without a preliminary inquiry.

[27] At the time the appellant re-elected on the first direct indictment to be tried by a judge without a jury, on April 10, 2008, he required the written consent of the prosecutor, which was given, under s. 565(3) of the *Code*:

> **565.** (3) Where an accused wishes to re-elect under subsection (2), the accused shall give notice in writing that he wishes to re-elect, together with the written consent of the prosecutor, to a judge or clerk of the court where the indictment has been filed or preferred who shall, on receipt of the notice, notify a judge having jurisdiction or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or clerk the indictment and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, any summons or warrant issued under section 578, or any evidence taken before a coroner, that is in the possession of the first-mentioned judge or clerk. [Emphasis added.]

[28] I note for completeness that s. 565(3) was amended, effective May 29, 2008. An accused no longer requires the consent of the prosecutor to re-elect to a trial by a judge without a jury after a direct indictment is preferred. Neither the appellant nor the Crown noted this change in their factums or arguments on appeal, nor is it referred to by the trial judge in his reasons for judgment on this issue. It has no relevance to the issue on appeal, as it does not address a re-election to be tried by a judge without a jury to be tried by a judge with a jury.

[29] The proceedings on the first direct indictment were stayed by the Crown on April 29, 2008, when the complainants failed to attend the trial to testify. The Crown's statutory power to stay the proceedings is found in s. 579(1) of the *Code*:

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> **579.** (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

[30] The Crown recommenced the proceedings on the first direct indictment on September 5, 2008, under s. 579(2) of the *Code*:

> **579.** (2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

[31] The issue of the appellant's right to a trial by a judge with a jury arose when the trial was set to proceed on the second direct indictment. Under s. 565(2), the appellant was deemed to have elected to be tried by a judge and jury on that indictment, and he declined to re-elect to be tried by a judge without a jury. The Crown therefore decided to proceed on the first direct indictment.

[32] The accused had elected on the first direct indictment under s. 565(2) on April 10, 2008 to be tried by a judge without a jury. That indictment had been stayed on April 29, 2008 and recommenced September 5, 2008. The defence took no issue with the co-existence of more than one charging document, and did not object to proceeding on the first direct indictment other than the issue of mode of trial (MOTR at para. 14).

[33] Acknowledging that the *Code* is silent on whether a re-election under s. 565(2) survives a stay and recommencement under s. 579(2), the defence argued that on a recommencement the proceedings start again, with a renewed right to a jury trial. The trial judge concluded otherwise, giving rise to this ground of appeal.

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History of the Crown's Right to Stay Criminal Proceedings

[34] The appellant's interpretation of s. 579(2) of the *Code* derives from the history of the Crown's right to stay criminal proceedings and the effect of such a stay.

[35] The appellant notes that the Attorney General had an historical right to stay proceedings by filing a *nolle prosequi*, translated as "I am unwilling that it should be prosecuted": see Bryce C. Tingle, "The Strange Case of the Crown Prerogative Over Private Prosecutions or Who Killed Public Interest Law Enforcement" (1994) 28 U.B.C. L. Rev. 309-365 at 321, citing F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1974) at 481.

[36] Tingle notes (at 321) that the first recorded exercise of the power was in 1555, and (at 322) "for the purposes of modern law, the status of *nolle prosequi* was settled by an 1862 case, *R. v. Allen* [(1862), 121 E.R. 929 (K.B.)]". In *Allen* the Court said (at 931): "the *nolle prosequi* puts an end to the prosecution".

[37] The statutory power to stay certain prosecutions in Canada was granted to the Attorney General in the first *Code* enacted in 1892. Tingle suggests that there are some differences between the *nolle prosequi* and the statutory stay provisions, but that is not supported by the decision of the Ontario Court of Appeal in *Rex v. Spence* (1919), 31 C.C.C. 365.

[38] In *Spence*, the Court considered the effect of a statutory stay in the context of the history of the *nolle prosequi*. The Attorney General had exercised his power to stay proceedings under s. 962 of the *Code*. He then laid a new information on the same charge. The accused sought to prohibit the magistrate from proceeding with the case on the ground that he had been discharged by the stay of proceedings. After reviewing the jurisprudence concerning the effect of the *nolle prosequi*, the judge denied the application for prohibition, concluding (at 374):

> Upon the authorities cited I am unable to see that the motion can prevail. While the stay entered precludes further action upon the original indictment -- in fact, permanently stays such action -- it does not preclude the laying of a further information, as has been done here.

The Court of Appeal dismissed the appeal. The headnote to the case says: “A stay of proceedings by the Attorney General under s. 962 of the *Code* is in effect a *nolle prosequi* …”.

[39] Thus, the exercise of the *nolle prosequi* and the statutory stay provisions in the *Code* had the effect of bringing the prosecution to an end, but permitted the Attorney General to start new proceedings for the same charge on a fresh information or indictment: see also *Rex. v. Takagishi* (1932), 60 C.C.C. 34 (B.C.S.C.).

[40] The appellant argues that the significance of this is that if the Attorney General resumed the proceedings by preferring a new direct indictment, the accused would be required (and entitled) to be tried by a judge and jury.

[41] In 1972, s. 508(2) (now s. 579(2)) was added to the *Code*. It permits the Attorney General to recommence a stayed proceeding within a year without filing a fresh indictment. The appellant argues that insofar as the mode of trial is concerned, it should be interpreted in a way that does not detract from the rights the accused had before its enactment.

[42] In *Dowson v. The Queen*, [1983] 2 S.C.R. 144, Justice Lamer (as he then was) for the Court held that the Attorney General could not enter a stay under s. 508(1) (now 579(1)) of the *Code* on an information charging an indictable offence until a justice of the peace had made a decision to issue process. Section 508(1) was subsequently amended to address this different treatment of stays on summary conviction and indictable offences. Of interest here is Lamer J.’s discussion of the effect of s. 508(2). He said (at 154):

> With respect, I do not find compelling the first and third reasons upon which [the Court of Appeal] predicated their conclusion. As regards the first of those reasons, all that s. 508(2) says is that you need not start all over to recommence the proceedings. It does not follow that laying a new information would amount to the “finding of an information”. If the Attorney General does choose to start all over, he will of necessity have to lay an information. Prior to the addition in 1972 of s. 508(2) to what is now s. 508(1), there was uncertainty as to whether you had to prefer a new charge or whether you could start the proceedings again by carrying on at the point the proceedings

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> were stayed. (See *R. v. Mitchel* (1848), 3 Cox C.C. 93; see also *R. v. Rosser* (1971), 16 C.R.N.S. 321, at p. 326, for a review of authorities) [emphasis added].

[43] Roger E. Salhany (in R.E. Salhany, *Canadian Criminal Procedure*, loose-leaf (consulted on May 30, 2014) 6th ed. (Toronto, ON: Thomson Reuters Canada Limited, 2013)) comments on *Dowson* (at 6-74):

> On further appeal to the Supreme Court of Canada, Lamer J. (as he then was) for the Court accepted the view that the Crown was entitled to direct a stay to be entered before an indictment had been “found”. But he could not find support for that view in s. 508(2) (now s. 579(2)), as did Howland C.J.O., because all that section did was resolve the uncertainty which had previously existed as to whether a new charge had to be preferred or whether the proceedings could be started again by carrying on at the point where the proceedings were stayed [emphasis added].

[44] Thus, it is not as clear as the appellant suggests that before the addition of s. 579(2) to the *Code*, the Crown would have had to prefer a fresh indictment to proceed with the case, and that the appellant would therefore have been required, subject to re-election, to be tried by a judge with a jury.

[45] I am therefore unconvinced that to interpret s. 579(2) as the trial judge did interferes with rights the appellant would have had before its enactment.

Constitutional Right to a Jury Trial

[46] Nor is the trial judge’s interpretation of s. 579(2) and its effect on the appellant’s right to elect his mode of trial inconsistent with the appellant’s right to a jury trial under s. 11(f) of the *Charter*. In *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1322-1323, the issue before the Court was whether provisions of the *Code* requiring a murder trial to be conducted before a judge and jury violated the appellant’s rights to waive a trial by jury under s. 11(f). The Court held that an accused may waive the right to a jury trial if it is not to his benefit, but having waived that right, the accused had no constitutional right to elect the mode of trial:

> Once the right is waived, however, reliance on the Constitution ceases and the provisions of the *Criminal Code* govern. There is, in my view, nothing in s. 11(f) to give the appellants a constitutional right to elect their mode of trial

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> or a constitutional right to be tried by judge alone so as to make s. 11(f) inconsistent with the mandatory jury trial provisions of the *Criminal Code*.

[47] In electing to be tried by a judge without a jury, the appellant effectively waived his right to be tried by a judge and jury. The question is whether that election survived the stay when the proceedings were recommenced under s. 579(2). In accordance with *Turpin*, that matter is determined by the provisions of the *Code*.

Meaning of the Word "Recommence"

[48] The appellant seeks to interpret the word "recommence" to support his argument that he should have the same rights as to his mode of trial as he would have had the Crown preferred a new indictment.

[49] He says that the plain meaning of the word "recommence" is "to begin again" (*The Compact Oxford Dictionary*, 3rd ed., *sub verbo* "recommence"), "to cause to start anew" (various online dictionaries), "requires a new beginning" (*R. v. Larosa*, [2000] O.J. No. 976 at para. 61, but referring to recommencing after one year).

[50] This approach to interpreting s. 579(2) begs the question. It is not whether or at what point the proceedings start over, but whether the accused has a renewed right to be tried by a judge and jury when stayed proceedings are recommenced. The *Code* is clear that the proceedings do not start over with a fresh indictment. As pointed out in *Dowson*, the addition of s. 579(2) to the *Code* clarified that question. And as the trial judge said (MOTR at para.17):

> The wording used expressly distinguishes recommencement from the process of laying a new information or preferring a new indictment. No purpose would be served by the differentiation if the recommencement was, for all intents and purposes, the same as starting afresh with a new charging document.

[51] I am unpersuaded by this argument.

Effect of a Stay on Other Orders

[52] The appellant points out that when the Crown enters a stay, the terms of any orders for judicial interim release are terminated, and the accused is discharged:

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see *Purves v. Canada (Attorney-General)* (1990), 54 C.C.C. (3d) 355 (B.C.C.A.); *R. v. Vukelich,* [1993] B.C.J. No. 3076 (C.A., Wood J.A. in Chambers); *R. v. Jones* (1997), 113 C.C.C. (3d) 225 (Ont. C.A.).

[53] The termination of bail terms is necessary to unencumber the accused while he is not in jeopardy during the stay. The same reasoning does not apply to the terms of the direct indictment or other procedures taken following its preferment by the Crown.

[54] The appellant says further that a stay terminates "any procedures or orders that were dependent upon the stayed indictment", citing *R. v. Smith* (1993), 79 C.C.C. (3d) 70 at 80 (B.C.C.A.), where Mr. Justice Hollinrake for the Court said:

> When the stay has been entered there is no contest between the individual and the state. The prosecution has come to an end. The position of the accused as against the state is the same as if he had never been charged. The individual is not put at jeopardy by the stay. On the contrary, the jeopardy he faced as an accused in an ongoing prosecution has come to an end.

[55] In *Smith*, after the Crown had entered a stay of proceedings, the accused sought to argue before the Provincial Court Judge that s. 579 of the *Code* violated the *Charter*. The Crown applied to the B.C. Supreme Court for an order prohibiting the trial judge from hearing the application on the ground that once the stay was entered, the judge was *functus* and without jurisdiction to proceed. The application for prohibition was dismissed. On appeal to this Court, the appeal was allowed. The Court agreed with the Crown that once the stay was entered, the prosecution had come to an end and the trial judge had no jurisdiction to proceed.

[56] *Smith* has no application to the issue before us, which is whether the accused's re-election to be tried by a judge without a jury survived the recommencement of the stayed direct indictment.

Accused's Rights as to the Mode of Trial

[57] The question on this aspect of the appeal is whether an accused being tried under a direct indictment, who has elected to be tried by a judge without a jury, has

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a right to be tried by a judge and jury when a stayed proceeding is recommenced within one year. The effect of s. 579(2) on the accused's rights with respect to the mode of trial has not previously been expressly considered.

[58] An accused's mode of trial is governed by the provisions of the *Code*, which are determinative of the court's jurisdiction. This principle is amply illustrated by the jurisprudence dealing with the application of *Code* provisions to the accused's right to elect and re-elect the mode of trial. A recent example is *R. v. Gould*, 2014 BCCA 146.

[59] Another example is in *R. v. Smith*, [1993] B.C.J. No. 1470 at paras. 16-17 (C.A.), where the Court held that the appellant could not re-elect for a trial without a jury once he was put in charge of the jury:

> In my view it is not necessary to decide that question. A mistrial or a stay of proceedings aside, and in the absence of any express statutory authority permitting a re-election at that stage, once the appellant had been placed in charge of the jury he could only be convicted or discharged by a verdict of that jury; see *Regina v. Heyes* (1950), 34 Crim. App. R. 161, *Regina v. Dietrich*, [1968] 4 C.C.C. 361 (Ont.C.A.).
>
> There is no statutory authority permitting a re-election once the accused has been put in charge of the jury. That being so, there was no jurisdiction in the trial judge to accept a re-election by the appellant. The only way in which the trial judge could have assumed jurisdiction over the appellant at that point in the proceedings, would have been to declare a mistrial and then have the appellant re-elect, assuming the Crown was then willing to give its consent to such a re-election. No application for such relief was made below, nor, from the record put before us, were there any grounds upon which it could have been granted. Indeed, counsel did not suggest there was any basis upon which a mistrial could have been granted. Accordingly, this ground of appeal cannot succeed.
>
> [Emphasis added.]

[60] This principle is also reflected in the line of cases that have held that when the Court of Appeal orders a new trial following an appeal, the accused has no right to re-elect the mode of trial: *R. v. Deakin*, [1912] B.C.J. No. 5 (C.A.); *R. v. Sagliocco* (1979), 51 C.C.C. (2d) 188; *R. v. Cohen (No. 2)*, [1983] B.C.J. No. 2062 (C.A.); *R. v. Switzer* (1985), 22 C.C.C. (3d) 60 (B.C.S.C.) (in Chambers); *R. v. Frattura* (1987), 40 C.C.C. (3d) 379 (B.C.S.C.). These cases confirm that there is no right to

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re-elect the mode of trial following an appeal unless conferred through provisions of the *Code.*

[61] Courts have taken a similar approach to the accused's right to re-elect the mode of trial where the Crown adds a count to an indictment after the accused has elected: *R. v. Atkinson* (1981), 57 C.C.C. (2d) 489 (N.B.C.A.), leave to appeal ref'd [1981] S.C.C.A. No. 257; *R. v. Smith*, [1989] S.J. No. 720 (C.A.).

[62] There is no statutory provision that provides an accused who has elected to be tried by a judge without a jury the right to re-elect to be tried by a judge and jury when a proceeding under a direct indictment that has been stayed is recommenced within one year. The *Code* requires an accused to be tried by a judge and jury when a direct indictment is preferred (s. 565(2)). That provision is not applicable when proceedings are recommenced under s. 579(2), because no new direct indictment is required. As the trial judge pointed out, s. 579(2) "expressly distinguishes recommencement from the process of laying a new information or preferring a new indictment" (MOTR at para. 17).

[63] Nor, absent constitutional considerations, is there an historical or inherent right in the accused to choose to be tried by a judge and jury when stayed proceedings are recommenced.

[64] Thus, in the absence of a new direct indictment or express statutory authority providing the appellant the right to re-elect under the recommenced indictment, the appellant was neither required nor entitled to be tried by a judge and jury. He had waived his right to be tried by a judge and jury under the first direct indictment when he elected to be tried by a judge without a jury.

Conclusion on Mode of Trial

[65] The appellant was not entitled to be tried by a judge and jury.

[66] I would not accede to this ground of appeal.

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BlackBerry Searches

[67] The appellant claims that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated when the police searched two BlackBerry devices seized from him during his arrests. The trial judge found the appellant's s. 8 *Charter* right was not violated on the basis that the searches were reasonable searches authorized by the common law power to search incident to arrest.

[68] The trial judge made his ruling on September 19, 2011, and released his reasons for the ruling on August 20, 2012: *R. v. Mann*, 2012 BCSC 1247 ("BlackBerry Search Ruling" ("BSR")).

Background

[69] During the police investigation of the kidnapping, the appellant was arrested twice, on June 8 and June 28, 2006. During each of the arrests, a BlackBerry device was seized by police.

[70] BlackBerry #1 was submitted for analysis at the RCMP's Technological Crime Unit in Ottawa on June 13, 2006. The cell phone could not be analyzed because it was password protected. It was submitted for analysis again in July 2008. Data extraction was completed by August 6, 2008. The recovered user data included the text of 72 messages received or sent on June 27 and 28, 2006, 22 of which the Crown relied on in its case against the appellant (BSR at para. 13).

[71] BlackBerry #2 was submitted for analysis on July 4, 2006. Data was extracted on August 26, 2006. The data recovered included the text of 269 messages received or sent by the user, 81 of which the Crown relied on in its case against the appellant (BSR at para. 16).

[72] No search warrant was sought or obtained with respect to the searches of the two BlackBerry devices.

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[73] The defence challenged the lawfulness of the warrantless searches of the contents of the BlackBerry devices. The appellant argued, as he does on appeal, that the common law power of the police to perform a search incident to arrest does not extend to a “highly intrusive” search that risks the collection of private information stored in a mobile communications device such as a BlackBerry. He claimed further that the searches were unreasonable because in the course of extracting data from BlackBerry #1 it was physically destroyed, and because the searches of the BlackBerrys were temporally disconnected from the arrests.

[74] The trial judge followed the decision in *R. v. Giles*, 2007 BCSC 1147, in finding the warrantless searches were lawful searches incident to the arrests. *Giles* also dealt with a warrantless search of a BlackBerry device seized during the arrest of the accused. The BlackBerry in that case was submitted seven weeks later to the RCMP Technological Crime Unit for examination and to retrieve data. The search yielded 164 e-mails, five address book contacts, and nine memos.

[75] Madam Justice MacKenzie (as she then was) held that the search did not fall outside the scope of a search incident to the arrest of the accused on serious drug charges. She found the search of the BlackBerry was “akin to looking inside a logbook, diary, or notebook found in the same circumstances” (at para. 56), and “[t]he capacity of this BlackBerry to potentially store volumes of information does not, in my view, change the character of the search from being lawful as incident to the arrest, into a search that required a warrant” (at para. 63).

[76] The trial judge considered and distinguished decisions subsequent to *Giles* in which the courts articulated the high expectation of privacy one has in a home computer (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253), a digital camera (*R. v. Caron*, 2011 BCCA 56), and cell phones (*R. v. Polius*, [2009] O.J. No. 3074 (S.C.J.), *R. v. D’Annunzio,* [2010] O.J. No. 4333 (S.C.J.).

[77] He held (BSR at para. 69):

> The reasoning in *Giles* remains sound and represents the law in British Columbia in relation to the validity of the common law power of “search

> incidental to arrest" as legal justification for the search of the contents of BlackBerrys or similar devices seized in a search incidental to arrest.

[78] The trial judge concluded that search warrants were not required to search the contents of the BlackBerrys (BSR at para. 70) and as there were no breaches of the appellant's s. 8 *Charter* right, the matter of remedy (whether the evidence should be excluded under s. 24(2) of the *Charter*) did not arise (BSR at para. 84).

The Appeal

[79] On appeal, the appellant's position is that the law has evolved since *Giles* so that a search of a technologically advanced device such as a smartphone seized incident to arrest now requires that a warrant first be obtained. He cites decisions of appellate courts in Ontario (*R. v. Manley*, 2011 ONCA 128 and *R. v. Fearon*, 2013 ONCA 106, leave to appeal granted [2013] S.C.C.A. No. 141) and Nova Scotia (*R. v. Hiscoe*, 2013 NSCA 48) as well as decisions of the Supreme Court of Canada (*Morelli*; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657) that have considered the intensely private nature of information stored on computers and cell phones.

[80] This is the first case involving a search of a smartphone incident to arrest to be considered by this Court. In the B.C. Supreme Court, *Giles* was followed in this case and in *R. v. Dhillon*, 2013 BCSC 869. In *R. v. Vye*, 2014 BCSC 93, the trial judge held that a warrant was required before the police conducted a software-assisted search of the accused's smartphone seized on his arrest. He found the accused's s. 8 *Charter* right was violated and excluded the evidence obtained under s. 24(2).

[81] The appellant concedes that a cursory search of a smartphone incident to arrest for a valid purpose related to the arrest does not violate s. 8 of the *Charter*. He argues that more intensive and intrusive searches require a warrant.

[82] The British Columbia Civil Liberties Association appeared as an intervenor on this issue. It supports the appellant's argument that a warrant is required to search a

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smartphone seized incident to an arrest, and goes further to argue that the law does not authorize a cursory search of a smartphone incident to arrest.

[83] The Crown's position is that the searches of the BlackBerrys in this case were reasonable searches authorized by the common law as searches incident to arrest. She says the BlackBerrys were not as technologically advanced as the devices considered in the later cases in Ontario and Nova Scotia, so the potential invasion of the appellant's privacy was not so heightened and *Giles* remains good law in respect of them.

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Search Incident to Arrest

[84] The starting point for the legal analysis relevant to this issue is the appellant's right under s. 8 of the *Charter* to be secure against unreasonable search and seizure. The provision aims to protect individuals from unjustified state intrusion on their privacy, and the onus is on the state to show that its interest in law enforcement outweighs the individual's privacy interest. Generally that requires prior authorization in the form of a warrant, as warrrantless searches are presumed to be unreasonable: *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 160-161.

[85] Where a search is carried out without a warrant, the Crown has the burden of showing, on a balance of probabilities, that the search was reasonable. A warrantless search will be reasonable if it is authorized by law, if the law itself is reasonable, and the manner in which the search was carried out is reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265 at 278.

[86] The power to search incident to arrest without a warrant is a well-established exception to the requirement for prior judicial authorization for a valid search. The Supreme Court of Canada described the principles underlying the power in *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 and explained them further in *R. v. Caslake*, [1998] 1 S.C.R. 51.

[87] In *Cloutier* (at 182) the Court identified two justifications for the power to search incident to arrest. First, it is necessary to ensure the arrested person will

come before the court; a search for weapons or other dangerous articles precludes the possibility of their use against police, the public or the accused himself. Second, the process of arrest must ensure that evidence found on the accused and the immediate surroundings is preserved. *Cloutier* also established limits on the power: there is no duty to exercise the power; "the police must be in a position to assess the circumstances of each case so as to determine whether a search meets the underlying objectives"; the search must be for a valid objective; and the search must not be conducted in an abusive fashion (at 186).

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[88] In *Caslake*, the Supreme Court elaborated on the purposes and limits of the scope of a valid search incident to arrest. As explained by Chief Justice Lamer in his reasons for the majority of the Court, the authority for the search "arises out of a need for the law enforcement authorities to gain control of things or information which outweighs the individual's interest in privacy." Thus, "searches which derive their legal authority from the fact of arrest must be truly incidental to the arrest in question" (at 63).

[89] Chief Justice Lamer summarized the doctrine (at 66):

> In summary, searches must be authorized by law. If the law on which the Crown is relying for authorization is the common law doctrine of search incident to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest. This means that the police must be able to explain, within the purposes articulated in *Cloutier*, *supra* (protecting the police, protecting the evidence, discovering evidence), or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable. Delay and distance do not automatically preclude a search from being incidental to arrest, but they may cause the court to draw a negative inference. However, that inference may be rebutted by a proper explanation.

[90] The Supreme Court has placed limits on the power to search incident to arrest in cases where the privacy interest of an individual is heightened. For example, the highly invasive nature of the seizure of samples of bodily substances (*R. v. Stillman*, [1997] 1 S.C.R. 607) and the strip search of an arrested person

(*R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679) require a "higher degree of justification … to support the higher degree of interference with individual freedom and dignity" (*Golden* at para. 98).

Search Incident to Arrest and Smartphones

[91] In applying these principles to the search of smartphones, the courts have considered the individual's privacy interest in the information contained in such devices, the purpose for the search, and the connection of the search to the arrest in time and distance.

[92] *Giles* was an early case that considered the scope of the power to search incident to arrest in relation to the search and seizure of smartphones.

[93] Two years later, in *Polius*, police seized the accused's cell phone on his arrest, searched the cell phone to find its number, and used that information to obtain a production order under s. 487.012 of the *Code* to acquire his cell phone records. Justice Trafford of the Ontario Superior Court held that the seizure of the accused's cell phone on his arrest for counselling murder was not lawful because the arresting officer did not have a reasonable basis to believe that the cell phone may contain evidence of the alleged offence. Justice Trafford went on to consider the scope of the power to search an item seized incident to an arrest. He expressed the view (at para. 41) that a search warrant was required to examine an item beyond a cursory examination. In particular, he found that the deeply personal nature of the information in a cell phone, computer or other electronic device implicated a range of privacy interests protected by s. 8 of the *Charter*. He concluded (at para. 57):

> It is the range of privacy interests that may be implicated by the information on the cell phone that leads me to conclude the values underlying s. 8 of the *Charter* are best cared for by limiting the power to SITA [search incident to arrest] and to seize a cell phone to a power to seize it, where there is a reasonable basis to believe it may contain evidence of the crime, for the purpose of preserving its evidentiary value, pending a search of its content under a search warrant.

[94] The following year, in *Morelli* (which did not concern a search incident to arrest), the Supreme Court of Canada noted the high degree of privacy afforded to

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the information in an individual's computer, stating (at para. 2): "It is difficult to imagine a search more intrusive, or invasive of one's privacy than the search and seizure of a personal computer."

[95] Next chronologically, the Ontario Court of Appeal considered the scope of a search incident to arrest in relation to cell phones in *Manley* and *Fearon*. In both cases the Court considered, but neither adopted nor rejected, Trafford J.'s views expressed in *Polius* on the necessity of a warrant to conduct more than a cursory search of a cell phone. These cases were decided after the trial judge's ruling in this case.

[96] In *Manley*, the police seized a cell phone from the accused when he was arrested for offences related to two robberies. The police opened the cell phone to search for evidence of ownership and found a photograph of the accused holding a sawed off shotgun, taken the day after one of the robberies. The photograph was copied and printed. The police subsequently obtained a warrant to search the contents of the phone.

[97] At trial, the accused argued the photograph should be excluded from evidence because it was unlawful to examine the phone's contents without a warrant. The trial judge found that the warrantless cursory search of the cell phone to determine ownership was lawful as the police had information that the accused had stolen cell phones in the past and because ownership of the cell phone was relevant to the offences for which he had been arrested. The Court of Appeal upheld the trial judge's ruling on the lawfulness of the cursory search.

[98] On appeal, the Crown also argued that contrary to Trafford J.'s views in *Polius*, police are entitled to conduct warrantless searches of cell phones seized as an incident to a lawful arrest. Commenting on *Polius*, Justice Sharpe noted that the traditional rules defining the powers of the police to conduct a search incident to arrest have to be interpreted and applied in a manner that takes into account modern technology. He also commented that obtaining a warrant would be prudent

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where police have reasonable grounds to believe that the search of a cell phone seized upon arrest would yield evidence of the offence.

[99] *Fearon* raised similar issues. Police arrested the accused for armed robbery and seized a cell phone. The arresting officer examined the contents of the cell phone (which was not password protected) and found incriminating photographs and a text message. The cell phone was searched further during the night and the next morning as the investigation continued, but no more evidence was found. Months later, the police obtained a search warrant to search the phone again.

[100] The trial judge held the police reasonably believed the examination of the cell phone contents would yield relevant evidence, and concluded there had been no breach of the accused's s. 8 *Charter* right.

[101] On appeal, Justice Armstrong upheld the trial judge's conclusion that the cursory search of the cell phone immediately following the arrest was a lawful search incident to arrest (at para. 57). He had more difficulty with the later examinations of the contents of the cell phone at the police station, and expressed the view that police should have obtained a warrant for these further searches. He deferred to the trial judge's findings, however, that the examination of the cell phone's contents at the police station was connected to the search at the scene of the arrest (at para. 58).

[102] Justice Armstrong went on to consider the reasoning in *Polius*, which was the focus of much of the argument on the appeal (at para. 69). He distinguished *Polius* on the basis that the officer who seized the cell phone had no reasonable basis to believe it would contain relevant evidence (at para. 70), and concluded, as the Court did in *Manley*, that it was "neither necessary nor desirable to attempt to provide a comprehensive definition of the powers of the police to search the stored data in cell phones seized upon arrest" (at para. 76, quoting *Manley* at para. 39).

[103] The Supreme Court of Canada heard the appeal in *Fearon* on May 23, 2014. Judgment has been reserved.

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[104] All of these cases were thoroughly canvassed in *Hiscoe*, where Justice Oland commented (at para. 59):

> In the result, the decisions of the Ontario Court of Appeal in *Manley* and *Fearon* neither approved - nor rejected - the approach in *Polius*. When the judge here gave his *voir dire* decision, there were two main lines of authority: one based on the British Columbia decision in *Giles* which upheld a full search of cell phone contents without a warrant, and one based on the *obiter dicta* in the Ontario decision in *Polius* which supported only a cursory search before a full search, if warranted. There were no decisions of any Canadian appellate court of persuasive authority.

[105] In *Hiscoe*, police read the text messages on the appellant's cell phone (described as a "smartphone like a BlackBerry") on his arrest for possession of cocaine and re-read the messages later that day. One month later, police had all the contents of the phone downloaded onto a DVD by the RCMP Technological Crime Unit.

[106] The trial judge held that police violated the accused's s. 8 *Charter* right. He determined that police were authorized to conduct a cursory review of the appellant's text messages upon arrest and later that day, but concluded the full content download or "data dump" was beyond the scope of a search incident to arrest. The trial judge found that the month delay between the seizure of the phone and the full data retrieval "reduces any connection with the arrest" (*Hiscoe* at para. 63 quoting *R. v. Hiscoe*, 2011 NSPC 84 at para. 86).

[107] He also held that the full download search was too broad in its scope, taking into account the heightened privacy interest in the information contained in the phone and the failure to focus the search on those contents of the phone that afforded a reasonable prospect of discovering evidence related to the offence. The trial judge agreed with Trafford J. in *Polius* that police should not be able to search beyond a cursory review of the contents of a cell phone without a search warrant.

[108] The trial judge excluded the evidence obtained through the data dump, except for the text messages twice retrieved on the day of arrest, under s. 24(2) of the *Charter*.

[109] The Court of Appeal upheld the trial judge's ruling. Justice Oland for the Court emphasized the individual's interest in the protection of his or her right to privacy from "unjustified state intrusions" (at para. 69), with particular reference to the impact of changing technology (at para. 70):

> The rapid advance of technology, the ever-quickening pace of change, and unimagined improvements and capabilities will continue and raise new issues on the risk to privacy in this digital age. This was recognized in, among others, the passages from the computer and cell phone decisions in *Morelli*, *Manley* and the decision under appeal that I quoted earlier.

[110] In *Vu*, released after *Hiscoe,* the Supreme Court of Canada reiterated the heightened privacy interests individuals have in the contents of computers and cell phones, echoing *Morelli* (at paras. 39-44), and held (at para. 45):

> The animating assumption of the traditional rule — that if the search of a place is justified, so is the search of receptacles found within it —simply cannot apply with respect to computer searches.

[111] *Vu* did not deal with a search incident to arrest. Justice Cromwell limited his reasons to the scope of the appeal, stating (at para. 63):

> … I do not, by way of these reasons, intend to disturb the law that applies when a computer or cellular telephone is searched incident to arrest or where exigent circumstances justify a warrantless search. Rather, these reasons relate to those situations where a warrant is issued for the search of a place and police want to search a computer within that place that they reasonably believe will contain the things for which the search was authorized …

[112] In *Vye*, released in January of this year, Mr. Justice Thompson did not follow *Giles*, *Mann* and *Dhillon*, but, based on the findings in *Vu* concerning the heightened privacy in computers and cell phones, concluded (at para. 29):

> Accordingly, the foundational pillars of the reasoning in *Giles*--that is, the notion of a cellular phone search being of a lesser order of invasiveness than other highly invasive types of searches, the conclusion that a cellular phone ought not to be treated differently than traditional receptacles, and the assertion of the pointlessness of allowing the police to seize a cellular phone without an accompanying power to search--have been overtaken by the reasoning in the unanimous Supreme Court of Canada judgment in *Vu*.

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[113] The police in *Vye* searched the accused's "iPhone 4" three times without a warrant, removing it from the accused's pocket, doing a cursory search of the device the same day, and conducting a software-aided forensic examination nearly one year later.

[114] The accused did not contest the validity of the first two searches, but submitted his s. 8 *Charter* rights were breached by the software-aided forensic search. The trial judge agreed, finding the search was beyond the power to search incident to arrest because the police had not turned their minds to the permissible scope of the search before it was conducted; the search was unreasonable because it was overbroad; and, based on the reasoning in *Hiscoe* and *Vu* concerning the highly invasive nature of the search, the Crown required a warrant to conduct the forensic search of the content of the phone (at para. 8).

[115] The trial judge referred (at para. 37) to the ten-month delay between the arrest and the search as showing an absence of exigent circumstances and supporting his conclusion that prior authorization was required. The trial judge said: "[As] prior authorization was feasible … I can see no principled reason not to require the police to obtain a search warrant before conducting such a potentially invasive search as the download of contents of a smartphone seized upon arrest" (at para. 37). He quoted, in further support of his conclusion, the reasons of Justice Dickson (as he then was) in *Hunter v. Southam Inc.* (at 161): "[W]here it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure".

This Appeal

[116] At the time the trial judge made his ruling in this case, *Giles* represented the law in British Columbia. No Canadian appellate court had suggested or found that a search of a smartphone incident to arrest, without a warrant, violated s. 8 of the *Charter*.

[117] Since then, the Supreme Court of Canada has recognized the highly invasive nature of searches of cell phones and computers because of the quantity and quality

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of personal information contained on these devices. Based on these judgments, one appellate court, the Nova Scotia Court of Appeal, and a British Columbia trial judge, have rejected the approach in *Giles*.

[118] It seems to me that downloading the entire contents of a cell phone or smartphone, like the BlackBerrys in this case, seized on the arrest of the accused, after some delay, without a search warrant, can no longer be considered valid under s. 8 of the *Charter* as a reasonable warrantless search. The highly invasive nature of these searches exceeds the permissible scope for a warrantless search authorized under the common law as a search incident to arrest.

[119] The interest of the state in law enforcement does not justify such a warrantless search. In this case, the searches were carried out more than two years after the appellant's arrests. The delay itself demonstrates that none of the purposes that justify a warrantless search incident to arrest were relevant. Obtaining a warrant could not have interfered with preserving the evidence or with officer safety. In fact, there is no explanation for not obtaining a warrant except that the nature of the object searched had previously been likened to other objects – logbooks, diaries, notebooks – that had not been considered to give rise to a serious invasion of the accused's right to privacy.

[120] It now seems obvious that the individual's privacy interest in the contents of a device such as a BlackBerry outweighs the state's interest in law enforcement, and a warrantless search of those contents is unreasonable according to the test set out in *Collins*.

[121] It follows that the warrantless search of the appellant's BlackBerrys was a violation of his right to be secure against unreasonable search and seizure under s. 8 of the *Charter*.

[122] The B.C. Civil Liberties Association's position went further than that of the appellant, who did not challenge any cursory search of the BlackBerrys in this case. As the validity of any cursory search is not before the Court, I do not find it

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necessary to deal with the Association's argument. I note that the Canadian Civil Liberties Association raised a similar argument in *Fearon*, and the Ontario Court of Appeal similarly declined to deal with the issue (at paras. 64 and 72).

[123] In summary, the law as it stands today no longer permits police to conduct warrantless searches of the entire contents of an individual's cell phone. I offer no comment on the permissible grounds of a "cursory" search, or other difficult questions pertaining to search incident to arrest and cell phones, as they were not before this Court.

Section 24(2)

[124] Having found no s. 8 breach, the trial judge did not deal with the application of s. 24(2) of the Charter. Curiously, the appellant made no submissions concerning s. 24(2) on appeal, though the burden is on him to establish that the admission of the evidence would bring the administration of justice into disrepute, and the Crown addressed the issue in its factum. Nonetheless, there is ample precedent for an appellate court to consider whether evidence obtained in violation of the Charter should be admitted or excluded though the matter was not addressed by the trial judge (see, for example, Morelli) and I will do so here.

[125] The governing principles for determining whether evidence obtained in breach of the *Charter* is admissible were re-stated in *R. v. Grant*, 2009 SCC 32 at para. 71, [2009] 2 S.C.R. 353, and summarized in *R. v. Cole*, 2012 SCC 53 at para. 81, [2012] 3 S.C.R. 34:

> Unconstitutionally obtained evidence should be excluded under s. 24(2) if, considering all of the circumstances, its admission would bring the administration of justice into disrepute. This determination requires a balancing assessment involving three broad inquiries: (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 (*R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71).

[126] The failure of the police to obtain a search warrant to search the BlackBerrys cannot be considered a serious breach in this case. The police acted in accordance with the law as it then stood. It that sense, the breach was inadvertent.

[127] The trial judge stated that the primary investigator of the kidnapping said that he "believed that both BlackBerrys were seized in searches incidental to lawful arrests and that, thereafter, a search warrant was not required to search the contents of them." The officer said that "it was, at the time, the prevailing police view that the law did not suggest otherwise." He sought warrants to search two vehicles seized incidental to the arrests (BSR at para. 28).

[128] The prevailing police view was, at the time, the correct view of the law as it then stood. By 2008, the decision in *Giles* clearly authorized the searches of the full contents of the BlackBerrys as searches incident to arrest, without a warrant.

[129] In assessing the impact of the breach, the Supreme Court in *Grant* said (at para. 76): "It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed."

[130] While the appellant's privacy interest in the information contained in the BlackBerrys must be considered to be high, the actual information retrieved did not include such highly private material such as photos, videos, or even music. The BlackBerrys in question were early models described by a witness as "rudimentary and slow by today's standards" and were not capable of taking photos or videos, or compressing files to download music (BSR at para. 21). The information obtained consisted of messages and contacts. Some of the messages were relied on by the Crown in its case against the appellant.

[131] Further, the evidence was discoverable had the police obtained a search warrant. This was considered to attenuate the impact of the breach in *Cole* (at para. 93):

> Moreover, the courts below failed to consider the impact of the "discoverability" of the computer evidence on the second *Grant* inquiry. As

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> earlier noted, the officer had reasonable and probable grounds to obtain a warrant. Had he complied with the applicable constitutional requirements, the evidence would necessarily have been discovered. This further attenuated the impact of the breach on Mr. Cole's *Charter*-protected interests (*Côté*, at para. 72).

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[132] The third factor is society's interest in adjudication of the case on its merits. As described in *Grant* (at para. 79): "[This] third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or its exclusion."

[133] An important factor is the reliability of the evidence (*Grant* at para. 81). In this case, the evidence obtained from the BlackBerrys is highly reliable and relevant, and existed independently of any breach of the *Charter*. Its exclusion would negatively impact the truth-seeking function of the criminal trial process. The seriousness of the offence of kidnapping also favours its admission.

[134] Weighing these three factors, I conclude that admitting the evidence obtained from the searches of the BlackBerrys would not bring the administration of justice into disrepute, and I would not exclude it under s. 24 (2) of the *Charter*.

Conclusion on BlackBerry Searches

[135] The warrantless searches of the appellant's two BlackBerrys seized on his arrests violated his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure. However, the admission of the evidence obtained from the searches would not bring the administration of justice into disrepute. I would therefore not exclude the evidence under s. 24(2) of the *Charter*.

[136] Thus, though the appellant succeeded on the ground of appeal he argued, I would not allow the appeal on this basis.

Misapprehension of Evidence

[137] The appellant claims the trial judge misapprehended key pieces of evidence that led him to erroneously conclude that the appellant was the third kidnapper. He says the circumstantial evidence pointed to the possibility that another man,

Bhupinder Benning, was the “unidentified East Indian kidnapper”, and the trial judge thus erred in concluding the only rational inference that could be drawn was that the appellant was guilty.

The Law on Misapprehension of Evidence

[138] The legal standard for determining when a conviction will be set aside based on a misapprehension of evidence was articulated by Justice Doherty in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (O.C.A.). He described a misapprehension of evidence as “a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence” (at 218), and concluded that an appellate court has statutory authority under s. 686(1) of the *Code* to quash a conviction where a misapprehension of evidence results in a miscarriage of justice (at 219).

[139] Justice Doherty set out the test for allowing an appeal based on a misapprehension of evidence (at 221):

> When will a misapprehension of the evidence render a trial unfair and result in a miscarriage of justice? The nature and extent of the misapprehension and its significance to the trial judge's verdict must be considered in light of the fundamental requirement that a verdict must be based exclusively on the evidence adduced at trial. Where a trial judge is mistaken as to the <u>substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction, then, in my view, the accused's conviction is not based exclusively on the evidence and is not a "true" verdict</u>. Convictions resting on a misapprehension of the substance of the evidence adduced at trial sit on no firmer foundation than those based on information derived from sources extraneous to the trial. <u>If an appellant can demonstrate that the conviction depends on a misapprehension of the evidence</u> then, in my view, it <u>must follow that the appellant has not received a fair trial</u>, and was the victim of a miscarriage of justice. <u>This is so even if the evidence, as actually adduced at trial, was capable of supporting a conviction.</u> [Emphasis added.]

[140] The Supreme Court of Canada further explained the test in *Morrissey* in *R. v. Lohrer*, 2004 SCC 80 at para. 2:

> *Morrissey*, it should be emphasized, describes a stringent standard. The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the

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> test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[141] This Court recently applied the test from *Morrissey* in allowing the appeal in *R. v. Bird*, 2013 BCCA 316. The issue in *Bird* was the evidence of the appellant's drinking pattern. The Court held the trial judge misapprehended the significance of an expert's opinion which was material to his reasoning. Madam Justice MacKenzie for the Court said (at para. 67):

> The misapprehension of the evidence of Mr. Bird's drinking pattern in Montreal a week after the offence was material to the judge's reasoning on the defence of intoxication. The judge described the toxicologist's evidence, based on an erroneous drinking pattern, as "germane." The evidence played a role in the judge's assessment of Mr. Bird's conduct when he fled Mikes restaurant and during his arrest. It influenced the judge's conclusion that Mr. Bird was an experienced drinker who could tolerate alcohol better than the average person. These findings, in turn, had a direct effect on the judge's assessment of Mr. Bird's intent when he killed Mr. Michell, and on his conclusion that Mr. Bird's "drunken intent" still amounted to the required intent for murder.

Alleged Misapprehensions of the Evidence

<u>Security Video of the Victim's Apartment after the Kidnapping</u>

[142] Security camera footage from the victim's apartment, where he was taken shortly after the kidnapping, was significant to linking the appellant to the scene of the crime. The appellant says that the Crown's theory that his co-accused, Mr. Scott, had opened the door at the apartment for him and then left the apartment to go outside (RFJ at para. 57) was not established by the video. The appellant argues this finding was central to the trial judge's conclusion that the appellant was the third kidnapper.

[143] The trial judge noted "the victim's description of the third kidnapper as an East Indian man in his mid-twenties, wearing sunglasses" (RFJ at para. 96). He described the videotape evidence (RFJ at paras. 57-58 and 96-99), stating (RFJ at paras. 98-99):

> [98] The best of the tendered surveillance images of the East Indian-looking man are of relatively good quality. <u>They show that he is tall and very slim,</u>

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> with long arms and legs. They show the features of his face in profile. The man in these images is remarkably similar looking to the accused Rajan Mann, as he appeared: (a) in the courtroom; and, (b) in various photographs taken close in time to June 7th, 2006, and tendered into evidence. In this regard, it is noteworthy that Mr. Mann is very distinctive looking. He is tall and lanky. His face and neck are long. He has a prominent nose and jaw. His hair is relatively short and well-groomed, and his ears are fully exposed. His hairstyle exposes his very angular and well-defined hairline.
>
> [99] The good quality police surveillance photo of Mr. Mann, taken within 20 hours of the apartment security videotape images, shows the right side of Mr. Mann's face in profile. The images of the East Indian-looking man captured in the security video show the same right-side facial profile. The similarities between Mr. Mann and the East Indian-looking man in the security videotape are remarkable and, thus, the video images are compelling evidence of identification.
>
> [Emphasis added.]

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[144] The appellant argued the evidence raised a real possibility Mr. Benning was the third kidnapper. With respect to this argument, the trial judge held (RFJ at para. 115(b)):

> There is no mistaking Mr. Mann and Mr. Benning for one another in either body type or facial features. One is short and stout, while the other is tall and lean. One is long-faced and large-featured, while the other is round-faced and small-featured. To the extent that some of the evidence is capable of incriminating either Mr. Benning or Mr. Mann, this does not detract from its probative value in relation to the identification of the tall and lean East Indian-looking man captured in the security surveillance tape as Mr. Mann.
> [Emphasis added.]

[145] The security stills from the security camera footage were in evidence at trial and provided to the Court on this appeal. They clearly demonstrate Mr. Scott pacing the lobby of the building starting at 5:04:54 p.m. and exiting the lobby by 5:06:09 p.m. The stills then capture a tall, slender East Indian-looking male wearing shorts and sunglasses propping open the door with his foot and later with his arms (5:06:14 to 5:06:33). These stills correspond with the timeline of events summarized by the trial judge (RFJ at paras. 16-24).

[146] The security stills, while not giving a perfect image of the appellant’s face, provide clear evidence of a tall, slender East Indian-looking male at the scene of the crime and match the brief description of the third kidnapper given by the victim.

Coupled with the trial judge's personal observations and other photographic evidence of the appellant, it was open to the trial judge to conclude that the appellant was at the apartment during the kidnapping.

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The Appellant's Accent

[147] The appellant claims the trial judge erred in finding that the victim was equivocal about the third kidnapper having a "Punjabi" accent, despite evidence of other witnesses that the appellant has no such accent. He says the victim was never equivocal about the accent of the third kidnapper and gave a reason for recognizing the accent.

[148] The trial judge stated that the victim was "somewhat equivocal" in his evidence (RFJ at para. 115(c)(i)). This statement was made in the context of providing reasons for attaching little weight to the victim's evidence of the third kidnapper's accent. The trial judge noted further:

> ii. that there is no basis upon which I might reasonably assess [the victim's] skill in detecting and identifying various accents;
>
> iii. that [the victim] was in the company of the East Indian driver for a very short period of time, during which they were not engaged in anything approaching normal conversation;
>
> iv. that many people are capable of adopting various ethnic accents at will, thus accents will often not be very reliable as evidence of identification; and,
>
> v. that the evidence which establishes the identity of Mr. Mann as a kidnapper is overwhelming.

[149] If the trial judge was inaccurate in his assessment of the victim's evidence concerning the third kidnapper's accent, it is clear from his reasons that he attached little weight to this evidence, and that it was not material to his conclusion that the appellant was the third kidnapper.

The Rented Ford Explorer

[150] The appellant claims the trial judge was incorrect in finding that police observed a rented Ford Explorer, seen by the victim on June 15, 2006, parked at the appellant's home at 4:00 p.m. that day.

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[151] The victim had told police a week after the kidnapping that he saw a man driving a "Ford SUV" beside him at an intersection, and identified the driver as the appellant. The trial judge described this encounter (starting at RFJ para. 39) where he stated that on June 13, 2006, a dark grey 2006 Ford Explorer, B.C. Number 037 BRK was rented under the appellant's name.

[152] The trial judge then described the victim's encounter two days later, on June 15 (RFJ at paras. 40-41):

> Midday: While [the victim] is stopped at a Richmond intersection, a Ford SUV pulls up beside him. The driver is an East Indian man in his twenties with dark hair, wearing sunglasses and showing beard stubble. The driver looks over to him for a period of two-to-five seconds. [The victim] reports this incident to the police, because he believes this may be the man who drove his pickup truck at the outset of his kidnapping. In a photo-pack lineup, [the victim] identifies Rajan Mann as the driver of the Ford SUV.
>
> Approximately 4:00 p.m.: Constable Khungay sees the same Ford Explorer, B.C. Licence Number 037 BRK, parked outside the Mann/Benning Ash Street residence in Richmond.
>
> [Emphasis added.]

[153] Later in his reasons for judgment, the trial judge links the Ford SUV in which the victim saw the appellant on June 15, 2006 to the Ford Explorer rented by the appellant two days earlier (RFJ at para. 108):

> Another piece of compelling supportive evidence is [the victim's] identification of the driver in the June 15th, 2006, encounter, as Mr. Mann. Evidence of the car rental agreement strongly supports [the victim's] identification. In all the circumstances, it must be regarded as much more than mere coincidence that this driver was the same man whom: (a) Constable Tarasoff identified as the man who stopped at [the victim's] pickup truck during the course of the kidnapping, and (b) was in the company of the known kidnapper, Mr. Scott, within four hours of [the victim's] release.

[154] I agree with the Crown that there was ample basis for the trial judge to find that the vehicle the victim observed the appellant driving was the same vehicle as that rented by the appellant two days earlier. The victim identified the appellant in a photo pack as the driver of an Explorer or Expedition; the appellant was seen in surveillance of the rented vehicle on June 20, 2006; and the rented vehicle matched

the victim's description except for the colour (the victim said it was brown though it was dark grey-blue).

Keys to the Victim's Ford Ranger

[155] The appellant says there was "not a shred of evidence supporting" the trial judge's finding that the appellant had the keys to the victim's Ford Ranger pickup truck from the time of the kidnapping to at least 5:00 a.m. the next morning (RFJ at para. 114 (c)).

[156] The victim was taken by the kidnappers in his Ford Ranger pickup truck to his apartment at about 5 p.m. on June 7, 2006. After one hour in the apartment, the victim was taken elsewhere by his two Caucasian kidnappers in his Dodge Caravan (RFJ at para. 4). The Ford Ranger pickup truck was seen the next morning in a Richmond mini-mall parking lot near a house owned by the appellant and Mr. Benning.

[157] At 4:57 a.m., RCMP Constable Tarasoff was conducting surveillance of the Caravan. Constable Tarasoff saw a Dodge Silverado approach the vehicle. He followed the Silverado after it left the mini-mall, watched it park, and talked to the driver who walked back to Constable Tarasoff's vehicle. Constable Tarasoff later identified the appellant as the driver of the Silverado (RFJ at para. 31).

[158] In arriving at his conclusion on this issue, the trial judge established a series of links between Mr. Mann and the keys to the Ford Ranger (RFJ at paras. 101-106):

> [101] The evidence of Constable Tarasoff establishes important links between Mr. Mann and the Silverado, and Mr. Mann and the [victim's] Ford Ranger. In relation to the former, it is noteworthy that the Silverado was seen by Constable Athwal at 4:30 a.m., very close to where [the victim's] Dodge Caravan had been abandoned by the kidnappers. Given the time of day and the nature of the location, the sighting is significant in linking the Silverado to the kidnapping.
>
> [102] In relation to the latter, the evidence establishes that the East Indian kidnapper was left in possession of [the victim's] pickup truck when [the victim] was escorted into his apartment building by his Caucasian kidnappers. It is also clear that the truck was not used, thereafter, to transport and hold [the victim]. It is evident that at some point after [the victim] was escorted into

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> his apartment, the truck was driven from [the victim's] apartment to the mini-mall where it was parked.
>
> [103] It is noteworthy that the mini-mall was one frequented by Mr. Mann and Mr. Benning (according to their friend Mr. Hodgson) and located within a very short walk of their townhouse.
>
> [104] Shortly after 5:00 a.m., Constable Tarasoff had a close encounter and brief conversation with the driver of the Silverado. Dawn had broken and there was nothing impeding his view of this man. When Constable Tarasoff was shown a photo-pack lineup to see if he could identify the driver of the Silverado, he selected the photograph of Mr. Mann, and he expressed his certainty in his identification in his testimony. He was cross-examined extensively about this identification and remained unshaken. I am not persuaded that his certainty was in any way compromised merely because he looked at the photograph of Mr. Mann for 55 seconds before selecting it (particularly when the man in question was not previously known to him).
>
> [105] In relation to Constable Tarasoff's identification, it is noteworthy that other evidence independently establishes a clear and timely association between Mr. Mann and Mr. Benning, and links Mr. Benning to the Silverado as a user of it. Such evidence must be regarded as supportive of Constable Tarasoff's identification, in all the circumstances. It is also noteworthy that Constable Tarasoff's physical description of the Silverado passenger was consistent with Mr. Benning's physical appearance, and Mr. Mann and Mr. Benning were in one another's company only seven hours later at the New Westminster residence of Mr. Scott.
>
> [106] Based on the foregoing, I find that Mr. Mann was the driver of the Silverado when it stopped at [the victim's] Ford Ranger at 5:00 a.m., and that such establishes a strong link between Mr. Mann and the kidnapping. It is, thus, very compelling supportive evidence on the question of identity between the East Indian-looking man captured on the security videotape and Mr. Mann.
>
> [Emphasis added.]

[159] The trial judge's finding that Mr. Mann possessed the keys was based on his review of all of the evidence. The appellant has not shown he misapprehended any of the evidence.

Evidence Pointing to Mr. Benning as the Kidnapper

[160] The appellant alleges a "substantial body of evidence" existed at trial pointing to the conclusion that Mr. Benning was the East Indian kidnapper.

[161] The trial judge acknowledged at the outset of his reasons that Mr. Benning was alleged by the Crown to have been the fourth "unindicted accomplice" of the

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group of kidnappers (RFJ at para. 2). Throughout his reasons, the trial judge noted where evidence was potentially inculpatory of both the appellant and Mr. Benning (see for example RFJ at para. 93, where BlackBerry #1 and BlackBerry #2 are linked to “Mr. Mann and/or Mr. Benning, and RFJ at para. 105, quoted above). However, he ultimately concluded (RFJ at para. 115(b)):

> There is no mistaking Mr. Mann and Mr. Benning for one another in either body type or facial features. One is short and stout, while the other is tall and lean. One is long-faced and large-featured, while the other is round-faced and small-featured. To the extent that some of the evidence is capable of incriminating either Mr. Benning or Mr. Mann, this does not detract from its probative value in relation to the identification of the tall and lean East Indian-looking man captured in the security surveillance tape as Mr. Mann.

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[162] The trial judge acknowledged the links between the appellant and Mr. Benning throughout the time the crime was being committed. He ultimately determined, based on all of the evidence, that the appellant was the driver of the vehicle on the day of the kidnapping. He knew that the circumstantial evidence had to establish no other rational inference (RFJ at para. 115(a)) and found the evidence of identification “overwhelming”.

<u>Police Investigative Techniques</u>

[163] The appellant alleges that police relied on “improper investigatory techniques that are known to produce misidentifications and tunnel vision”. Specifically, he claims:

> a. Cst. Lew’s identification of Mann was such a complete departure from accepted lineup procedures that it constituted what judges have termed a “show up”. Both Lew and Sgt. Schneider (the lead investigator) acknowledged that they had not complied with accepted protocols and investigatory standards.
>
> b. Cst. Athwal also participated in a flawed line up. Following his line-up, he approached the officer who organized it (Cst. Khungay) and asked if he had identified the “correct person”. He was told he had not. Cst. Athwal acknowledged that this communication was improper.
>
> c. The task assignments organized for Cst. Tarasoff appeared to have been designed to reinforce his identification of Mann.

[164] The trial judge specifically dealt with each officer’s evidence. I will discuss them in turn.

Constable Lew

[165] The trial judge noted Constable Lew’s observation of the appellant as part of a chronology of events (RFJ at para. 45), but did not make further mention of it.

[166] To the extent Constable Lew’s observations of the appellant were flawed, his observations were not material to the trial judge’s reasoning.

Constable Athwal

[167] Constable Athwal saw “a fit-looking Indo-Canadian male, 20-25 years of age, with short-to-medium-length hair” driving the Silverado shortly before 4:30 a.m. on June 8, 2006 and had a brief conversation with the driver (see RFJ at paras. 59-63). This was before Constable Tarasoff observed the same vehicle driven by the appellant at 4:57 a.m. The trial judge acknowledged the frailties of Constable Athwal’s observations of the appellant (RFJ at para. 62):

> On June 14th, 2006, Constable Athwal was shown a photo-pack lineup to see if he could identify the driver of the Silverado. He selected a photo and said, "This image matches my recollection of the person I had a brief conversation with on June 8th." The photo was not of Rajan Mann. Constable Athwal said he was not a hundred percent sure that the man in the photo was the truck driver.

[168] Constable Athwal’s testimony was used in aiding the trial judge’s conclusions (RFJ at paras. 101 and 110):

> [101] The evidence of Constable Tarasoff establishes important links between Mr. Mann and the Silverado, and Mr. Mann and the [victim’s] Ford Ranger. In relation to the former, it is noteworthy that the Silverado was seen by Constable Athwal at 4:30 a.m., very close to where [the victim’s] Dodge Caravan had been abandoned by the kidnappers. Given the time of day and the nature of the location, the sighting is significant in linking the Silverado to the kidnapping.
>
> …
>
> [110] In relation to BlackBerry #1, I am satisfied that the communications in the early evening of June 7th, 2006, and at 4:44 a.m. and 5:28 a.m. on June 8th, 2006, show that the user of this device was an active participant in the

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> kidnapping. The timing of the communications and the references to "collecting info from the guy", "rolling around or parked", "a fucking gong show", "Beaver", "Rusty's", "the chink[']s", "[t]rying to escape", "the heat's on", "being watched", and "undies", are significantly revealing when considered with due regard for the evidence of [the victim] and Constables Athwal and Tarasoff. They lead one to the inescapable conclusion that these are the communications of persons who were active participants in the kidnapping of [the victim], and that it was a joint criminal venture of three or more persons.
>
> [Emphasis added.]

[169] The trial judge acknowledged the uncertainty with which Constable Athwal identified the appellant. Constable Athwal's observations were not an essential part of the trial judge's reasoning process leading to a conviction.

Constable Tarasoff

[170] Constable Tarasoff's observation of the appellant as the driver of the Silverado on June 8, 2006 was an important piece of identification evidence relied on by the trial judge. The trial judge described these observations (RFJ at paras. 64-68), and noted the following (RFJ at paras. 69-73):

> [69] On June 14th, 2006, Constable Tarasoff was shown photo pack lineups to see if he could identify these two men. In one photo pack, he selected a photograph of Rajan Mann as depicting the driver of the Silverado. He testified that he was a hundred percent certain in this identification. He said that he took 55 seconds to select the photograph because "people make mistakes when they identify quickly". He said that when he made the identification, he did not know anything about his role, if any, in the kidnapping; he was simply identifying the driver of the Silverado.
>
> [70] Constable Tarasoff denied that prior to his lineup identification he was aware that Mr. Mann was a suspect and/or that he had seen a photograph of him.
>
> [71] On June 23rd, 2006, Constable Tarasoff participated in the execution of a search warrant at the Mann family home on Berkeley Street in Vancouver. Rajan Mann was not present during this search.
>
> [72] On June 28th, 2006, Constable Tarasoff was tasked with booking in Rajan Mann following his arrest on that date, and he said he recognized Mr. Mann as the Silverado driver he had seen on June 8th.

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> [73] At the trial, Constable Tarasoff identified Mr. Mann, who was seated in the prisoner's box, as the Silverado driver, and agreed that his post-lineup encounters with Mr. Mann likely helped him with his in-court identification.
>
> [Emphasis added.]

[171] The appellant provided transcript references that refer to Constable Tarasoff's involvement in the investigation of the appellant. The appellant questioned Constable Tarasoff's recollection as it took him 55 seconds to identify the appellant in the photo pack lineup, and noted that Constable Tarasoff only stated he was 100 per cent sure that the individual he identified was the appellant on the day of trial and not on the day of the identification. These concerns were addressed by Constable Tarasoff in his cross-examination by defence counsel:

> Q When you looked at the photograph of Mann, you looked at it for 55 seconds before making any indication that you recognized. Am I right?
>
> A I don't -- I don't rec -- I don't recall if I gave any indication that I recognized him right away.
>
> Q You looked at that photograph starting right now. That photograph was put in front of you. It was on the table in front of you. You looked at it. You kept looking at it. You looked at it some more. You kept looking at it. You looked at it some more.
>
> Then at this point, you started to write on the back. 55 seconds. It's a long time, isn't it?
>
> A Not really, no.
>
> Q Okay. This was not -- how many photo line-ups had you done yourself presenting pictures to identifying witnesses at this point in your career?
>
> A I had approximately six years' service, so --
>
> Q I thought it was five at that time.
>
> A 2001. Five years' service, sure.
>
> Q And --
>
> A Somewhere around there. I don't know the exact number, but maybe ten a year, so -- five a year. Go conservative, five a year. So --
>
> Q 25 --
>
> A -- 25 photo packs, maybe.
>
> Q And have you ever had the experience where you put a photo pack in front of somebody, and you put a picture down, they go "That's the guy"?
>
> A Yes.

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Q Yes. That's the kind of thing that we recognize as immediate recognition?

A That's correct.

Q That's not what happened in your case, is it?

A No. And the reason it didn't happen that way is because I'd given photo line-ups in the past, and I know that people sometimes pick out the wrong people. They make -- they -- they see someone who they think looks like that person and immediately go "That's the guy," and later they're -- they're a little bit hesitant to think, "Oh, I should have looked at it longer, not -- now I'm not exactly sure," that sort of thing.

So I'd had experience giving these things. I know some of the common mistakes that people will make during photo selections.

So when I saw the photo, I recognized the person right away, but like I -- My Lord, as I explained earlier, I want to be absolutely sure that this was the person that -- you know, it's a very serious -- very serious case. I didn't know exactly to what extent Mr. Mann's involvement was at the time, nor do I at this time know his exact involvement. But I know by picking out that person that the consequences are fairly -- could be fairly severe. So I wanted to be absolutely sure.

After I viewed the photo for 55 seconds -- of course, that's the only photo I looked at for that long, I was 100 percent sure that that was the person who I spoke to on that day.

Q Why didn't you say that?

A When?

Q When you were with Devries and when all of this was being recorded for posterity on videotape? I mean, now you come here years later and you say I'm 100 percent sure. Right?

A Right.

Q You never said that before, did you?

A No, and we --

Q No.

A -- we don't ask people to do that during photo line-ups.

Q Well, why not? Isn't that part of the RCMP manual about how to conduct line-ups?

A Well, policies changed over the years back and forth. I don't know the exact reason why, but if I say -- I think part of the rationale is if someone said, I'm 75 percent sure that's the person or I'm -- I'm 80 percent sure of the -- that's the person, that's -- that's kind of not what we're looking for. We're looking for people to say it's him, or it isn't him, or it's her, it isn't her, to make absolutely sure.

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> If a person's 50 percent sure that that's the person, then -- I'm not -- I don't know make the policy in regards to that. So that's the reason, it's either it is the person or it isn't the person.
>
> [Emphasis added.]

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[172] The appellant alleges that Constable Tarasoff saw the appellant while working in undercover cells on the evening of June 8, 2006. This question was put to Constable Tarasoff during cross examination and he unequivocally stated: “I did not see him in cells that night.” The trial judge did not address this exchange directly, but noted that Constable Tarasoff denied that he had seen a photograph of Mr. Mann or was aware he was a suspect prior to his lineup identification (RFJ at para. 70).

[173] The appellant’s other arguments concerning the validity of Constable Tarasoff’s subsequent role in the investigation of the appellant are largely irrelevant to whether the Constable saw the appellant on the morning of June 8, 2006 driving the Silverado, and subsequently identified him in a photo lineup on June 14, 2006.

[174] The trial judge was presented with many of the same arguments and concluded that Constable Tarasoff did in fact see the appellant driving the Silverado on June 8, 2006 and correctly identified him six days later in a photo lineup. I see no reason to interfere with these findings.

Conclusion on Misapprehension of Evidence

[175] The appellant has not shown that the trial judge misapprehended the evidence as alleged, or if he did, that it was material to his decision. The trial judge considered all of the evidence, including all of the matters raised by the appellant, which were also raised at trial, and concluded the case against the appellant was overwhelming.

[176] I would not accede to this ground of appeal.

Conclusion on the Appeal

[177] The appellant was not entitled to be tried by a judge with a jury. The warrantless searches of the appellant’s BlackBerrys breached his right under s. 8 of

the *Charter*, but I would not exclude the evidence under s. 24(2). The trial judge did not misapprehend any evidence, or if he did, it was not material to his decision.

[178] It follows that I would dismiss the appeal.

[179] I thank counsel for their helpful submissions on these interesting issues.

"The Honourable Madam Justice Levine"

I Agree:

"The Honourable Chief Justice Bauman"

I Agree:

"The Honourable Madam Justice Neilson"

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