



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *R. v. Potter*, 2021 NLCA 11

**Date:** February 11, 2021

**Docket Number:** 201901H0034

**Pursuant to sections 486.31 & 486.5 of the *Criminal Code*, no person shall publish in any document or broadcast or transmit in any way any information that could identify any undercover operator or cover person testifying as a witness in this proceeding.**

**BETWEEN:**

ALLAN WINFIELD POTTER

APPELLANT

**AND:**

HER MAJESTY THE QUEEN

RESPONDENT

**Coram:** Welsh, Hoegg and Goodridge JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
General Division 201801G2025  
(2019 NLSC 8 and 2019 NLSC 50)

**Appeal Heard:** December 10, 2020

**Judgment Rendered:** February 11, 2021

**Reasons for Judgment by:** Welsh J.A.

**Concurred in by:** Hoegg and Goodridge JJ.A.

**Counsel for the Appellant:** Randolph J. Piercey Q.C. and Jonathan E. Noonan

**Counsel for the Respondent:** Sheldon Steeves

**Authorities Cited:**

**CASES CONSIDERED:** *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *R. v. Charemski*, [1998] 1 S.C.R. 679 (S.C.C.); *R. v. Ayotte*, [1998] O.J. No. 4700 (Ont. Gen. Div.); *R. v. Banwait*, 2011 SCC 55, [2011] 3 S.C.R. 533; *R. v. Nygaard*, [1989] 2 S.C.R. 1074 (S.C.C.); *R. v. Campbell*, 2020 ONCA 221; *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523.

**TEXTS CONSIDERED:** David Watt, *Watt's Manual of Criminal Jury Instructions*, 2d ed (Toronto, ON: Carswell, 2015).

**Welsh J.A.:**

[1] Following a trial by jury, Allan Potter was convicted of first degree murder in the death of Dale Porter, who was stabbed to death on June 29, 2014. Mr. Potter appeals his conviction on the basis that the evidence did not support an instruction to the jury regarding first degree murder, or a conviction for first degree murder, and that the judge failed to protect against the misuse of bad character evidence.

**BACKGROUND**

[2] In his decision denying Mr. Potter's application for a directed verdict of acquittal on the charge of first degree murder, the trial judge summarized the circumstances that resulted in Mr. Porter's death (2019 NLSC 50 (the "directed verdict decision")):

[13] Dr. Denic said that Dale Porter died of multiple stab wounds to his upper body, the most serious being a stab wound that severed the jugular vein on the left side of Mr. Porter's neck. Dr. Denic noted that Mr. Porter lost most of his blood while he lay at the bottom of his driveway where Mr. Potter stabbed him ... . [Dr. Denic] measured Mr. Porter's chance of surviving the wounds that Mr. Potter inflicted on him, especially the one to his left neck, "in minutes".

[3] Dr. Denic also testified that Mr. Porter suffered contusions on his neck, shoulder, and left arm and leg which he described as "blunt force injuries that are consistent with trauma from kicking and punching" (directed verdict decision, at paragraph 31).

[4] Following an afternoon of partying and drinking with several people, at about 1:00 a.m. on June 29, 2014, Mr. Porter took a taxi to the Coach House Lounge in Bay Roberts where he met Mr. Potter, Daniel Leonard and Ms. C., who had gone to the Lounge three or four hours earlier. At about 3:15 a.m., Mr. Porter, Mr. Potter, Mr. Leonard and Ms. C. took a taxi from the Lounge to Mr. Porter's residence where the three men got out, while Ms. C. continued on in the taxi.

[5] When a second taxi arrived at Mr. Porter's residence with others who had been at the Lounge, they found Mr. Porter at the end of his driveway. He was severely injured and died shortly thereafter. There was no sign of Mr. Potter or Mr. Leonard, who had been picked up by a taxi as they walked away from the scene to be taken to the Vikings Motorcycle Clubhouse in Cupids.

[6] After the trial judge dismissed the application for a directed verdict, Mr. Potter testified, admitting that he had stabbed Mr. Porter but claiming he had acted in self-defence.

## ISSUES

[7] At issue is whether:

- (1) the trial judge erred by denying Mr. Potter's application for a directed verdict of acquittal on the charge of first degree murder;
- (2) on the evidence, a verdict of guilty of first degree murder was unreasonable; and
- (3) the trial judge erred by failing to protect against the misuse of evidence of bad character.

## ANALYSIS

### Directed Verdict on First Degree Murder

[8] By means of a *voir dire*, Mr. Potter applied for a directed verdict of acquittal on the charge of first degree murder on the basis that there was insufficient evidence to establish all the elements of the offence, and, in particular, whether the death of Mr. Porter had been planned and deliberate.

[9] The test to be applied when an application is made for a directed verdict is discussed in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368. Binnie J., for the majority, explained:

[48] A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction: *R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 1-4; ... . Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge. ...

[10] Evidence that would justify a conviction requires the Crown to “adduce some evidence of culpability for every essential definitional element of the crime for which the Crown has the evidential burden” (*R. v. Charemski*, [1998] 1 S.C.R. 679 (S.C.C.), at paragraph 3 (underlining in original)).

[11] The following provisions of the *Criminal Code* establish the elements that comprise the offence of first degree murder. Pursuant to section 222(4), a person who causes the death of a human being by means of an unlawful act commits culpable homicide. Section 229 of the *Code* explains when culpable homicide is murder:

Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

...

[12] Pursuant to section 231(2) of the *Code*:

Murder is first degree murder when it is planned and deliberate.

[13] In this case, prior to considering the evidence for purposes of the application for a directed verdict, the trial judge addressed the meaning of “planned and deliberate” (directed verdict decision):

[11] In *R. v. Ayotte*, [1998] O.J. No. 4700, Watt, J. stated the meaning of “planned and deliberate” this way:

For there to be a planned and deliberate murder, there must be evidence that the murder was a result of a scheme or design that the accused had previously formulated or designed. The murder must be the implementation of that

scheme or design. A murder committed on sudden impulse, without prior consideration, however intentional, is not a planned and deliberate murder.

[12] Of course, I do not know how Mr. Potter will address the allegation that he killed Mr. Porter if he testifies in this matter. However, regardless of how Mr. Potter responds, he clearly asserts that there is no evidence that he planned to kill Mr. Porter. I disagree. There is evidence both that Mr. Potter killed Mr. Porter and that he planned and deliberated over how he would do it. Now, to that evidence.

[14] The quotation from *Ayotte* mirrors the language used in *Watt's Manual of Criminal Jury Instructions*, which was approved by the Supreme Court of Canada in *R. v. Banwait*, 2011 SCC 55, [2011] 3 S.C.R. 533, at paragraph 1. In that case, the Court allowed the appeal “for the reasons set out by MacPherson J.A. at paras. 178-89 of his dissenting judgment”. In that decision, MacPherson J.A. quoted from the standard language from *Watt's Jury Instructions*, and in addition to the instruction on planning, he addressed deliberation (2010 ONCA 869):

[181] ...

“Deliberate” is not a word that we often use when speaking to other people. It means “considered, not impulsive”, “carefully thought out, not hasty or rash”, “slow in deciding”, “cautious”. A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of. The deliberation must take place before the act of murder, ... . A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is not a deliberate murder.

[182] ... The trial judge employed the language from the standard jury charge with respect to both ss. 231(2) and 229(a)(ii) of the *Code*. In my view, this language is clear and long-accepted (*Nygaard* [[1989] 2 S.C.R. 1074]). Moreover, he directly linked the two components and immediately applied them to the relevant facts of the case.

[15] Mr. Potter submits that the meaning of “planned and deliberate” has been determined by the Supreme Court of Canada in the decision in *R. v. Nygaard*, [1989] 2 S.C.R. 1074 (S.C.C.), which uses somewhat different language than is used in *Watt's Jury Instructions*. In *Nygaard*, Cory J., for the majority, stated that “planned” means that “the scheme was conceived and carefully thought out before it was carried out”. He went on to accept that a planned and deliberate murder involves a plan “the nature and consequences of which have been considered and weighed”. The plan may be simple; it need not be complicated,

and it may be carried out immediately after it is devised. “Deliberate” means “considered, not impulsive”. (*Nygaard*, at page 1084, paragraph 43.)

[16] Mr. Potter also relies on the decision in *R. v. Campbell*, 2020 ONCA 221, in which the Court summarized:

[34] The Crown here [for purposes of first degree murder] was required to prove beyond a reasonable doubt that each of Campbell and David had carefully thought out and calculated a scheme, considered the nature and consequences, and weighed the pros and cons of the murder. ...

[17] The Courts have long recognized the value of standard jury instructions as a means of avoiding error by a trial judge. Given the decision in *Banwait*, I am satisfied that the trial judge in this case did not err in relying on the language in *Ayotte*, as mirrored in *Watt’s Jury Instructions*, when assessing whether to grant the application for a directed verdict on first degree murder. While the judge did not quote the second part of the instruction regarding the meaning of “deliberate”, the quotation from *Ayotte* refers to the murder not being “committed on sudden impulse, without prior consideration”. That language mirrors the reference in *Nygaard* to the meaning of deliberate as “considered, not impulsive”.

[18] The additional language in *Watt’s Jury Instructions* regarding the meaning of “deliberate” serves to elaborate on “considered, not impulsive”. The reference to “carefully thought out, not hasty or rash”, “slow in deciding”, “cautious” found in *Watt’s Jury Instructions* must be read in context and in light of the circumstantial as well as direct evidence in a particular case. For example, a “contract killing” would likely involve more care, consideration and caution than a plan formulated or devised in a Lounge. As stated in *Nygaard*, the plan may be simple and uncomplicated, and may be carried out without delay. A planned murder in either case may be “deliberate” depending on the trier of fact’s assessment of the evidence.

[19] In this case, the trial judge found that there was some evidence “that Mr. Potter deliberately inflicted the wounds on Mr. Porter that caused his death” (directed verdict decision, at paragraph 15). This would be a sufficient basis for an instruction to the jury on the charge of murder. At issue for purposes of the directed verdict application is whether there was sufficient evidence on which to instruct the jury regarding the additional element in first degree murder, whether it was “planned and deliberate”.

[20] Regarding evidence of planning, the trial judge referenced the evidence of police agent L., who was selling drugs for Mr. Potter and saw him regularly after Mr. Porter's death. The judge continued:

[28] [Police agent L.] says Mr. Potter told him on one of his visits "what happened out around the bay": According to [police agent L.], Mr. Potter said that a man was making fun of the "colours" [of the Vikings Motorcycle Club] and Daniel Leonard told him they had to do something about it. Mr. Potter told [police agent L.] he and Mr. Leonard "buddied up" back at Mr. Porter's home where Mr. Potter stabbed Mr. Porter while Mr. Leonard kicked and punched him. Of course, as I noted above, Mr. Potter told [undercover police officer R.] that he stabbed Mr. Porter, just as he told [police agent L.] he did.

[21] There was evidence that Mr. Potter subsequently burned his clothes and told Mr. Leonard "to get rid of the knife which he had used to stab Mr. Porter" (directed verdict decision, at paragraph 32). Without commenting on the credibility of the witnesses, the judge concluded from his review of the evidence:

[35] From the preceding discussion I extract the following points:

Mr. Potter changed his plans of how he was getting home to North River from the Coach House Lounge in Bay Roberts;

Allan Potter and Daniel Leonard (possibly with [Ms. C.'s] complicity) devised a plan to attend Dale Porter's house in North River after the Coach House Lounge in Bay Roberts shut down;

Mr. Potter and Daniel Leonard reacted angrily to the contempt that Mr. Porter showed towards the Vikings Motorcycle Club and [Ms. C.] (a sister to a Club member, ..., and Daniel Leonard's girlfriend);

Mr. Potter and Daniel Leonard formulated a plan of when, how and where they would deal with Mr. Porter; and

Mr. Potter attempted to hide his part in Mr. Porter's death, based on the direction he gave to Mr. Leonard to get rid of the knife he stabbed Mr. Porter with and then burning his clothes to rid himself of Mr. Porter's DNA.

[36] It is reasonable to infer from the preceding that Mr. Potter and Mr. Leonard deliberately isolated Mr. Porter from his friends at the Coach House Lounge and accompanied him back to Mr. Porter's home in North River to attack Mr. Porter for the conflict that he had with Daniel Leonard.

[37] Isolating Mr. Porter from his friends afforded Mr. Potter and Mr. Leonard the unimpeded and unnoticed access to Mr. Porter that they wanted when they set about to avenge the insults that Mr. Porter had directed at the Vikings Motorcycle Club, Daniel Leonard and [Ms. C.] earlier that evening at the Coach House Lounge. That planning is consistent with the planning and deliberation that are required for first-degree murder.

[22] Mr. Potter submits that, at most, there was to be a physical assault of Mr. Porter; that there was no evidence of a plan to kill or assault Mr. Porter to the point that his life could be at risk; and that there was no evidence he had weighed the nature and consequences of a plan. He submits that there was no possibility that the jury, acting judicially, could have convicted him of first degree murder, and that, therefore, the judge should not have instructed the jury on that charge.

[23] The trial judge explained his reasons for concluding that there was some evidence, if believed by a properly instructed jury acting reasonably, that would justify a conviction. While the plan to attack Mr. Porter was not sophisticated or complicated, there was some evidence from which the jury could conclude that Mr. Potter, who was armed with a knife, made a plan with Mr. Leonard, that they would isolate Mr. Porter so as to give them the opportunity to attack him. It was for the jury to weigh the evidence and determine whether the elements of first degree murder had been proven.

[24] In the result, I am satisfied that the trial judge did not err in denying Mr. Potter's application for a directed verdict of acquittal on the charge of first degree murder.

### Unreasonable Verdict

[25] Mr. Potter also submits that, on the evidence, a verdict of guilty of first degree murder was unreasonable and should be set aside pursuant to section 686(1)(a)(i) of the *Criminal Code*.

[26] The test of whether a verdict by a jury is unreasonable is set out in *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180. Cromwell J., for the Court, explained:

[26] A verdict is unreasonable or cannot be supported by the evidence if it is one that a properly instructed jury acting judicially could not reasonably have rendered: *R. v. Yebe*s, [1987] 2 S.C.R. 168, at p. 185; ...

[27] In applying this test, Cromwell J. drew a distinction between a verdict by a jury and one by a trial judge on the basis that trial judges give reasons for their decisions that may be reviewed and considered on appeal as part of the reasonableness analysis. He continued:

[27] Appellate review of a jury's verdict of guilt must be conducted within two well-established boundaries. On the one hand, the reviewing court must give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a "13th juror" or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.

[28] On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the role of the reviewing court. Rather, the court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence" (*Biniaris* [2000 SCC 15, [2000] 1 S.C.R. 381], at para. 36) and consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *Biniaris*, at para. 40.

[28] Cromwell J. then gave examples "in which accumulated judicial experience may suggest that a jury's verdict is unreasonable", such as where a jury must be cautioned about a certain witness or certain type of evidence. Examples cited are: the evidence of jailhouse informants and accomplices, eye witness identification evidence, and "risks of accepting bizarre allegations of a sexual nature and the risk of prejudice in relation to psychiatric defences". In summary:

[29] ... What all of these examples have in common is that accumulated judicial experience has demonstrated that they constitute an explicit and precise circumstance that creates a risk of an unjust conviction.

[29] That said, Cromwell J. cautioned:

[32] ...

1. It is for the jury to decide, notwithstanding difficulties with a witness's evidence, how much, if any, of the testimony it accepts. ...
2. Credibility assessment does not depend solely on objective considerations such as inconsistencies or motives for concoction. ...
3. The jury is entitled to decide how much weight to give to factors such as inconsistency and motive to concoct. ...
4. To sum up, the reviewing court must be deferential to the collective good judgment and common sense of the jury. ...

[30] In this case, applying the principles in *W.H.*, the sole issue is whether the trial judge erred with respect to admitting, and instructing the jury on, evidence of Mr. Potter's bad character, as discussed below. Mr. Potter has not provided any other basis on which to conclude either that the jury's verdict is not supported by the evidence or that the jury's conclusion conflicts with the bulk of judicial experience.

#### Evidence of Bad Character

[31] The charge against Mr. Potter followed a covert operation ("Mr. Big") involving undercover police officers together with two paid police agents, police agent M. and police agent L. A comprehensive summary of the evidence and the operation is included in the trial judge's decision on the *voir dire* at 2019 NLSC 8 (the "admissible statements decision"). The covert operation had two effects: first, it resulted in Mr. Potter making statements to the participants about his involvement in Mr. Porter's murder; and second, it showed Mr. Potter's willingness to engage in other criminal activity, which is evidence of bad character. Mr. Potter's submissions on the appeal address only the second of these, the use of bad character evidence. In particular, he submits that the trial judge erred by: (1) admitting evidence unnecessary to the narrative; and (2) providing insufficient instructions to the jury.

[32] The issue of bad character evidence in the context of a "Mr. Big" covert operation is discussed in *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544. Moldaver J., for the majority, addressed the balancing of prejudicial effect and probative value in assessing the admissibility of the evidence:

[85] ...Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can

establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value turns on an assessment of its reliability. Its prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession in context. ...

[33] In assessing the reliability of the confession, the circumstances in which the statement was made and any confirmatory evidence are relevant. In *Hart*, Moldaver J. cautioned:

[102] Confessions derive their persuasive force from the fact that they are against the accused's self-interest. People do not normally confess to crimes they have not committed (*Hodgson* [[1998] 2 S.C.R. 449], at para. 60). But the circumstances in which Mr. Big confessions are elicited can undermine that supposition. Thus, the first step in assessing the reliability of a Mr. Big confession is to examine those circumstances and assess the extent to which they call into question the reliability of the confession. ...

[34] In addition to the circumstances in which the confession was made, the court will consider "markers of reliability in the confession itself", such as the level of detail, and confirmatory evidence (*Hart*, at paragraph 105).

[35] Regarding the prejudicial effect of the evidence, Moldaver J. describes two kinds of prejudice:

[74] Bad character evidence causes two kinds of prejudice. It causes "moral prejudice" by marring the character of the accused in the eyes of the jury, thereby creating a risk that the jury will reason from the accused's general disposition to the conclusion that he is guilty of the crime charged, or that he is deserving of punishment in any event (*Handy* [2002 SCC 56, [2002] 2 S.C.R. 908], at para. 31). And it causes "reasoning prejudice" by distracting the jury's focus away from the offence charged, toward the accused's extraneous acts of misconduct (*ibid.*). ...

[36] The question of mitigating the prejudicial effect of the evidence is also addressed in *Hart*:

[107] On the other hand, the risk of prejudice can be mitigated by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative. Moreover, trial judges must bear in mind that limiting instructions to the jury may be capable of attenuating the prejudicial effect of this evidence.

(Emphasis added.)

See also: *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3.

[37] In the case under appeal, the trial judge applied the *Hart* analysis. While recognizing that the factors identified by the Court in *Hart* are not exhaustive, he used the listed factors in considering the level of detail in the evidence; whether the evidence included elements of the crime not in the public domain; whether it described details only the accused was likely to know; and whether there was other confirmatory evidence.

[38] Under prejudicial effect, again using the *Hart* indicia, the trial judge considered the length of the operation; the relationship between the undercover officers and Mr. Potter; the inducements offered to Mr. Potter; the conduct of the interrogation that led to Mr. Potter's confession; and Mr. Potter's personality, including his age, sophistication and mental health.

[39] Having considered the evidence at length, the trial judge gave reasons for concluding that the probative value of Mr. Potter's statements to the undercover officers and police agents was high. Further, he gave reasons for his conclusion that the probative value of the evidence outweighs its prejudicial effect. In particular (admissible statements decision):

[196] ...

At approximately four months in length, Operation Bombard was both relatively short in duration and of limited intrusiveness in Mr. Potter's life;

Undercover operators, [police agent M.] and [undercover officer R.], deceived Mr. Potter into thinking they were part of a criminal organization which he could join, but they did not threaten him and there is no evidence, short of Mr. Potter's testimony, that he spoke to [undercover officer R.] about the Porter homicide because he was afraid of [undercover officer R.];

[Undercover officer R.] offered Mr. Potter some inducements before he elicited the statements from him, but [undercover officer R.'s] enticements were no more than meagre details of mysterious work, in a nebulous enterprise with an equally ambiguous agency;

[Undercover officer R.] did not interrogate Mr. Potter but simply allowed him to talk about Mr. Potter's death and Mr. Potter responded readily, if not enthusiastically to the chance;

Mr. Potter is a career criminal, who has abused drugs and alcohol heavily all his life and has a long criminal record for violent crime;

Mr. Potter has been associated with and/or a member of outlaw biker gangs all his life;

Mr. Potter does not have serious mental health problems; and

Mr. Potter was not under the influence of alcohol or drugs when he made his statements to [undercover officer R.].

[197] In short, there is no reason to fear that the jury who tries Mr. Potter will be overcome by “moral” or “reasoning prejudice” because Mr. Potter wanted to join a criminal organization or committed simulated crimes under [undercover officer R.’s] direction. Mr. Potter was well aware of the lifestyle that [police agent M.] and [undercover officer R.] held out to him and he was excited to get back to it when he got out of jail. Nor is there any risk the jury will be distracted by these secondary events from their primary focus of deciding whether Mr. Potter committed murder when he stabbed Dale Porter.

[40] Mr. Potter submits that the trial judge erred by admitting evidence of his bad character that was not essential to the narrative regarding Mr. Porter’s death. Mr. Potter points to the story, told to an undercover officer, that he had slammed a pool ball against the table and gave a speech about giving a “worse beating” to any member who did not defend the Club in the face of denigration or insult.

[41] While this incident was not directly related to the murder of Mr. Porter, the trial judge admitted the evidence, ruling that its prejudicial effect “is relatively benign”. He explained:

... I believe that this statement is broad enough to be taken outside of the context of simply what Mr. Potter would do to other members of the motor cycle club, Vikings or whomever. And that it can be interpreted to apply to any other person who might be talking about the motor cycle club in a disrespectful way.

(Transcript, volume X, at page 54.)

[42] The judge concluded that the evidence was relevant to the issue of Mr. Potter’s motive for stabbing Mr. Porter. The pool ball story was not admitted for purposes of demonstrating Mr. Potter’s general disposition as contemplated under “moral prejudice”. Further, because the story related to motive, its admission would not result in “reasoning prejudice”, that is, distracting the jury’s focus away from the offence charged.

[43] In any event, the pool ball story is so incidental that it could not be considered to be a piece “of particularly prejudicial evidence” even if it was considered to be “unessential to the narrative” (paragraph 36, above).

[44] Mr. Potter also submits that the trial judge failed to adequately instruct the jury on the issue of bad character. In *Mack*, Moldaver J., for the Court, cautioned:

[55] With respect to the bad character evidence that accompanies a Mr. Big confession, the challenge is a familiar one. The trial judge must instruct the jury that this sort of evidence has been admitted for the limited purpose of providing context for the confession. The jury should be instructed that it cannot rely on that evidence in determining whether the accused is guilty. Moreover, the trial judge should remind the jury that the simulated criminal activity – even that which the accused may have eagerly participated in – was fabricated and encouraged by agents of the state.

[45] Moldaver J. also emphasized that the fact that the trial judge could have said more on bad character evidence when instructing the jury does not mean the charge was deficient. What is required is an instruction that is adequate. Further, the adequacy of the instructions should be assessed in context and holistically. In *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, Bastarache J., for the majority, explained:

[58] Finally, it should be recalled that the charge to the jury takes place not in isolation, but in the context of the trial as a whole. Appellate review of the trial judge's charge will encompass the addresses of counsel as they may fill gaps left in the charge: see Der [*The Jury – A Handbook of Law and Procedure*], at p. 14-26. ...

[46] The trial judge gave his first instruction to the jury regarding character evidence part way through the trial:

I am going to take a couple of minutes to explain a point of law to you. One that [defence counsel] raised and which I share with him and its got to do with character evidence. Ordinarily the Crown is not permitted to lead evidence of the bad character of an accused person unless the accused person puts his character in issue and that hasn't happened as yet in this trial. However, you will recall from some of the things that you've heard in the audio tape this morning from a meeting between Mr. Potter and [police agent M.] at his apartment, [police agent M.'s] apartment in Pleasantville, that there were some things that might reflect badly on Mr. Potter's character in that conversation and you have the transcript of it as well.

Now as I understand there are some half dozen telephone conversations that you are going to be hearing of – that were intercepted between Mr. Potter and [police agent M.] ... . I was told that there will be other information there that might reflect badly on Mr. Potter's character as well. And I'd like to say first of all, put those matters out of your mind and here is what you have to focus on.

...

So what you are hearing now is the buildup to that association [between police agent M., Mr. Potter, and undercover officer R.] and that will give you an understanding of what was going on in the background leading to what is going to be introduced as relevant evidence in this trial, okay. But it is impossible to edit out all the references so that you don't hear this other information which ordinarily wouldn't be a part of the Crown's case. So I don't know if that makes sense or not but anytime you hear anything in these transcripts or in the audio tapes, I should say, that reflects badly on Mr. Potter's character – put that out of your mind and focus on what is the purpose of this particular evidence ... .

(Transcript, volume VII, at pages 63 to 65.)

Defence counsel indicated his agreement that the judge's instruction addressed the issue.

[47] In his final instructions to the jury prior to commencing their deliberations, after addressing the issue of reliability of Mr. Potter's confession, the trial judge commented on the use of evidence of his bad character:

You also heard some evidence that may reflect in a bad way on Mr. Potter's character. Such evidence ... often ... accompanies these major crime investigative techniques. I allowed this evidence to be put before you for the limited purpose of providing context for the confession. You cannot rely on that evidence in determining whether Mr. Potter is guilty of killing Mr. Porter.

(Transcript, volume XIX, at page 23.)

[48] This is essentially the language used in *Mack*. While more detail may have been desirable, based on a review of the instructions as a whole taken together with the jury addresses of counsel, in the context of the trial as a whole, I am satisfied that the trial judge's instruction was adequate. The judge reviewed the evidence regarding the police deception, level of inducements, and manner in which Mr. Potter confessed to participants in the covert operation. He took care to caution the jury regarding the evidence of police agent M. and police agent L., who had criminal records and were acting as paid police agents, and the limited use that could be made of Mr. Potter's criminal record. For example, in addressing Mr. Potter's criminal record, the judge cautioned:

It is very important not to use the facts, the number or nature of Mr. Potter's prior convictions to decide that Allan Potter is a person of bad character and thus, likely to have committed the offence.

(Transcript, volume XIX, at page 46.)

[49] In closing submissions to the jury, both defence and Crown counsel cautioned the jury regarding the use of evidence of bad character. There was no specific reference to the pool ball story by either counsel or the judge. Regarding the bad character evidence, defence counsel, in his address to the jury, after referring to the evidence of Mr. Potter's lifestyle, said:

... when you've come to your conclusions, I think each one of you should say to yourself, is that conclusion based on that character evidence in any way? If I didn't hear that character evidence would I have decided differently or could I have decided differently? So, you've got to keep the character evidence out of your mind, ... but I also think you've got to look at whether or not that character evidence impacted on the decision you've come to. ...

(Transcript, volume XVIII, at page 38.)

[50] Crown counsel, in his address to the jury, said:

Again, I agree with my friend to some extent that you can't convict Mr. Potter based on his character, lifestyle, past activities because that evidence is only viewed in context with the Mr. Big scenario. ...

(Transcript, volume XVIII, at pages 53 to 54.)

[51] Both counsel made comprehensive addresses to the jury. Both focused on the evidence and inferences that could be drawn. Neither focused on, or characterized the evidence as demonstrative of Mr. Potter's bad character.

[52] In the result, I am satisfied that the trial judge did not err by admitting evidence unnecessary to the narrative, and that the jury was sufficiently instructed regarding the use of the bad character evidence that "must be admitted in order to put the operation and the confession in context" (paragraph 32, above).

## **SUMMARY AND DISPOSITION**

[53] In the result, I am satisfied that the trial judge did not err by denying Mr. Potter's application for a directed verdict of acquittal on the charge of first degree murder. Further, the judge did not err by failing to protect against the misuse of evidence of bad character. Finally, there is no basis on which to conclude that the verdict of guilty of first degree murder was unreasonable.

[54] Accordingly, I would dismiss the appeal.

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B. G. Welsh J.A.

I concur: \_\_\_\_\_

L. R. Hoegg J.A.

I concur: \_\_\_\_\_

W. H. Goodridge J.A.