CITATION: R. v. Tran, 2010 ONCA 471
DATE: 20100630
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COURT OF APPEAL FOR ONTARIO

Sharpe, Simmons and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Quang Hoang Tran, Hoa Dang and Robert Johnson

Appellants

Najma Jamaldin, for the appellant Quang Hoang Tran

Graham T. Clark, for the appellant Hoa Dang

Paul Genua, for the appellant Robert Johnson

Elise Nakeskly and Deborah Krick, for the respondent Crown

Heard: January 26 and 27, 2010

On appeal from the convictions entered by Justice M. Tulloch of the Superior Court of Justice on June 1, 2006 and the sentences imposed by Justice Tulloch on September 11, 2006.

EPSTEIN J.A.:

OVERVIEW

[1] The primary issues raised in this appeal pertain to the prosecution of the charges of conspiracy and the consequences of police brutality. These issues are raised in the context of charges arising out of a series of home invasions.

[2] In April and June 2002, a number of violent robberies of private residences took place in the Mississauga area. The appellants, Quang Hoang Tran, Hoa Dang, and Robert Johnson, together with Hen Hai Thai, Dennis Rhodes, Kevin Dam, Mark Rodney, Mitchell Oraa and Randy Sachs, were charged with offences relating to these robberies.

[3] In addition to various substantive charges, the indictment alleged two counts of conspiracy. The first conspiracy count alleged that Thai, Tran and Johnson had, during a 15-month period ending in early March 2003, conspired together with other named but unindicted co-conspirators including Dang, Rhodes and Dam "to commit the indictable offence of armed robbery".

[4] The second conspiracy count alleged that Dang had conspired with other named but unindicted co-conspirators, including the other appellants as well as Rhodes and Dam, during a three-month period ending in late June 2002 "to

commit the indictable offence of robbery by conspiring to plan, prepare and execute a series of home invasion style robberies".

[5] The evidence at trial demonstrated that a crew had formed for the purpose of raiding targeted homes late at night. Several members of the crew pled guilty – Rhodes to robbery with a firearm and conspiracy to commit robbery, Dam to conspiracy to commit robbery and Rodney to conspiracy to commit robbery, three counts of disguise with intent, two counts of robbery with a firearm, and one count of robbery.

[6] These individuals testified at trial. They gave detailed evidence of the appellants' involvement in the crew. In general terms, Thai managed the group. He would call other members about a specifically planned robbery and provide them with instructions concerning pick-up. He would transport them to the targeted residence in his van. The van carried disguises, weapons and other items used in the robberies. Thai would remain in the van while other members of the crew invaded the homes. The crew members shared in the proceeds of the robberies.

[7] After a lengthy *voir dire*, the trial judge found that after Tran surrendered to answer the charges, he received a severe beating at the hands of two police officers

resulting in a broken jaw and permanent injury. The police officers attempted to cover up their behaviour and, despite these outrages, the Crown permitted them remain in court to assist with the prosecution until the trial judge ordered otherwise.

[8] On June 1, 2006, after a 40-day trial, the appellants were found not guilty of the substantive charges but guilty of conspiracy to commit robbery.

[9] Dang received a sentence of four years' imprisonment (three years, five months and two weeks of imprisonment in addition to credit for pre-trial custody and pre-trial bail). The trial judge refused to stay the proceedings against Tran but found that the appropriate remedy was to reduce the sentence he would otherwise received by half. After this reduction, Tran was sentenced to 14 months' imprisonment plus three years' probation, and Johnson was sentenced to an additional twenty-three days of custody after credit for pre-trial custody (thirty-five months, seven days). He received a global sentence of three years imprisonment plus three years' probation. The parties appeal both their convictions and their sentences.

[10] For the reasons that follow, I would dispose of these appeals in the following fashion. In relation to Dang and Johnson, I would dismiss the conviction

appeals, grant Dang leave to appeal her sentence but dismiss her sentence appeals. In relation to Tran, I would allow the conviction appeal and enter a stay of proceedings.

FACTS

[11] The evidence at trial disclosed that the four home invasions that gave rise to the charges in this prosecution were carried out in similar fashion. In each invasion, the privacy and security of the homes were shattered, victims were violated, both physically and psychologically, and property was taken.

[12] Two homes were involved – each invaded twice, apparently because the perpetrators believed there were drug dealers in these homes who owed them money. The perpetrators, wearing masks and armed with guns and knives, forced their way into the homes in the early hours of the morning. The assailants used plastic tie wraps to bind the residents by their wrists and ankles. They would then do whatever was necessary to get the victims to cooperate in locating valuables. The homes were searched and ransacked.

[13] The perpetrators inflicted significant abuse upon some of the victims, including:

1. confining an elderly woman and telling her she would be shot if something went wrong;

2. using a knife to carve a dollar sign into a man's back and to try to cut off his finger;

3. beating a woman and cutting her clothing to force her to give up her diamond ring;

4. grabbing an eight-year old, pushing her down, telling her to say goodbye to her parents, and threatening the child's parents that they would take her unless all their money was handed over; and

5. sexually assaulting a woman by placing a gun in her mouth while digitally penetrating her vagina, and by placing a gun in her vagina.

[14] After inflicting this completely gratuitous brutality, the aggressors left with property including cash, jewellery and personal documents.

ISSUES

[15] The issues on appeal from conviction fall into three categories;

I. *Conspiracy*: Errors are alleged in relation to the trial judge's refusal to charge the jury with respect to multiple conspiracies and his charge with respect to the law as it pertains to conspiracy;

II. *The co-conspirators' evidence*: Errors are alleged in relation to the *Vetrovec* warning portion of the charge, allowing the Crown to cross-examine Dam on his statement and guilty plea, admitting the guilty plea for its truth and precluding the defence from cross-examining Dam about the police assault on Tran; and

III. *Tran's Charter remedy:* Tran submits that the trial judge erred in refusing his application to stay the prosecution against him.

[16] With respect to the sentence appeals, Dang and Tran contend that their sentences are excessive and that they should be given credit for time served under restrictive bail terms pending this appeal.

THE APPEALS AGAINST CONVICTION

I. Conspiracy

I.1 *Multiple Conspiracies*

[17] The appellants submit that the trial judge erred by failing to charge the jury on the issue of "multiple conspiracies".

[18] Despite the difference in the wording of counts one and two, it is common ground that with respect to both counts, the Crown alleged and advanced before the jury allegations of global conspiracies to commit a series of robberies during the periods specified.

[19] The appellants argue that the Crown must prove the very conspiracy that is alleged. If the evidence reveals only a series of distinct conspiracies and fails to prove the global conspiracy that the Crown has alleged, the accused is entitled to an acquittal. The appellants submit that there was a basis in the evidence to suggest that rather than two global conspiracies, there had been nothing more than a series of separate or *ad hoc* agreements to commit specific crimes.

[20] The appellants submit that the trial judge's failure to charge the jury on the "multiple conspiracies" theory is fatal to their convictions.

[21] Both parties rely on *R. v. Cotroni* (1979), 45 C.C.C. (2d) 1 (S.C.C.), at pp. 17 - 18, where the Supreme Court of Canada defined conspiracy in the following way:

> The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy...There must be evidence beyond reasonable doubt that the alleged conspirators acted in concert in pursuit of a common goal.

[22] The trial judge gave the jury a careful and comprehensive instruction on what the Crown had to prove to convict the appellants of conspiracy as defined in *Cotroni*. In my view, it would have been apparent to the jury that to convict the appellants, they had to be satisfied beyond a reasonable doubt that the appellants had been members of a gang or crew, co-ordinated by Thai and Dang, the purpose of which was to act in concert in pursuit of the common goal of committing a series of home invasion robberies.

[23] I see no merit in the submission that the trial judge erred by refusing to charge the jury on the "multiple conspiracies" theory of the defence. In my view, there was no support for that theory in the evidence. The only evidence the appellants can point to in support of the multiple conspiracies theory arose from

the cross-examinations of Rhodes and Dam. At the highest, their evidence might be taken to suggest that during the course of the robberies that they committed, there were specific agreements reached about the details of how the robberies would be committed, the roles that each participant would play and how the proceeds would be divided. To the extent that their evidence discloses specific subsidiary agreements of that nature, it does not detract from or alter the essential thrust of their evidence that there were ongoing agreements among the crew members to commit a series of robberies. It does not provide a basis for the multiple conspiracies theory advanced by the appellants.

[24] Accordingly, I would not give effect to this ground of appeal.

II. **Co-conspirators' Evidence**

II.1 Vetrovec *warning and exculpatory evidence*

[25] The trial judge gave a strong *Vetrovec* warning in relation to the evidence of Dam, Rodney, and Rhodes. The appellants submit that the trial judge erred by failing to distinguish between inculpatory and exculpatory evidence given by those witnesses and by failing to instruct the jury that the warning did not apply to the exculpatory evidence.

[26] I am unable to accept this submission.

[27] While no *Vetrovec* warning should be given where an unsavoury witness testifies for the defence, the trial judge may exercise discretion with respect to "mixed witnesses", in other words, witnesses who give both inculpatory and exculpatory evidence: *R. v. Tzimopoulos* (1986), 29 C.C.C. (3d) 304 (Ont. C.A.); *R. v. Gelle* (2009), 244 C.C.C. (3d) 129 (Ont. C.A.). There is no authority that suggests that a trial judge must give a "mixed instruction" with respect to a "mixed witness".

[28] It is well-established that, in general, trial judges have a broad discretion to craft appropriate instructions regarding unsavoury witnesses to meet the particular circumstances of each case. I am satisfied that the course taken by the trial judge in the present case fell well within the limits of that discretion. The jury would have been aware of the conflicting statements made by these witnesses. The evidence they gave at trial was essentially exculpatory while their pre-trial statements implicated the accused. It would have been apparent to the jury that the trial judge's *Vetrovec* warning amounted to an instruction to exercise considerable caution before convicting the appellants on the basis of the inculpatory evidence given by these witnesses and upon which the Crown relied. The exculpatory evidence was simply the flip side of the same coin. Reading the charge as a whole, I am entirely satisfied that the jury would have understood that if that "mixed"

evidence left them with a reasonable doubt, they would have to acquit the appellants.

II.2 ***Did the trial judge err in his ss. 9(1) and (2) ruling permitting the Crown to cross-examine Dam on his statement to the police?***

II.3 ***Did the trial judge err in admitting Dam's guilty plea for the truth of its contents?***

[29] As these two issues are related, I will consider them together.

[30] Dam made four out-of-court statements implicating the appellants in the robberies:

1) A statement made to the police upon his arrest;

2) A statement made at the preliminary inquiry;

3) A statement made at the trial of different member of the conspiracy; and

4) A statement made on his own guilty plea.

[31] The Crown made a successful application under s. 9(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and cross-examined Dam on these four prior statements. Later, the Crown made a *K.G.B.* application to have the statements admitted for the truth of their contents. The trial judge ruled that the Crown had

failed to satisfy the reliability component of the *K.G.B.* test with respect to the statement to the police, but admitted the other statements.

II.3.1 *The s. 9(2) application*

[32] The trial judge ruled that the proffered statements were prior inconsistent statements and permitted the Crown to cross-examine Dam on their contents. After making this ruling, the trial judge provided the jury with a mid-trial instruction on the limited use to which they could put a prior inconsistent statement. The trial judge devoted several paragraphs of this instruction to the matter of the guilty plea. He instructed the jury in line with *R. v. Simpson*, [1988] 1 S.C.R. 3, namely, that the jury could not use the fact of Dam's guilty plea to infer guilt on behalf of the named co-conspirators.

[33] The appellants submit that the trial judge erred by ruling that the Crown could cross-examine Dam pursuant to s. 9(2) on his post-arrest statement to the police. The appellants make two related submissions in this regard. First, they contend that the trial judge erred by permitting the Crown to cross-examine Dam on his statement to the police as that statement was involuntary. Second, they submit that the *K.G.B.* ruling excluding the admissibility of the statement for the

truth of its contents is inconsistent with, undermines or impugns the validity of the s. 9(2) ruling.

[34] I am unable to accept either of these submissions.

[35] With respect to the voluntariness point, the trial judge conducted a *voir dire* in accordance with *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.), (leave to appeal refused 4 C.C.C. (2d) 566) to determine the circumstances surrounding the statement. He found that while Dam may have perceived a threat that his sentence would rise, from the fifteen years he expected, to twenty years if he did not give the statement, this was not "a situation that tainted the circumstances of the statement in such a way as he is going to fabricate and/or [accede] to the suggestions by the officer". I see no basis to interfere with that factual finding.

[36] The appellants concede that the decision whether to grant leave to cross-examine pursuant to ss. 9(1) and (2) is discretionary and not to be disturbed absent legal error. I see no legal error that would permit us to interfere with the trial judge's exercise of discretion. Even if the perceived threat might have rendered the statement inadmissible against Dam had he been the accused, in this trial he was a Crown witness. I am not persuaded that the nature of the threat, on the facts

found by the trial judge, was such that cross-examination on the statement as a prior inconsistent statement was necessarily precluded.

[37] The trial judge subsequently refused to admit the statement for the truth of its contents under the *K.G.B.* test. That ruling turned upon a number of factors: the use of leading questions by the police officer; the absence of an oath; the lack of a video recording of the entire exchange; and the failure of the police to respect Dam's right to counsel. The trial judge concluded that in the light of those concerns, the reliability component of the *K.G.B.* test had not been satisfied.

[38] I do not accept the submission that the trial judge's subsequent *K.G.B.* ruling impugns or undermines his ss. 9(1) and (2) ruling. As *R. v. K.G.B.* holds, at para. 121, the test for admissibility does not apply to the question of whether cross-examination should be permitted on a prior inconsistent statement:

> Where the prior statement does not have the necessary circumstantial guarantees of reliability, and so cannot pass the threshold test on the *voir dire*, but the party tendering the prior statement otherwise satisfies the requirements of s. 9(1) or (2) of the *Canada Evidence Act*, the statement may still be tendered into evidence, but the trial judge must instruct the jury in the terms of the orthodox rule.

[39] Accordingly, I conclude that the trial judge did not err in permitting the Crown to cross-examine Dam on his statement to the police pursuant to s. 9(2) of the *Canada Evidence Act*.

II.3.2 *The K.G.B. application*

[40] On the *K.G.B.* application, in relation to the guilty plea, the parties essentially reiterated the submissions that had been made on the s. 9(2) argument. The appellants relied primarily on the rule from *R. v. Simpson* that the guilty plea of a party cannot be used as evidence of guilt of a co-accused. Defence counsel also argued that there is an important distinction between a statement by a witness, and facts read in by the Crown on a guilty plea, where it is only defence counsel who states that they are "substantially correct".

[41] It was also argued that even if defence counsel's statement that the facts were "substantially correct" could be taken as a statement by Dam, it could only be an acceptance of the elements of the offence for which he was charged. Since the identity of co-conspirators is not an essential element of conspiracy, he should not be taken as having made any statement as to the members of the conspiracy. Defence counsel also pointed out that Dam was not under oath when he made his guilty plea.

[42] In his ruling, the trial judge stated:

> With respect to Mr. Dam's guilty plea, I find that its content is inconsistent with the evidence Mr. Dam gave at this trial. I also find that his guilty plea is a statement as defined by the case law; it satisfies the necessity and reliability criteria and as such is admissible. This statement was made in a court proceeding where the seriousness and solemnness of the occasion was brought home to Mr. Dam by both the comments of the judge as well as Mr. Dam's own lawyer. In addition, this proceeding was audio recorded by the court reporter. Finally, Mr. Dam is present to be cross-examined by the defence which can compensate for the lack of a contemporaneous cross-examination at the time the statement was made.
>
> However, certain prejudicial editorial comments made by the Crown at the time of the guilty pleas, were essentially accepted by Mr. Dam's lawyer as being substantially correct. These comments must be edited out of the statement. The statement will be admitted only with respect to the portions of the statement which refer to Mr. Dam's involvement in the conspiracy with Mr. Tran and Mr. Johnson. There is no need to refer to Mr. Thai. And there is no need to include the various inflammatory elements of the facts that were accepted as substantially correct by Mr. Raftery on behalf of Mr. Dam.

[43] In my view, obvious concerns arise in relation to the admissibility under *K.G.B.* of facts acknowledged as being "substantially correct" on a guilty plea. The accused person does not make any statement but merely acknowledges the truth of those facts through counsel and, as was pointed out by defence counsel,

even then needs only admit to the truth of the facts that constitute the essential elements of the offence. Where the accused has made a deal with the Crown to plead guilty and later to testify against others, there are obvious reliability issues surrounding facts acknowledged to be "substantially correct" in relation to those other individuals. Accordingly, to admit facts acknowledged to be "substantially correct" on a guilty plea in a later trial against other accused persons under *K.G.B.* appears to me to be so fraught with danger that it should be refused in all but the most exceptional cases.

[44] That said, I am not persuaded that the *K.G.B.* ruling in relation to the guilty plea in this case amounts to an error that would lead us to allow the appeal.

[45] First, I note that the trial judge appears to have been alive to the dangers I have identified in that he did edit the facts to be admitted to exclude certain prejudicial remarks.

[46] Second, it is significant that no issue was taken with the admission of Dam's statement at the preliminary inquiry and his statement at the other trial, both of which clearly implicated the appellants in the robberies. Accordingly, even if the trial judge did err in admitting the guilty plea for the truth of its contents, I am not persuaded that there was any significant prejudice occasioned and, if necessary,

I would apply the curative proviso, s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

III. **Tran's Stay Application**

[47] The trial judge found that Tran's rights protected by ss. 7 and 12 of the *Charter* had been breached. Tran argues before this court, as he did before the court below, that given the circumstances surrounding the breach and its seriousness, the continued prosecution offends the fundamental principles of justice that underlie the community's sense of fair play and decency and therefore the only appropriate response is a stay.

III.1 *The Relevant* Charter *Provisions*

[48] Section 7 provides citizens with a right to be secure against arbitrary force, especially physical violence, by state actors.

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[49] Section 12 deals with the degree to which the state may treat or punish an individual and provides that:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[50] Jurisdiction to provide a remedy for a breach of a *Charter* rights can be found in ss. 24(1) and (2):

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

III.2 *The Circumstances Giving Rise to the breach of Tran's* Charter *Rights*

[51] The following is a brief summary of the evidence and relevant rulings at the two-month *voir dire* relating to the breach of Tran's *Charter* rights and his application for a stay of proceedings.

[52] On March 27, 2003, on his counsel's advice, Tran turned himself in to the Hamilton Police. They determined that this was a Peel matter and contacted the Peel Regional Police for Tran's transfer. Tran was picked up by Officers Vander Wier and Conway.

[53] According to Tran, during the drive to Peel, the officers tried to obtain a statement from him. Tran said that Conway told him on the drive that he "don't want to hear me say that I don't want to make a statement, or else it's going to be the hard way..." However, Tran had been advised by his lawyer not to say anything and the officers' efforts were unsuccessful.

[54] Tran testified that upon arrival at the station, he was shoved and punched by Conway and Vander Wier. They then put him in an interview room that was not equipped with a video camera and demanded a statement. Tran continued to invoke his right to silence. Vander Wier punched him in the ribs and the jaw. Tran's mouth bled profusely. Still Tran would not talk.

[55] The officers gave up their quest for a statement and tried to conceal their misconduct. They attempted to clean up the blood in the interview room. They placed Tran in front of a video camera and tried (unsuccessfully) to get him to say that he had hit his chin on the table.

[56] The officers explained Tran's injuries to other officers by saying that he was wiggling his tooth and trying to "play it up", and that he had been violent and uncooperative with the Hamilton police.

[57] The extent of Tran's injuries was not discovered until the next day when he was transferred to the Maplehurst Correctional Complex. Upon arrival, Tran was sent to the hospital where it was determined that his jaw was broken. On April 2, 2003, after Tran's release on bail, he went to another hospital and was attended by an expert in facial injuries.

[58] Tran's jaw had been broken in two places. He had a right mandibular fracture and an interior fracture running between the central incisors. The doctor wired Tran's mouth shut and provided follow-up treatment. The permanent consequences of the beating include that Tran now bites himself when he eats, has a sore jaw and loose teeth, and suffers from migraines.

[59] Officers Conway and Vander Wier described things very differently. They denied the assault. They claimed to have left Tran alone in the interview room and when they returned, they found him on the floor, still handcuffed, with blood coming from his lower lip. Officer Conway testified that it looked like "he had bit his lip", and that Tran explained his presence on the floor by saying "I don't know, I guess I fell." They put him on videotape to tell the truth about the source of his injuries. They asked "Have we treated you fairly?" Tran looked at the floor and refused to answer.

[60] There was independent evidence on the *voir dire* that supported Tran's version of events. The most significant evidence was the expert medical evidence that the injuries Tran suffered were consistent with a blow to the jaw; not with a fall.

[61] The trial judge disbelieved the officers and found the evidence "overwhelming" that both officers had assaulted Tran and that specifically Officer Vander Wier had punched Tran and broken his jaw. In his ruling at the conclusion of the *voir dire*, he said:

> I do find based on the evidence, the overwhelming evidence that with respect to Mr. Tran, his section 7 and section 12 rights were breached. I do believe his evidence, which in my view is corroborated by the evidence of two doctors, both Dr. Freidlich and Dr. Allen...[I]t is my finding that the accused's evidence was, in my view, substantiated by the independent evidence of the two doctors who testified, one called by the defence and the other by the Crown, in addition to the other independent witnesses...and also with respect to all the witnesses, in my view, except for the evidence of Officer Vander Wier and Officer Conway. So on the totality of the evidence, I do find that there was a breach, which in effect was that Tran was assaulted by Officer Vander Wier and Officer Conway while he was in their custody. I also find that one of the assaults on Mr. Tran by Officer Vander Wier constituted a punch to his jaw which caused his jaw to be broken. I reject the evidence of both Officer Vander Wier and Officer Conway on this point, i.e. the cause of the injury to Mr. Tran's jaw.

> The issue for me is what the remedy should be, and as indicated on the last occasion, what it entails is a balancing of the seriousness of the offence that Mr. Tran is charged with as against the seriousness of the breach.

[62] The trial judge indicated that he was going to reserve the issue of remedy and that before the end of the trial he would release a "more extensive written judgment" with respect to the *Charter* application.

[63] The trial proceeded. Despite the trial judge's ruling that Vander Wier had brutally assaulted Tran and violated his *Charter* rights, Crown counsel invited Officer Vander Wier to sit at the counsel table as assisting officer. Defence counsel moved to have the officer precluded from participating in the trial. Counsel argued that in the light of the fact that Vander Wier had violently assaulted Tran, it would be inappropriate for the officer to be present in the courtroom and to have contact with witnesses who might feel under pressure to cooperate with the prosecution.

[64] The trial judge agreed and ruled as follows:

> I am going to make an order then that you get another officer to assist you, and I think that is in everyone's best interest. It is also in Officer Vander Wier's best interest and in the integrity of the prosecution of this case's best interest.

Immediately afterward, the trial judge included Officer Conway in the ruling.

[65] The evidence demonstrates that despite this ruling, during the next few days of trial, Vander Wier continued to involve himself outside of the courtroom by working with witnesses in their preparation.

[66] At the close of the Crown's case, Tran renewed his application for a stay. Again, the trial judge deferred dealing with the issue of a response to the *Charter* violation.

[67] At the conclusion of the trial, Tran was found guilty of conspiracy to commit robbery.

[68] Prior to submissions as to sentence, the trial judge dealt with the *Charter* remedy. In very brief reasons, he reiterated his findings of *Charter* breaches but denied the remedy of a stay on the basis that a stay should only be granted in the "clearest of cases" and ruled that as the breach did not affect the evidence against Tran, and given the seriousness of the charges, a stay was not appropriate. Instead he ruled that the appropriate and just remedy would be to reduce by half the sentence he ultimately decided to impose in relation to the crime for which Tran had been convicted.

III.3 *Analysis*

[69] There is no challenge to the trial judge's finding that Tran's *Charter* rights were breached. The challenge is to the remedy.

[70] The trial judge had few available options to respond to the *Charter* breaches. Realistically, there were only two – to reduce the sentence otherwise considered fit in the circumstances or to stay the proceedings. As indicated, the trial judge settled upon the former on the basis that no evidence was negatively affected, and, weighing the seriousness of the crime for which Tran was convicted against the seriousness of the breach, he found that this was not one of those "clearest of cases" where a stay should be granted.

[71] Counsel for Tran argues that the state conduct was so egregious that a stay is the only appropriate and just remedy. The Crown submits that the trial judge took into account the apposite factors and that there is no reason to interfere with the exercise of his discretion to redress the abuse through sentence reduction.

[72] For the reasons that follow, I do not accept the Crown's submissions.

[73] Absent legal error, a trial judge's s. 24(1) ruling attracts deference on appeal. However, in my respectful view, the trial judge's reasons reveal a failure to

consider significant factors that, as I will explain, have been identified in the jurisprudence as having a direct bearing upon whether to grant a stay in cases of this kind. This amounts to an error of law, requiring this court to determine the appropriate remedy: see *R. v. McCue*¸ 2010 ONCA 15, at para. 18. See also *R. v. Leduc* (2003), 176 C.C.C. (3d) 321 (Ont. C.A) at para. 140, and *R. v. Mangat* (2006), 209 C.C.C. (3d) 225 (Ont. C.A.), at paras. 13 - 16.

III.3.1 *Available Remedies Under s. 24(1)*

[74] While s. 24 provides the jurisdiction to remedy a *Charter* breach, it offers little by way of specific guidance. It merely provides that the court should grant a remedy that it considers "appropriate and just in the circumstances". It has been left to the courts to develop guidelines pertaining to the applicability of particular remedies that avoid a rupture with past jurisprudence yet take into account the new framing of Canadian values with the advent of the *Charter*.

III.3.1.1 *Sentence Reduction*

[75] The jurisprudence relating to sentence reduction as a *Charter* remedy has recently been reviewed by the Supreme Court in *R. v. Nasogaluak*, 2010 SCC 6, decided after this case was argued before the trial judge. The issue in *Nasogaluak*

was primarily the relationship between the sentencing provisions of the *Criminal Code* and the remedy section of the *Charter*, particularly in the context of responding to excessive use of force by the police.

[76] Mr. Nasogaluak attempted to evade the police in a high speed chase. His efforts to resist arrest resulted in two officers' punching him several times in the head and ribs with enough force to break his ribs. No recordings were made of this interaction, despite the presence of video cameras in the cars. The officers made no attempt to get medical attention for Mr. Nasogaluak, notwithstanding clear evidence that he required it. When he was released the following morning, his collapsed lung required immediate surgery.

[77] At trial, Mr. Nasogaluak sought a stay of proceedings on the grounds that the police used excessive force, did not report his injuries, and failed to get him medical attention, breaching his ss. 7, 11(d) and 12 *Charter* rights.

[78] The Alberta Court of Appeal agreed that the force was excessive and upheld the finding of a s. 7 breach. As for the remedy, the majority, following this court's decision in *R. v. Glykis* (1995), 84 O.A.C. 140 (C.A.), reasoned that a sentence reduction is available under s. 24(1) in two circumstances: where the breach mitigated the seriousness of the offence or when the breach imposed

additional hardship or punishment to the accused. Mr. Nasogaluak had clearly experienced hardship.

[79] The Supreme Court agreed with the majority of the Alberta Court of Appeal that a sentence reduction was an appropriate response to the *Charter* breach. However, Lebel J. (for the court) did not decide the case on the basis of s. 24(1). At para. 3 he noted that a fit sentence may be crafted through the sentencing provisions of the *Criminal Code*. It does not matter whether the misconduct actually reaches the level of a *Charter* breach; state misconduct is always a relevant consideration in sentencing because all sentencing must take place within the constitutional framework: para 53. Thus, "incidents alleged to constitute a *Charter* violation can be considered in sentencing, provided that they bear the necessary connection to the sentencing exercise:" para. 48.

[80] Despite having decided the case without resort to s. 24(1), Lebel J. went on to discusses jurisprudence relating to sentence reduction under that provision.

[81] He observed that different provinces had taken more or less restrictive approaches to using sentence reductions as remedies under s. 24(1). At one end of the spectrum Saskatchewan and New Brunswick had used it less restrictively. Other courts had used it with "greater hesitation": in this regard the *Glykis* case is

mentioned. At the other end of the spectrum, British Columbia was resistant to responding to *Charter* breaches through the use of sentence reductions.

[82] Given his conclusion that *Charter* values can be taken into account in the sentencing provisions of the *Criminal Code*, Lebel J. did not explicitly approve one province's approach over another. In principle, however, *Nasogaluak* recognizes that excessive force by the police can be remedied through a reduction in sentence, either by application of the remedial provision of the *Charter* or through the sentencing provisions of the *Criminal Code*.

III.3.1.2 *Stay of Proceedings*

[83] The inherent jurisdiction of a superior court to stay proceedings as a measure of control over the judicial process was affirmed in *R. v. Jewitt*, [1985] 2 S.C.R. 128. The common law abuse of process doctrine is designed to protect the fundamental principles of justice that underlie the community's sense of fair play and decency. In *R. v. Mack*, [1988] 2 S.C.R. 903, the Supreme Court confirmed that the judiciary should resort to a stay when necessary to communicate that it will not condone state conduct that transcends what our society perceives as acceptable. The objective of a stay as a remedy is to maintain public confidence in both the legal and the judicial process.

[84] The leading post-*Charter* stay decisions are *R. v. O'Connor,* [1995] 4 S.C.R. 411, *Canada (Minister of Citizenship and Immigration) v. Tobiass,* [1997] 3 S.C.R. 391 and *R. v. Regan,* [2002] 1 S.C.R. 297. In these decisions, the Supreme Court developed more specific guidance for when a stay is an "appropriate and just" remedy under s. 24(1).

[85] In *O'Connor,* L'Heureux-Dubé J., writing for herself, La Forest and Gonthier JJ., stated that a stay of proceedings is an exceptional remedy to be employed as a last resort, only after canvassing other available remedies. Of significance to this case, L'Heureux-Dubé J. noted at para. 73, that in *Charter* cases "concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system." She added:

> In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

[86] In *Tobiass*, the Supreme Court, drawing from the reasoning in *O'Connor*, held that where the Crown has rendered the proceedings unfair or has acted in such

a way as to adversely affect the integrity of the administration of justice, (the residual category) a stay is warranted. However, two criteria must be satisfied:

> (i) The prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (ii) No other remedy is reasonably capable of removing that prejudice: para. 90.

[87] The court went on to suggest that there may be a third criterion in cases where it is not clear that the abuse in question is sufficient to warrant a stay. In such cases, "it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits": para. 92.

[88] Significantly for the purposes of this case, at para. 96, the court held that a stay is appropriate not only where the abuse will be manifested in the future but also where it is so traumatic that to continue the prosecution would be unfair.

> [I]f a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice.

[89] Finally, in *Regan*, a case involving prosecutorial abuse, the Supreme Court again considered the approach to cases in the residual category. Lebel J., for the majority, said at para. 55:

> As discussed above, most cases of abuse of process will cause prejudice by rendering the trial unfair. Under s. 7 of the *Charter*, however, a small residual category of abusive action exists which does not affect trial fairness, but still undermines the fundamental justice of the system (*O'Connor*, at para. 73). Yet even in these cases, the important prospective nature of the stay as a remedy must still be satisfied: "[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings" (*Tobiass*, at para. 91). When dealing with an abuse which falls into the residual category, generally speaking, a stay of proceedings is only appropriate when the abuse is likely to continue or be carried forward. Only in "exceptional", "relatively very rare" cases will the past misconduct be "so egregious that the mere fact of going forward in the light of it will be offensive" (*Tobiass*, at para. 91).

[90] Few cases appear in Canadian jurisprudence where a stay has been imposed as a remedy specifically for police brutality. But there have been some. I refer to cases such as *R. v. Gladue*, [1993] A.J. No. 1045 (Prov. Ct., Crim. Div.; *R. v. Spannier*, [1996] B.C.J. No. 2525 (B.C.S.C.), *R. v. Murphy*, [2001] Carswell Sask 613 (Prov. Ct.); *R. v. Wiscombe*, [2003] B.C.J. No. 2858 (Prov. Ct.); *R. v. Markowska*, [2004] O.J. No. 5133 (O.C.J.); *R. v. Fryingpan*, [2005] A.J. No. 102

(Prov. Ct., Crim. Div.); *R. v. Cheddie*, [2006] O.J. No. 1585 (S.C.J.); *R. v. Merrick*, 2007 CarswellOnt 3855 (O.C.J.).

[91] These cases demonstrate that the determination of whether a sentence reduction or a stay of proceedings is the appropriate and just remedy in the circumstances will depend upon the application of the above principles to the facts of each case.

III.3.2 *Selecting the Appropriate Remedy*

[92] As was held in *Nasogaluak*, a sentence reduction may be appropriate in a case where it is felt that there is a need to take into account the "punishment" already meted out through the excessive use of police force: see also *Glykis*.

[93] Here, while the *Charter* violations bear the "necessary connection to the sentencing exercise" as contemplated in *Nasogaluak* and *Glykis,* to open the door to a sentence reduction as a possible *Charter* remedy, the nature and degree of the state misconduct demand a remedy that goes beyond an adjustment to the sentence - a remedy that appropriately responds to the damage that misconduct such as this does to the foundation of our system of justice.

[94] This was not a case of excessive police force in the discharge of their duties. The two officers involved were taking him to the police station after he had turned himself in. No degree of force was warranted. In fact, if Tran's version of the story is to be believed, the police beat him for invoking his *Charter* right to remain silent. As the Crown correctly points out, there is no specific finding to this effect. While that is true, regardless of whether the officers abused Tran to obtain a confession or for some other reason, the essential fact is that they beat him up. While other specific findings of fact may have made the officers' conduct worse, there is nothing that would make it better. Their conduct was despicable regardless of its motivation.

[95] Furthermore, the gratuitous beating to which Tran was subjected, after turning himself in to the authorities, caused him permanent bodily harm. He was denied prompt medical attention. And the members of the Peel Regional Police involved in this abuse attempted to cover-up their shocking conduct by destroying evidence, lying to fellow officers and perjuring themselves before the court during the *voir dire.*

[96] Even if the state misconduct had ended there, it would, in my view, certainly be open to a trial judge to exercise his or her discretion and grant a stay

on the basis that proceeding with the prosecution in the face of it would undermine the public's confidence in the administration of justice as contemplated in *Tobiass.*

[97] But the state misconduct did not end there. The misconduct continued into the trial and, in my view, implicated trial fairness in the broad sense identified by Deschamps J., in her concurring reasons in *R. v. Grant,* [2009] 2 S.C.R. 353, at para. 207, where she wrote that "trial fairness corresponds to courtroom fairness."

[98] I refer to the Crown's cavalier attitude toward the seriousness of the police misconduct and abuse to which Tran had been subjected demonstrated by Crown counsel's decision to have Officer Vander Wier sit at the counsel table after the trial judge's ruling on the *voir dire*. This decision suggested indifference to, if not approbation of, the police abuse and attempted cover-up. Matters were made even worse when the Crown allowed Officer Vander Wier to have a continuing involvement with witnesses after the trial judge made an order excluding him from the counsel table.

[99] The Crown's conduct was evocative of an alignment with the police, notwithstanding the abuse. The Crown's responsibility lies not in securing a conviction but in presenting the case for the prosecution while ensuring a fair trial for the accused: see *Boucher v. The Queen*, [1955] S.C.R. 16. Conduct suggesting

that the Crown was condoning egregious police misconduct in violation of its duty of even-handedness would, in my view, cause a reasonable observer informed of the circumstances to question whether Tran could receive a fair trial. While the trial judge found that the police misconduct and *Charter* breaches did not affect the evidence, a reasonable person could well conclude that Vander Wier's continued involvement with the case and his ongoing contact with key Crown witnesses could influence their testimony to Tran's disadvantage.

[100] To make matters still worse, there is no evidence of any effective response to the police brutality here.

[101] The only action apparently taken against the police was the SIU investigation. It was closed on June 6, 2003. Defence counsel inquired into the reason for this, and was told that while the reason was confidential, the decision was justified. At the stay hearing, counsel for the SIU advised the court that the Director "closed the SIU file in the case having reached his conclusion that there were no reasonable grounds to believe that the officer had committed any criminal offence." In oral argument, the panel was informed that despite the trial judge's findings of serious police brutality, no further action has been taken against these officers. It is difficult to understand why or how those responsible for investigating

the incident could continue to maintain that there are no reasonable grounds to proceed.

[102] The message of *Nasogaluak* at para. 32 bears repeating: "Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences." It is not for this court in this appeal to concern itself with punishment for those who abused Tran. It is, however, for this court to affirm the fundamental values of our society and to respond to actions that undermine the integrity of the justice system. The failure of the SIU and other authorities to follow through with a meaningful investigation also militates in favour of a stay.

III.4 *Summary and Conclusion*

[103] I agree with the submission made rhetorically by defence counsel: "If this conduct does not warrant a stay, what does?"

[104] In my view, this is one of those "clearest of cases", were the prosecution should be halted. This case involved horrendous police misconduct that breached Tran's ss. 7 and 12 *Charter* rights, jeopardized the perception of trial fairness and brought the integrity of law enforcement into disrepute.

[105] Therefore, the trial judge erred when he held that a stay should not be granted because the evidence against Tran was not affected and because the charges were serious. The jurisprudence is clear that a stay can be granted even where the evidence is not affected and that society's interest in having a trial on the merits is only to be weighed in the balance "where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay:" *Regan* at para. 57. Here, there is no uncertainty. The abuse is serious – more than sufficiently serious to warrant a stay.

[106] It is essential for the court to distance itself from this kind of state misconduct – an unwarranted, grave assault causing bodily harm, delayed medical attention, a cover up that included perjury, a prosecutorial response that affected the perception of trial fairness and no effective response. Not to do so would be to leave the impression that it tacitly approves of it. The granting of a stay of proceedings affirms the fundamental values of our society and ensures that the rights under the *Charter* are not, in substance, meaningless.

[107] Based on this analysis, I conclude that the affront to decency and fair play precludes any further investigation of the societal interest in the prosecution of the case. In my view, the prosecution must therefore be stayed.

THE APPEALS AS TO SENTENCE

[108] I note that while Johnson appealed his sentence, he did not pursue his sentence appeal in argument.

[109] In her sentence appeal, Dang argued that her sentence was excessive. Further, she submitted that she should be provided with credit for a portion of time spent under house arrest between the date she was sentenced and the hearing of this appeal. In large part, she relies on the fact that it took a full year for transcripts to be prepared.

[110] I see no reason to interfere with Dang's sentence. First, home invasions involve serious criminal conduct that calls for a serious response. The trial judge's detailed reasons for sentence disclose no basis for intervention by this court. Second, there is no fresh evidence to show that pending this appeal, Dang took any steps toward rehabilitation or suffered any hardship, let alone the kind of undue hardship that may make a submission of this nature relevant to her sentence appeal.

[111] While leave to appeal the sentence is granted, the appeal is dismissed.

DISPOSITION

[112] In relation to Dang and Johnson, I would dismiss the conviction appeals, give Dang leave to appeal her sentence but dismiss the sentence appeal. In relation to Tran, I would allow the appeal and enter a stay of proceedings.

RELEASED:

"RJS"

"JUN 30 2010"

"Gloria Epstein J.A."

"I agree Robert J. Sharpe J.A."

"I agree Janet Simmons J.A."