Regina v. Voss

50 C.C.C. (3d) 58

Ontario Court of Appeal,
Howland C.J.O., Brooke and Tarnopolsky JJ.A.

June 30, 1989

Constitutional law — Charter of Rights — Right to counsel — Detention — Accused questioned regarding death of his wife — After accused giving exculpatory statement police obtaining results of autopsy indicating that death could have been caused by assault — Police continuing to question accused and accused allegedly making inculpatory statement — Accused in presence of police officers for several hours before formally arrested and advised of right to retain and instruct counsel — After police informed of cause of death, nature of police investigation changing — Accused detained from that point on and should have been advised of right to retain and instruct counsel — Statement obtained from accused inadmissible — Canadian Charter of Rights and Freedoms, s. 10(b).

The accused was charged with manslaughter as a result of the death of his wife. Following the death of the deceased a number of police officers attended at the accused's home to obtain information concerning the cause of death. At that time the accused gave a brief exculpatory summary of events. One of the officers then indicated that he was going to attend at the hospital where the accused's wife had died in order to determine the cause of death and the accused was asked to go to the police station to give a statement regarding his wife's death. At the police station the accused gave a lengthy exculpatory statement. After that statement ***[page59]*** was concluded the police officer who had attended at the hospital called the other officers and indicated that the cause of death was injuries to the abdominal area which could have resulted from a motor vehicle accident, a fall from a significant height or being stomped upon or kicked. The police officer then confronted the accused with this information and asked the accused if he could explain these injuries. According to the police officer the accused at this time turned pale and admitted that he sometimes fought with the deceased and hit her. The accused however testified that the officer said "sometimes we all have arguments with our wives, sometimes things get out of hand" and that the accused should admit anything he had done to his wife or things would be harder for him later. The accused testified that he felt threatened and accused of being responsible for his wife and denied making the inculpatory remarks. The trial judge accepted the version of events of the police officers and rejected the accused's evidence upon this point. The police officers then told the accused that they would be returning to his home. The accused was taken to the house in a police cruiser where he remained until the other officers arrived. At the house the questioning of the accused continued and in particular the accused was asked to explain a number of injuries which had been found on the deceased. He was asked specifically if he had kicked his wife and he denied that he did but he then admitted that he had punched the deceased in her abdomen and head. The accused was then returned to the police station and as a result of further information obtained from the deceased's co-workers he was then charged with manslaughter and informed of his right to retain and instruct counsel. At this time the accused asked to speak to a lawyer. At trial the judge found that the statements made by the accused were voluntary and that he was not detained until he was actually arrested. Accordingly, the trial judge found that the accused's rights under s. 10(b) had not been infringed and the statement was admitted.

On appeal by the accused from his conviction, **held,** Brooke J.A. dissenting, the appeal should be allowed and a new trial ordered.

Per Tarnopolsky J.A., Howland C.J.O. concurring: This was a difficult case because it was so close to the dividing line between on the one hand a detention and on the other hand an instance of mere questioning by the police of someone not yet suspected of having committed a crime, in order to obtain information about what might turn out to be a crime. If this was a case of mere questioning, which is frequently required of police in fulfillment of their duties, there was no detention and no requirement to inform the person being questioned of a

right to counsel. In this case, however, having regard to all the circumstances the accused was detained within the meaning of s. 10(b) at least by the time that he was confronted by the police with the information as to the cause of death and asked to give an explanation. The necessary element of compulsion or coercion to constitute a detention may arise from a reasonable belief that the person does not have a choice as to whether or not to comply with a demand or direction from a police officer. The exact words used by the police officer will not be as important as the relationship between the accused and his questioners and the point in time at which the language is used. In this case the accused had been in the company of police officers for a number of hours and went with the police as he was told or advised. These events would fit criteria indicating that the accused was detained at least after the time of his implication in his wife's death became more evident from the forensic evidence and he, thereafter, seemed either too distraught to react to police communication to him or if he did react, it was in accordance with such communication. An objective view would have to be that the police investigation ***[page60]*** changed from one of trying to determine cause of death to one of trying to get information from a man who is alleged to have and has admitted to having assaulted his wife in order to determine if he was implicated in the death. As the day went on the nature of the questioning changed and the police themselves treated the investigation differently. The mere fact that the police officers were polite was not determinative. Nor was the fact that the police officer testified at trial that he did not have reasonable and probable grounds to arrest the accused until he made the actual arrest. It would be possible for a police officer to delay his evaluation of whether there were reasonable and probable grounds for charge until the accused has, after persistent questioning, provided the information from his own mouth to prove his commission of a crime. The specific questioning of the accused after the police learned the cause of death must amount to confronting the accused with evidence pointing to his guilt. While the questioning was not threatening or menacing this was not the crucial issue in determining if there was a detention. In this respect a clear distinction must be kept between the issue of voluntariness and the issue of whether or not the accused has been detained. Finally, the accused testified that he felt threatened and without the choice to leave. In all the circumstances it must be concluded that the accused was detained by the time the police officer received the information about the deceased's death, explained it to the accused and asked if he had any explanation and the accused responded both verbally and physically. It was at that time that the police officer took control over the accused's movements and should have informed him of his rights under s. 10(b). The failure to inform the accused of his right to retain and instruct counsel constituted a denial of one of the most fundamental rights and the statement obtained from the accused must be excluded.

Per Brooke J.A., dissenting: It was apparent from the careful reasons given by the trial judge that he was aware of the proper legal principles in determining whether the accused was detained at any time and kept in mind the distinction between the issue of detention and that of common law voluntariness. The trial judge applied the legal principles to the facts and found those facts after making clear findings of credibility. At trial the allegation that the accused was detained was based on the accused's testimony that the police officer after learning the cause of death told the accused that it would be better if the accused told the police if he had done anything to his wife and that it would be harder on him if the police had to prove it later. The trial judge however did not believe this statement had been made by the police officer and accepted the evidence of the police. It was not contended at trial that the mere conveying to the accused of the information as to the cause of death and asking the accused to explain the injuries to his wife was the turning point between investigation and detention. To now put the case on the footing of the disclosure of that information is to recast the case for the accused on the issue of detention and to retry it in the Court of Appeal on a basis that was not relied upon in the trial courts. The trial judge having rejected the accused's evidence as to the statement which the accused relied upon as marking the point at which he was detained proceeded, as he was entitled to do, to judge the quality of the accused's evidence that the police had assumed control over his movements from that point on and found the evidence to be quite unreliable. In the circumstances the Court of Appeal should accept his findings on the evidence that he believed and should not draw inferences which the trial judge undoubtedly rejected or give to the evidence some other meaning. The fact that this case was so close to the dividing line was strong reason to recognize the significance of the advantage of the trial judge in dealing with the credibility of witnesses and the probative value of their evidence. ***[page61]***

R. v. Thomsen (1988), 40 C.C.C. (3d) 411, 63 C.R. (3d) 1, [1988] 1 S.C.R. 640; R. v. Moran (1987), 36 C.C.C. (3d) 225, *consd*

Other cases referred to

R. v. Bazinet (1986), 25 C.C.C. (3d) 273, 54 O.R. (2d) 129, 51 C.R. (3d) 139; R. v. Therens (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 59 N.R. 122, 38 Alta. L.R. (2d) 99, 40 Sask. R. 122, 32 M.V.R. 153, 13 C.R.R. 193; Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, sub nom. Director of Investigation & Research of Combines Investigation Branch v. Southam Inc., 55 N.R. 241, 33 Alta. L.R. (2d) 193, 55 A.R. 291, 27 B.L.R. 297, 9 C.R.R. 355, 84 D.T.C. 6467; R. v. Clarkson (1986), 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383, 50 C.R. (3d) 289, 66 N.R. 114, 69 N.B.R. (2d) 40, 19 C.R.R. 209; R. v. Soares (1987), 34 C.C.C. (3d) 403; R. v. Esposito (1985), 24 C.C.C. (3d) 88, 53 O.R. (2d) 356, 49 C.R. (3d) 193, 20 C.R.R. 102; R. v. Smith (1986), 25 C.C.C. (3d) 361, 26 D.L.R. (4th) 466, 49 C.R. (3d) 210, 38 Man. R. (2d) 184, 19 C.R.R. 133; R. v. Oakes (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 65 N.R. 87, 19 C.R.R. 308

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 10(b), 24(2)

Criminal Code, ss. 217, 219, 613(1)(b)(iii) (am. 1985, c. 19, s. 143(1)) -- now R.S.C. 1985, c. C-46, ss. 234, 236, 686(1)(b) (iii)

APPEAL by the accused from his conviction for manslaughter.

A.D. Gold, for accused, appellant.

J.A. Ramsay, for the Crown, respondent.

HOWLAND C.J.O. concurs with **TARNOPOLSKY J.A.**

TARNOPOLSKY J.A.:— The appellant, Peter Wolfgang Voss, was arraigned on an indictment charging him with having, on or about July 31, 1985, at the City of Stoney Creek, unlawfully killed his wife Carolina Voss, thereby committing manslaughter, contrary to ss. 217 and 219 of the Criminal Code, R.S.C. 1970, c. C-34 (now R.S.C. 1985, c. C-46, ss. 234 and 236 respectively). The appellant was tried by a jury presided over by Donnelly J. On February 17, 1987, the jury found the appellant guilty as charged.

On April 16, 1987, the appellant was sentenced to a five-year period of incarceration. In addition, the trial judge made an order, pursuant to s. 98(1) (now s. 100(1)) of the Code, that the appellant be prohibited from the possession of a firearm for a period of five years following his imprisonment. The appellant now appeals from his conviction and seeks leave to appeal his sentence.

The main issue argued before us on the appeal from conviction concerned the admissibility of certain utterances of the appellant to police officers, which were challenged at the trial as having been made after he was "detained" and before he was advised of ***[page62]*** his right to counsel as required by s. 10(b) of the Canadian Charter of Rights and Freedoms (hereinafter the Charter). At trial these utterances were also challenged as being involuntary, but that issue was not argued on appeal. Following a voir dire, at which there was testimony from four police officers and the appellant, the trial judge held that there was no "detention" prior to the appellant's arrest, at which time he was informed of his right to counsel and did, indeed, contact his counsel.

The pertinent Charter provisions are:

> 10. Everyone has the right on arrest or detention
>
> (b) to retain and instruct counsel without delay and to be informed of that right

24(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.

I.

FACTUAL BACKGROUND

Peter and Carolina Voss were married in Germany in 1963 and moved to the Hamilton area in 1965. They were not able to have children. However, they both enjoyed breeding and showing their four large dogs. The appellant worked as a skilled mechanic and the deceased operated cutting equipment in the wholesale department of a meat-packing plant.

The Voss house was small and cluttered. The interior was characterized by the presence of countless boxes on the floor and piles of newspapers on the furniture. Through the interior of the house was a "dog run" -- essentially a cord suspended along the wall onto which a dog lead could be attached so as to limit the range of movement of the dog within the house.

According to the appellant, Carolina Voss began drinking heavily three years before her death, following the loss of a job. It was the third time in a row that she had lost a job because her employer closed down. He suggested this depression was compounded by years of unsuccessful attempts on their part to have children. According to him, Mrs. Voss did most of her drinking secretively. Her co-workers did not know of any drinking problem and there was little evidence that it affected her job performance. As well, the appellant testified that Mrs. Voss never drank in front of him, except for the occasional glass of wine with Sunday dinner. There was evidence from the autopsy and a liquor ***[page63]*** store clerk, which corroborated the appellant's contention that Mrs. Voss had a drinking problem.

Mrs. Voss also had a problem with one of her eardrums which caused her to feel dizzy and off-balance on a regular basis. The problem persisted to some extent, despite minor surgery to correct the defect. With this problem and her drinking, Mrs. Voss was ill-suited to run the obstacle course of scattered boxes, treacherous stairways, and rambunctious dogs that made up her home environment. As a result, the appellant contended, Mrs. Voss was constantly recovering from one household accident or another. A. Evidence of the relevant events

The appellant testified that Mrs. Voss had a household accident on Sunday, July 21, 1985, while bringing a load of dry laundry to the house from a clothesline in the backyard. He said that, in order to avoid the dogs' leads, she stepped up the "high side" of the stairs with her arms full of laundry. The appellant testified that he heard his wife fall and found her sprawled over the porch. She had sustained a number of bruises and scrapes to her legs and elbows, had great difficulty getting up, and seemed to have injured her back. The appellant claimed that he had picked her up from behind by putting his arms under hers and by hugging her with his hands clasped together at the front of her chest; that he had dragged her into the washroom, where he cleaned and bandaged her wounds. He testified that her face had landed on top of the laundry and so no bruises appeared for a couple of days, at which time marks were visible in the area of her left eye and cheek, and that she also sustained a wound where a tooth had punctured the tissue inside her mouth.

Co-workers and others testified that, some time after Sunday, July 21st, in the few days before her death, her face was bruised and swollen. Both eyes were blackened and she had a blue cheek and blue chin and a distinct, deep bruise at the base of her neck. There were bruises on her arms. She seemed to stare vacantly, hunching while she walked. After missing several days of work, she returned on July 30th. When her foreman saw her the next day, the day of her death, he sent her home because he was afraid she would hurt herself. There was something wrong -- "how she moved, how she talked". B. The appellant's testimony regarding the night of July 31, 1985

When the appellant arrived home from work at 5:00 p.m., he found his wife in bed. She told him she was feeling a bit better. ***[page64]***

The appellant made himself dinner and sat down to watch television. At one point his wife came out of the bedroom and started toward the kitchen, saying she was hungry. The appellant told her to sit down, that he would prepare some food for her. He saw she was staggering and was concerned that she was going to have an accident. Mrs. Voss sat down and watched television with the appellant, eating a sandwich that he had prepared her. The appellant inferred from her unsteadiness and the smell of alcohol that Mrs. Voss had been drinking. When confronted, Mrs. Voss denied that she had purchased or consumed any alcohol. After Mrs. Voss went to bed around 8:00 p.m., the appellant checked through her purse for an indication whether she had purchased alcohol. He found a liquor store receipt.

While the appellant was in the basement working, he heard a thump upstairs. He rushed up and found his wife in the front room, slumped across an overturned coffee table. The footstool that sat in front of her chair had also been overturned. He helped her to her feet, but she was unsteady and unable to walk. He grabbed her by the right arm and tried to lead her to the bathroom, but she fell forward and landed on her face on the carpet. The appellant noticed that his wife's nose was bleeding. To avoid the risk of another fall, he dragged her to the bathroom and cleaned her up for bed. He then dragged her from the washroom to the bedroom and put her to bed. He left the bedroom and sat down to watch television.

The appellant testified that he checked on his wife on one occasion. He found vomit around her mouth and used wet rags to clean her face. He was concerned that she might choke on her vomit and so rolled her onto her side. The appellant heard her snoring and believed she was having a sound sleep. When the snoring stopped, the appellant became concerned and went to the bedroom to investigate. His wife was pale and clammy and he could not find a pulse. The appellant made a futile attempt at artificial respiration before calling an ambulance. While waiting for the ambulance, he made another attempt at artificial respiration.

Upon arrival the two ambulance attendants removed a stretcher from their vehicle and carried it up to the house. A precarious set of front steps, which appeared homemade and were not properly secured, made entry with the stretcher quite difficult. An ambulance attendant began administering CPR while the other attendant and members of the fire department tried to manoeuvre the stretcher. The resuscitation operation was frustrated by the softness of the bed. The stretcher could not be manoeuvred ***[page65]*** through the small and cluttered front room and Mrs. Voss had to be carried or "log-rolled" from the bedroom to the waiting stretcher. A board was placed on the stretcher to increase the effectiveness of the CPR attempts. CPR continued even as the stretcher was carried from the house to the ambulance. Once again, the unstable front steps and low-lying tree branches made movement difficult outside the front door.

The ambulance attendant continued to apply CPR all the way to the hospital, despite the difficulties caused by a bouncing vehicle. The ambulance attendant would apply the compressions while standing up with his back braced against the roof of the van to steady himself. Upon arriving at the hospital, a medical team immediately began lifesaving methods. This included further CPR, electric shocks to the chest area, and intubation -- (the placement of a tube into the trachea). All of these methods proved futile and Mrs. Voss was pronounced dead shortly after 10:00 p.m. Shortly thereafter, a doctor visited the appellant to inform him that his wife had died. The appellant was very upset and crying. The doctor prescribed serax and valium to help the appellant sleep and alleviate his distress. The doctor also asked for a brief history of Mrs. Voss' illnesses for hospital records. Then a nurse asked the appellant about the circumstances of his wife's death. The appellant gave a brief summary of events consistent with his testimony at trial.

That night the appellant took several prescription drugs to aid his sleeping but he had a fitful night without rest. The next morning he made funeral arrangements for his wife. Again he took several valium and did not eat. C. The police investigation: stage one

On August 1, 1985, Sgt. Sutton of the Hamilton-Wentworth Police Force received a call from one of Mrs. Voss' co-workers. She stated that a woman she knew (Mrs. Voss) had been assaulted one week before by her husband and when she had called earlier that morning, the appellant told her that Mrs. Voss was dead. Sgt. Sutton contacted the local hospitals as a result, but was unable to find any record of Mrs. Voss dying the night before. Because of this, he ordered Sgt. Lamb and two other police officers to investigate.

Sgt. Lamb, driving an unmarked cruiser and in plainclothes, proceeded to the Voss home. The other officers, uniformed and driving a marked car, followed. Lamb knocked on the front door and was greeted by the appellant. Lamb asked if Mrs. Voss was ***[page66]*** home. The appellant explained that Mrs. Voss had passed away the evening before at Joseph Brant Hospital.

The appellant, at Sgt. Lamb's request, allowed the three policemen to enter his home. The appellant and Sgt. Lamb sat down in the living-room. Lamb asked the appellant to explain the circumstances of his wife's death. Sgt. Lamb testified, with the assistance of his notes, that the appellant gave a brief exculpatory summary of events, which was essentially the same as the appellant's testimony at trial.

Shortly after this Sgt. Slack, Lamb's supervisor, arrived at the Voss residence. He was met outside by Sgt. Lamb and given a summary of the appellant's explanation. The two officers then went inside the house. Sgt. Slack heard the appellant comment that his wife had a drinking problem and that he sometimes found empty bottles around the house. He asked the appellant to show him where he found the bottles. Voss led Sgt. Slack down a set of stairs into the basement, where three or four wine bottles were sitting against a wall.

Sgt. Slack and the appellant returned to the living-room, where Slack received a telephone call from Sgt. Sutton. As a result of that call, Sgt. Slack advised Lamb and the appellant that he was going to Joseph Brant Hospital to determine the cause of death. The appellant was asked to return to the Stoney Creek police station to give a statement regarding his wife's death.

After locking up the house, the appellant was transported to the Stoney Creek station in Sgt. Lamb's unmarked police cruiser. The drive took about five minutes. At the station Sgt. Lamb and the appellant went to the criminal investigation office. Sgt. Lamb closed the door and sat down at the typewriter with the appellant sitting across the desk from him. He told the appellant that the coroner's office required a statement in sudden deaths and, for that purpose, the appellant was to give a witness statement.

In response to this request, the appellant gave Sgt. Lamb a lengthy account of the circumstances surrounding his wife's death. Sgt. Lamb typed the statement as the appellant spoke. Sometimes he stopped typing and asked a question. (The typewritten statement does not include these questions.) During the course of the statement the appellant changed his mind about something he said and Sgt. Lamb made the appropriate correction. The statement, which commenced at 11:50 a.m., took approximately 40 or 45 minutes and was three pages long. It was exculpatory and was consistent with the statement the appellant had given to Sgt. Lamb at the Voss residence that morning.

[page67] While the appellant was reading over the typed statement, Sgt. Lamb received a telephone call from Sgt. Slack. During the call, Slack summarized the conclusions that the pathologist, Dr. Weiss, had arrived at with respect to the cause of death. At this time, about 12:40 p.m., Slack arranged to meet Lamb and the appellant at the Voss residence at 1:45 p.m. D. The forensic evidence

Dr. Margaretta Weiss conducted the autopsy on the body of Mrs. Voss. She told Sgt. Slack that, among other things, Mrs. Voss may have been beaten. She stated that the cause of death was a result of internal bleeding; in particular, five lacerations to the omentum, mesentery and peritoneum -- all tissues in the abdominal area -- caused the bleeding. She told Sgt. Slack that these could have been the result of a motor vehicle accident, a fall from a height higher than a standing height or being propelled against an object, or being stomped upon or kicked. E. Police investigation: stage two

During his 12:40 telephone call to Sgt. Lamb, Sgt. Slack related this information from Dr. Weiss. Lamb told the appellant the new information about the cause of death and asked him if he could explain those injuries. The appellant was described as having turned pale and having stared at the floor. He was sweating heavily. It was Sgt. Lamb's testimony that the appellant said, "Occasionally we fought. Sometimes I hit her. How could she have gotten those injuries from her fall?" Sgt. Lamb testified that, at this point, he asked the appellant two or three times to sign the written statement but received no response.

The appellant testified to a different version of events. It was his contention that after Sgt. Lamb informed him of the cause of death, the officer went on to state, "Sometimes we all have arguments with our wives, and sometimes things get out of hand". His evidence was that Sgt. Lamb then told him to admit anything he had done to his wife or things would be harder for him later. The appellant testified that he was preoccupied with the pain his wife went through and that he felt threatened and accused of being responsible for his wife's death as a result of the officer's conduct. He said that he responded to Sgt. Lamb that he did nothing to his wife.

In the ruling on the voir dire the learned trial judge concluded that he believed Sgt. Lamb's version of these events.

Sgt. Lamb testified that he then "told [the appellant] that we would be returning to his address to meet [Sgt.] Slack and two ***[page68]*** identification officers" at 1:45. Voss nodded his head affirmatively in reply, still in his daze-like state. The appellant was then left to wait in the criminal investigation office for 45 minutes. The door was left open and there was a working telephone in the office. From time to time Sgt. Lamb or other police officers came and went, but on other business. No one spoke to him, except for Sgt. Lamb, who asked him how he felt and whether he wanted coffee. At 1:40 Sgt. Lamb returned and, he testified on the voir dire: "I advised Mr. Voss that I would be driving him back to his residence. We left the office." They arrived at 1:45 p.m., as did the two identification officers, and parked in the driveway. Lamb stated that it was too warm to wait in the car and got out, as did the two other officers from their car and the three paced in the driveway, waiting the arrival of Sgt. Slack. The appellant did not respond to the comment about it being too warm to stay in the car and continued to do so, staring at the dashboard. Sgt. Lamb described him in the following terms:

> MR. CAMPORESE: [in cross-examination] Did he still appear somewhat distraught to you at this point in time?
> A. Yes, very similar to at the station when he was sitting staring at the floor.

The appellant remained seated inside the car until Sgt. Slack arrived at about 2:00 p.m. At that point Sgt. Lamb opened the car door and told the appellant they were ready to go inside. The appellant unlocked the door to the house and they all went in. Voss explained again how his wife had fallen and pointed to a spot on the carpet where there would be bloodstains. He was asked by Sgt. Slack to accompany him to the back porch where the other three officers were. The appellant went to the back porch and answered questions about his wife's fall on the previous Sunday, when she was carrying in the laundry.

The appellant, Sgts. Lamb, and Slack then went back into the living-room. The officers described a number of Mrs. Voss' injuries and asked Voss if he could explain them. He was asked to explain the bruises on her legs, on her scalp, on her chest, and on her left eye. He attributed them to falls or, in the case of her chest, to a pressure point when he carried her. The appellant was then asked to explain her internal injuries. He said he could not. He was then asked if he kicked or stomped his wife. He said he did not. The appellant was then asked if he hit his wife the night before. The two officers testified that he admitted punching her in the side and that he pointed to his lower right abdomen. The officers testified he was asked if he had used his fist and that he said: "Yes. In the ***[page69]*** head three or four times." Sgt. Lamb asked if he could see the appellant's shoes in order to determine whether the treads matched circular marks found on Mrs. Voss' abdomen.

The appellant testified that his final few answers were considerably different. In response to the question about hitting his wife the night before, he explained that he slapped her to revive her, as he had done on three or four occasions in the past when she was intoxicated. With respect to punching her, the appellant testified that he had said that he had once jammed his hand into his wife's chest because she was collapsing forward and he wanted to break her fall. The appellant denied ever making the inculpatory statements which Sgt. Lamb and Sgt. Slack attributed to him.

Again, the learned trial judge ruled that he believed the police version of this event, rather than that of the appellant.

Staff Sergeant Slack testified that at that point he did not feel that the hitting to which the appellant had admitted would have caused the very serious internal injuries revealed by the autopsy. He did not feel that he had

reasonable and probable grounds to lay a charge against the appellant. Sgt. Lamb agreed and testified that he wanted to investigate further before asking any more questions. He testified that he did not want to accuse a grieving widower of something which he might not have done.

The appellant was then told that they would be travelling to the central police station (in Hamilton). En route, Sgt. Lamb stopped at a convenience store to purchase cigarettes. The appellant followed him and purchased some cigars.

At the central police station the officers spoke to Sgt. Holk, who read to them the statements of the deceased's co-workers, Mary Mork and Irma Sasse, to the effect that the appellant had been beating his wife so badly that she had not been at work for a week. Staff Sergeant Slack testified that he then decided that the appellant should be charged with manslaughter. Accordingly, at 3:35 p.m. the appellant was placed under arrest, warned about making statements, and informed of his right to counsel. Very shortly after he took advantage of that right.

II.

THE SUBMISSIONS

At trial and before us, the appellant challenged the admissibility of the utterances allegedly made after Sgt. Lamb received the telephone call from Sgt. Slack, outlining the cause of death. The utterances were argued to be inadmissible under s. 24(2) of the Charter, on the basis that there had been a "detention" within the ***[page70]*** meaning of s. 10(b) of the Charter and, therefore, a violation of the appellant's right to counsel.

Counsel for the appellant referred to the following events as supporting his allegation that the appellant was detained at least after the telephone conversation between Sgts. Slack and Lamb:

(a) The appellant went to the Stoney Creek station to give a statement about his wife's death, because he did not think he "had any options" when requested to do so by the police.
(b) The appellant was driven to the station in an unmarked police cruiser.
(c) The appellant was taken to the "Criminal Investigations Office", which was a small room within the Stoney Creek police station. The door was closed.
(d) The appellant testified that he felt accused of having caused his wife's death when Sgt. Lamb asked him to explain his wife's internal injuries.
(e) Both Sgt. Lamb and the appellant testified that the appellant began to perspire and look pale following Sgt. Lamb's request for an explanation.
(f) The appellant was left to sit and wait alone in the criminal investigations office for at least 40 minutes, rather than being allowed to go home or be driven home. The appellant's residence was only five minutes away and was to be the site of further investigation. The appellant testified on the voir dire that he did not believe he was free to go. Sgt. Lamb, while testifying that the appellant could have walked out anytime he wanted, stated he did not inform the appellant that he was free to go. The appellant did not leave the criminal investigations office until Sgt. Lamb said it was time to return to the residence.
(g) While the appellant had the keys to his house, he testified that he felt that his only options were to sit in the car or pace in the driveway, but not to enter the house until Sgt. Slack arrived.
(h) At the residence Sgts. Slack and Lamb asked questions of the appellant that clearly contemplated the acquisition of evidence which would incriminate him. These questions, which were much more than investigatory, included: "Did you hit her?" "Did you use your fist?" and "Did you ever kick or stomp your wife?". These questions followed a barrage of questions about his wife's external injuries which, cumulatively, were accusatory in nature.

[page71]

(i) The appellant was told that his wife had unusual circular shaped bruises on her abdomen and was asked to show the officer the bottom of his shoe. At that point, an identification officer was called in to photograph the bottom of the shoe.
(j) During the entire afternoon session at the Voss residence, there were four police officers in the small house with the appellant. Two of the officers were questioning the appellant while the other two policemen, identification officers, were moving about his house and taking photographs.

Crown counsel responded to the issue of detention by attempting to show that the accused had a degree of freedom of movement and that the police had never made a "demand" or "direction" to him but had merely "requested" his participation in the investigation.

It was submitted that until the moment when Sgt. Slack decided to charge the appellant, the appellant was treated in every way as a witness rather than as a prisoner. The following evidence was submitted to support that conclusion:

(a) The appellant rode in the front seat of the police car.
(b) The appellant came and went as he pleased when he was with the police, and was able to see to his pigeons and dogs and so on.
(c) The appellant went into the kitchen to get himself a drink of water and went into the variety store to buy cigars.
(d) The appellant was left in an office with a telephone in the police station and the door was left open, except when the appellant was actually giving his typed statement.
(e) The officers who spoke to the appellant were courteous and considerate throughout their dealings with him.
(f) The officers did not have grounds to charge the appellant at the relevant time.

(g) The appellant expressed a willingness to co-operate.

III.

THE VOIR DIRE

In his review of the events from 11:00 a.m. on August 1st, when Sgt. Lamb arrived at the Voss home, to the time when Voss was arrested and cautioned at 3:35 p.m., the learned trial judge emphasized that the relationship between the appellant and various police officers, particularly Sgt. Lamb, was characterized by decorum and courtesy on the part of the police, and co-operation on the part of the appellant.

[page72] The point at which there is the first divergence between the version of events given by the appellant, and the version given by Sgt. Lamb, is when Sgt. Slack transmitted the forensic evidence of the cause of Mrs. Voss' death. Voss testified that after that call Sgt. Lamb said the following to him:

> All of us sometimes argue with our wives; sometimes it gets out of hand. It's better for you to tell me now. It will be harder on you if we have to prove it later.

The appellant claimed that at that point he started to feel threatened. However, after a review of the evidence concerning that time period, as well as later ones, and a consideration of Sgt. Lamb's 20 years of experience, the trial judge concluded that: "I find that the words were not said by Officer Lamb and that specifically they cannot be a threat or compulsion inducing any utterances."

Similarly, he concluded that the events concerning the second visit to the Voss house did not involve "intimidating circumstances or overtures", "nothing threatening nor menacing". He concluded that there was "no psychological hammering or overpowering". He observed that:

> The officers were polite, the tone of voice was normal, there were no accusations, there was no repetition, the questions were relevant as to the location and possible causes or explanations for injuries, the accused at that time described himself as weak and numb.

Having concluded that there was nothing "intimidating" or "threatening" about the police questioning, the learned trial judge applied that evaluation to the question of whether there had been a detention. After referring to my discussion in R. v. Bazinet (1986), 25 C.C.C. (3d) 273 at p. 283, 54 O.R. (2d) 129, 51 C.R. (3d) 139 (Ont. C.A.), of the reference by Le Dain J. in R. v. Therens (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, [1985] 1 S.C.R. 613 (S.C.C.), to a "demand or direction", as constituting the basis of a psychological restraint, he asserted that: "No physical control or restraint depriving the accused of liberty was exercised". On the part of the appellant the trial judge made the following observation:

> He did not submit or acquiesce in any police presence, action or demands which constituted a deprivation of his liberty. There were no orders or intimidating demands to which the accused submitted, depriving him of such liberty.

He concluded as follows:

> In summary, I do not accept that the intimidating utterance which he attributes to Sergeant Lamb was made. I find that his actions at the time belie his words in court. I find that the police investigation was warranted and ***[page73]*** proper and I place some reliance upon Mr. Voss' own statement that he just did not think of leaving, that the issue just did not arise.
> I therefore affirmatively find that he was not detained within the meaning of s. 10(b). There was no violation of his right to counsel.

IV.

APPLYING THE LAW TO THE FACTS

This is a very difficult case because it is so close to a dividing line between, on the one hand, a "detention" and, on the other hand, an instance of mere questioning by the police of someone not yet suspected of having committed a crime, in order to obtain information about what might turn out to be a crime. In the case of a detention, of course, there is a requirement under Charter s. 10(b) that the person detained be informed of a right to counsel. In the case of mere questioning, which is frequently required of police in fulfilment of their duties, there is no "detention" and no requirement to inform the person being questioned of a right to counsel.

On the one hand, if one were to apply the "purposive" test first suggested in Hunter v. Southam Inc., (1984), 14 C.C.C. (3d) 97 at pp. 106-7, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145 (S.C.C.), and later applied in a s. 10(b) case in R. v. Clarkson, (1986), 25 C.C.C. (3d) 207 at pp. 217-9, 26 D.L.R. (4th) 493, [1986] 1 S.C.R. 383 (S.C.C.), to ensure that "the accused is treated fairly in the criminal process", then one could conclude that the purpose of s. 10(b) is to provide a suspect with a right to retain, instruct and, obviously, be advised by counsel before being questioned and possibly, in the absence of such advice, providing incriminating statements. In this event, one would tend to find borderline cases to be ones involving detention so as to invoke the rights under s. 10(b) of the Charter. As Le Dain J. expressed it in R. v. Therens, supra, at pp. 503-4:

> The purpose of s. 10 of the Charter is to ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay. The situations specified by s. 10 -- arrest and detention -- are obviously not the only ones in which a person may reasonably require the assistance of counsel, but they are situations in which the restraint of liberty might otherwise effectively prevent access to counsel or induce a person to assume that he or she is unable to retain and instruct counsel. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.

On the other hand, Le Dain J. did state that the "situations ***[page74]*** specified by s. 10" were "arrest and detention". He went on to assert, that "detention" included not just physical constraint but also

> when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.

Therefore, one could conclude that, in borderline cases, one must ask first whether there has been "a demand or direction", unless the judgment of Le Dain J. is to be taken as implying that when there has been "a demand or direction" there is probably a detention, as there is in instances of physical constraint, but that not all cases of detention require that pre-condition.

Perhaps the best way, to resolve this issue is to start with R. v. Thomsen (1988), 40 C.C.C. (3d) 411, [1988] 1 S.C.R 640, 63 C.R. (3d) 1 (S.C.C.), wherein, at pp. 417-8, Le Dain J. summarized what he called "the essentials" of his judgment in Therens, supra:

> 1. In its use of the word "detention", s. 10 of the Charter is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.
> 2. In addition to the case of deprivation of liberty by physical constraint, there is a detention within s. 10 of the Charter, when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.
> 3. The necessary element of compulsion or coercion to constitute a detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply.
> 4. Section 10 of the Charter applies to great variety of detentions of varying duration and is not confined to those of such duration as to make the effective use of habeas corpus possible.

In the time between Therens and Thomsen this court has applied the Therens extension of detention beyond physical constraint. The reference to "a demand or direction" in Therens was applied and somewhat elaborated by this court in R. v. Bazinet, supra. At pp.283-4 I emphasized the "authoritative order or command" aspect of the two terms.

In the subsequent case of R. v. Moran (1987), 36 C.C.C. (3d) 225 at p. 258 (Ont. C.A.), Martin J.A. referred to another judgment of this court, R. v. Soares (1987), 34 C.C.C. (3d) 403 (Ont. C.A.), for the proposition that:

> [L]anguage used by a police officer, although phrased in the form of a request, may, depending on the circumstances, be reasonably construed by the person ***[page75]*** to whom the request is made to be a direction or command. All the circumstances must be considered

He then went on to summarize the effect of Therens, Bazinet, Soares, R. v. Esposito (1985), 24 C.C.C. (3d) 88, 53 O.R. (2d) 356, 49 C.R. (3d) 193 (Ont. C.A.), another decision of this court, and R. v. Smith (1986), 25 C.C.C. (3d) 361, 26 D.L.R. (4th) 466, 49 C.R. (3d) 210 (Man. C.A.), a decision of the Manitoba Court of Appeal, as follows [at pp. 258-9]:

> I venture to suggest that in determining whether a person who subsequently is an accused was detained at the time he or she was questioned at a police station by the police, the following factors are relevant. I do not mean to imply, however, that they are an exhaustive list of the relevant factors nor that any one factor or combination of factors or their absence is necessarily determinative in a particular case. These factors are as follows:

1. The precise language used by the police officer in requesting the person who subsequently becomes an accused to come to the police station, and whether the accused was given a choice or expressed a preference that the interview be conducted at the police station, rather than at his or her home;
2. whether the accused was escorted to the police station by a police officer or came himself or herself in response to a police request;
3. whether the accused left at the conclusion of the interview or whether he or she was arrested;
4. the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused;
5. whether the police had reasonable and probable grounds to believe that the accused had committed the crime being investigated;
6. the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt;
7. the subjective belief by an accused that he or she is detained, although relevant, is not decisive, because the issue is whether he or she reasonably believed that he or she was detained. Personal circumstances relating to the accused, such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained.

Without, as Martin J.A. expressed it, considering these as being "an exhaustive list ... nor that any one factor or combination of factors or their absence is necessarily determinative in a particular case", it is useful to consider the facts before us in the light of his criteria.

1. What was the precise language used

[page76] 2. Was the appellant escorted or did he come himself

3. Did the appellant leave after questioning or was he arrested

It would appear that the pertinent events of August 1st started with four police officers visiting the appellant at his house. After some questioning about the circumstances of his wife's death and a telephone call taken by Sgt. Slack, after which he said he was going to the hospital to determine the cause of death, the appellant was "asked" to return with Sgt. Lamb to the Stoney Creek police station to give a statement regarding his wife's death. The appellant was then transported in Sgt. Lamb's unmarked police cruiser and taken to the criminal investigation office, where he was asked to give a statement for use by the coroner's office. For the next 40 to 45 minutes he gave an exculpatory statement in response to Sgt. Lamb's questions. The invitation to come to the police station, the nature of the transportation of the accused to the station, and the nature of the initial questioning clearly do not indicate a detention. Was there a subsequent change? That is best dealt with in considering criteria 4 and 5. Before doing so I note, with respect to criterion 3, that the appellant was never out of police presence after the initial visit to his house.

4. At what stage did the questioning occur
5. When did the police have reasonable and probable grounds to believe that Voss was implicated

While the appellant was reading over his statement, Sgt. Lamb learned from Sgt. Slack, by telephone, that Mrs. Voss had died from internal bleeding, which could be caused by one of: (1) a motor vehicle accident -- none had been referred to by anybody; (2) a fall from a height higher than a standing height -- none of the events summarized by the appellant to that time included a fall of that significance; or (3) being stomped upon or

kicked. At this point Sgt. Lamb relayed the information about the cause of death to the appellant and asked him to explain those injuries. Counsel for the appellant claims that, in the light of what went on before, what information the police had and from what followed, it was clear that this was the point of detention. After about a minute Voss responded: "Occasionally we fought. Sometimes I hit her." And also, "How could she get those injuries from her fall?" His reaction was sudden -- he turned pale, he stared at the floor, he began sweating heavily. After making the statement above, he made no response to the two or three times that Sgt. Lamb requested him to sign the statement he had given.

[page77] In the light of Voss' reactions we must consider that Sgt. Lamb then 'told' the accused that they would return to the Voss house to meet Sgt. Slack and two identification officers about an hour later. The appellant was then left in the criminal investigation office. He was not told he had to stay, but he was not told he could go, even though his house was only two long blocks, or a five-minute drive away. At the appointed time Sgt. Lamb returned to the office and "advised Mr. Voss that I would be driving him back to his residence". When they arrived, Sgt. Slack was not there and so the police officers got out of their cars to stand in the driveway and await his arrival. The officers did not tell Voss he was free to enter his house and he did not do so, although he had his keys with him. When Sgt. Slack arrived, Sgt. Lamb opened the car door and "told" the appellant that they were ready to go inside. At that point he got out, unlocked the door and walked in with the police officers.

There was a further period of questioning in the house by the police sergeants, in the presence of the two identification officers. The questioning was, as the trial judge described it, "relevant as to the location and possible causes or explanations for" each of a number of his dead wife's injuries and he was asked if he had inflicted any of them. He was even asked to let an identification officer photograph his shoes to see whether their treads would match some of her injuries.

Following these events, the police officers, with the appellant, returned to the central police station. It is not clear whether the appellant was "asked", "requested", "told", "advised" or "commanded" to do so, although the last-mentioned word was not used in the testimony we have. In any case, at 3:35 p.m. after conferring with Sgt. Holk about the suspicions of Mrs. Voss's co-workers, Sgt. Slack charged the appellant, cautioned him and advised him about his right to counsel.

We have a situation where the appellant was, for a period of four and one-half hours, in the company of one to four police officers, two of whom were senior, and two others of whom were identification officers photographing his house and even his shoes. This constant police attention had only one respite -- a 45-minute period when he was left alone, just after having been told that his wife died as a result of one of three possible causes, one of which was clearly not applicable, one of which was unlikely and the third of which implicated him. During those four and one-half hours, he went from his house to the local station, back to his house and back to central police station at such time as a senior police officer ***[page78]*** "told" or "advised" him. In the circumstances, the exact term -- "ordered" or "told" or "advised" -- does not seem as important as the relationship between the appellant and his questioners. These events would fit criteria indicating that he was detained, at least after the time when his implication in his wife's death became more evident from the forensic evidence and he thereafter seemed either too distraught to react to police communication to him or, if he did react, it was in accordance with such communication.

It would seem that the initial questioning of the appellant at his home, despite the information that Sgt. Sutton had about suspicion of family violence, took place before the police realized that they had a homicide to investigate. However, the nature of the investigation must have changed when, considering Sgt. Sutton's information and the responses of Voss to the first questioning in his house and then at the criminal investigation office, Sgt. Lamb learned of the forensic evidence. At that point, and particularly in the light of his response: "Occasionally we fought. Sometimes I hit her ... How could she get those injuries from her fall?" there is a significant change of circumstances. An objective view would have to be that the police investigation changed from one of trying to determine a cause of death to one of trying to get information from a man who is alleged to have and has admitted to having assaulted his wife in order to determine if he was implicated in the death. Although, in retrospect, Sgt. Lamb testified that he did not yet have sufficient information to charge Voss, he nevertheless left him waiting in the criminal investigation office, and did not tell him he was free to leave, but instead told him that they would all return to the Voss house to meet Sgt. Slack, who had the forensic information

about Mrs. Voss' death. Thereafter, Voss was never without the presence of Sgt. Lamb and others, even in his own home.

There are a number of factors which lead me to believe that the nature of the questioning changed as the day went on. Of course, as the trial judge found, the questioning became more penetrating as further information was elicited. The police, too, treated the investigation differently. The trial judge found that the accused's interview with Sgt. Lamb, for the coroner's purposes, was not taken down verbatim in the officer's notebook: "[To] me this is indicative or supportive of the police stance that this was an investigation at this stage rather than an attempt to obtain a statement for admission in evidence."

However, after the autopsy information was known and while Voss answered the officer's questions at his home at 2:00 p.m. all ***[page79]*** questions and answers were recorded by both Sgts. Lamb and Slack in their notebooks.

The trial judge held that detention was not indicated because: (1) the police officers never "ordered" or "commanded" the appellant and they were always polite; (2) the appellant always acquiesced, and (3) the appellant seemed to feel free enough to feed his birds while at his house and buy cigars on the return to the police station. However, politeness on either or both sides cannot be a determining criterion. An order can be given politely, particularly when an accused is not being obstreperous. And, consequently, politeness on the part of a citizen is not a determining criterion in deciding whether a police officer has taken such control over a citizen as to amount to a detention. Moreover, even a person arrested, upon leaving his house for an indefinite period of time, is likely to feed his animals.

It would be possible for a police officer to delay his evaluation of whether there were reasonable and probable grounds for a charge until the appellant has, after persistent questioning, provided the information from his own mouth to prove his commission of a crime. In any event, in this case the trial judge did not so find. However, that is not the determining criterion because, when reasonable and probable grounds for a charge do exist, an arrest would be made. The analysis here, however, concerns whether there was a detention before the arrest, to which a s. 10(b) right to counsel would apply. 6. The nature of the questions

I fail to see how the questions posed by Sgt. Lamb to the appellant, after Sgt. Slack transmitted the forensic information, could be described as "general". Following a reciting of the three possible causes of death, Sgt. Lamb's question: "Can you explain those injuries?" must be seen as pointed. As I have indicated earlier, the specific questioning in the Voss house, as to specific injuries of the deceased, with all the information that Sgts. Slack and Lamb had by then, and in the presence of two other officers taking photographs of the house and the appellant and his shoes, must amount to confronting the accused with evidence pointing to his guilt.

Thus, the trial judge's findings that there was "no psychological hammering or overpowering", "no repetition", "nothing threatening nor menacing", that there were "no accusations", and that the questions "were neither intimidating nor inducing", are not the crucial issues in determining if there was a detention. There is ***[page80]*** a danger when dealing with both the voluntariness issue and a s. 10(b) challenge that the two will not be kept distinct. The issues are more distinct than simply requiring different tests and burdens of proof. Although both are aimed at maintaining fairness in the process, the issue of voluntariness is concerned with intimidation or inducement in eliciting statements, while detention is more concerned with police control over an accused's movements. It is, therefore, essential that the two be decided separately, in form as well as in concept. 7. The subjective belief of the appellant

The appellant testified that he felt threatened and without the choice to leave. It must be recalled that Sgt. Lamb testified that, upon receiving the forensic information, the appellant's physical appearance changed -- he fell into a trance-like state. Could one expect such a person to ask whether he was free to go? Not likely. But, if Sgt. Lamb did not have reasonable and probable grounds to charge, he could easily have told the appellant that he was free to go home to await his and Sgt. Slack's arrival or, at least, he could have given the appellant a choice between waiting for a ride or going home alone. It must be recalled that as soon as the appellant was charged and informed of his right to counsel, he took advantage of that right. Voss himself characterized the 3:35 p.m. official charging as him being formally charged, i.e., he was a suspect until that point and now the police were simply going through the formalities of what already existed.

In all the circumstances I am inexorably driven to the conclusion that the appellant was detained by the time Sgt. Lamb received the information about how Mrs. Voss died, explained it to Voss, asked if he had any explanation and Voss had responded both verbally and physically. It was at that time that Sgt. Lamb took control over Voss' movements and should have informed him of his s. 10(b) Charter rights. Section 1

In this case the Crown did not argue a possible s. 1 justification. There is no limit prescribed by law expressly. There is not, either, such a pressure of time to justify denial of the s. 10(b) right as could arise with a breathalyzer test: see Thomsen, supra. There is no point, therefore, to going through a detailed s. 1 analysis a la R. v. Oakes (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, [1986] 1 S.C.R. 103 (S.C.C.), to conclude that the denial of s. 10(b) rights in this case was not a reasonable limit as provided by s. 1 of the Charter. ***[page81]***

Section 24(2)

The denial concerned one of the most fundamental rights, as the Supreme Court of Canada has held in Therens, supra, and Thomsen, supra. Therefore, the statements made by the appellant after being informed by Sgt. Lamb that they were going to meet Sgt. Slack at the Voss house, must be excluded.

V.

THE RESULT

In the circumstances, we cannot second-guess what a jury decision might be in the absence of the subsequent inculpatory statements of the appellant, nor can we invoke the curative provisions of s. 686(1)(b)(iii) [formerly s. 613(1)(b)(iii)] of the Code. A new trial must be ordered. As a result, there is no need to consider a possible appeal against sentence.

Accordingly, I would allow the appeal, set aside the verdict of the court appealed from and order a new trial.

BROOKE J.A. (dissenting):— I have come to the conclusion that we should not interfere with this conviction. There was only one issue in the appeal and that is whether the trial judge erred in holding the appellant's right guaranteed by s. 10(b) of the Canadian Charter of Rights and Freedoms had not been infringed. The appellant's submission here was that the appellant was detained and that from what had gone on before, including the information which the police had received and from what followed, the detention occurred when the police sergeant at the police station told the appellant the information which had reached him from the hospital as to the cause of the appellant's wife's death and then asked the appellant if he could explain her injuries. My brother puts the moment of detention at that time as he says:

> The appellant was detained by the time that Sgt. Lamb received the information about how Mrs. Voss had died, explained it to Mr. Voss, asked if he had any explanation and Mr. Voss responded both verbally and physically. It was at that time that Sgt. Lamb took control over Mr. Voss' movements.

This case was tried by a sensitive and experienced trial judge. As the record of the voir dire reveals, he was quite aware of the legal principles, including the significance of the onus and the degree of proof on the questions which confronted him, including the question of whether or not the appellant was at any time detained. He applied those principles to the facts as he found them after making clear findings of credibility which were quite important in deciding the case as it was put to him by the parties. His reasons for judgment deal accurately with the evidence and the argument on the voir dire. His reasons are set out in full.

[page82]

Donnelly J. stated at pp. 440-5:

> This is a voir dire to determine the admissibility of certain utterances by the accused while in police presence between 11 a.m. and about 3:35 p.m. on August 1, 1985, the day following his

wife's death. The burden of proof rests with the Crown, the extent of the burden being proof beyond a reasonable doubt.

This was heard concurrently with an application by the defence for a ruling that the accused was detained by the police within the meaning of s. 10(b) of the Canadian Charter of Rights and Freedoms, and that he was not accorded his right to counsel under s. 10(b). Accordingly, his subsequent statements should not be admitted in evidence by virtue of s. 24(2) of the Charter because their admission would bring the administration of justice into disrepute. The burden on this application rests with the defence on a balance of probabilities.

Carolina Voss, wife of the accused, died about 10:05 p.m. on July 31, 1985, at Joseph Brant Hospital. Following that, the accused went to bed about 2:00 a.m., having taken a prescribed sleeping tablet. He describes a restless night and early rising. By 9:00 a.m. he had taken three prescribed valium capsules. He then went to the funeral home in company with his work supervisor and there completed the funeral arrangements.

He was then taken home and there he had a telephone conversation with Mary Mork, a friend of his wife. All of this was handled in a normal fashion although the accused described himself as distraught and upset.

There is no suggestion by the accused, nor any medical basis, that the medications in any way affected the accused on the issue of voluntariness.

His abstinence from food and drink that day was by his own choice. He simply was not hungry. There was no suggestion that he was in any way deprived.

Sergeant Lamb arrived at the Voss residence about 11:00 a.m. on August 1st. He identified himself and on his request was admitted to the residence. He asked to speak to Carol Voss and was advised that she died the previous night. Sergeant Lamb offered his condolences and offered to help notify relatives.

Throughout, Sergeant Lamb acted with decorum and courtesy in tone and manner. He was polite and considerate. Mr. Voss quotes Lamb as asking "Would you mind telling me what happened yesterday?" whereupon Mr. Voss delivered an oral account of the events of the preceding evening. He confirmed that he had nothing to hide, he wanted to assist in determining the cause of death and he helped as best he could. Throughout, his apparent status was one of co-operation. He granted access to his home, he responded to questions and later he showed various locations in his home and accompanied officer to the police station and back to his home.

Officer Slack arrived. The same tone and atmosphere prevailed. A further utterance was made to Officer Slack. Mr. Voss was then asked by the police if he would mind giving a statement and was requested to accompany Officer Lamb to the Stoney Creek police station. He agreed, and did so.

At the station the circumstances were sterile, the tone was conversational, the interview was conducted in a bland office furnished with desk, chairs, filing cabinet, typewriter and telephone. No other police officers were present. Sergeant Lamb indicated that the statement was for the coroner's purposes and he used a witness statement form.

[page83]

Officer Slack indicated this was routine procedure in regional police matters wherein a sudden death is being investigated. I had no impression that this was a deliberate deception or pretense.

Mr. Voss was asked to relate the events leading to the death. He agreed and there followed, starting about 11:50 a.m., a statement which was a blend of questions and answers and narrative. The tone and pace were normal; there were pauses by Mr. Voss; no caution was administered; and as was the case at the Voss house, the questions and answers were not exactly recorded by the police in notebook form, and to me this is indicative or supportive of the police stance that this was an investigation at this stage rather than an attempt to obtain a statement for admission in evidence.

The declaration by Mr. Voss was reduced to a narrative form comprising about three typewritten pages. This occupied about a 40-minute interval. The three typewritten sheets were given to Mr. Voss to read. In the course of reading them, Sergeant Lamb received a telephone

call which was taken in that office in the presence of the accused. In that call Sergeant Lamb learned details of the cause of death and in Mr. Voss's words, after the telephone call he then explained how Carol died. Mr. Voss described this as being three rips or tears in the abdominal wall, indicating she died of internal bleeding. Officer Lamb, in his testimony, further indicated he received information about a wound to the right side and the severity of the tears, indicating that the cause may have been a motor vehicle accident, a fall from a substantial height or something in the nature of a kicking or stomping.

Until then, Mr. Voss indicated, he thought the cause of death was from aspirating stomach contents. He said that he was shocked to hear this particular cause of death. He was seen by Sergeant Lamb to perspire profusely and to turn pale. Sergeant Lamb inquired of Mr. Voss if he could explain such wounds. Mr. Voss responded that he could not.

To that stage no issue is taken as to voluntariness or detention and the crucial demarcation then arises. Mr. Voss attributes to Sergeant Lamb the following: "All of us sometimes argue with our wives; sometimes it gets out of hand. It's better for you to tell me now. It will be harder on you if we have to prove it later".

At that stage Mr. Voss claims he started to feel threatened. He now felt that the police were implicating and blaming him, whereas he had formerly considered the conversations casual in nature, something in the order of procedural formalities. Sergeant Lamb asked two or three times if Mr.Voss wished to sign the typewritten pages. Mr. Voss appeared preoccupied; he neither responded nor signed.

Counsel for the defence submit that the detention started with that statement by Sergeant Lamb; hence the accused should have been given his s. 10(b) rights at that time. Counsel for the defence further submit that those words constituted a threat or an inducement and that the perspiration as observed by Sergeant Lamb was supportive of Mr. Voss's statement that he then felt accused or implicated. It is contended, therefore, that the subsequent utterances by the accused were not voluntary.

Following that declaration attributed to Sergeant Lamb there were further questions and answers between Sergeant Lamb and the accused. Thereafter, Mr. Voss was advised by Sergeant Lamb that a meeting had been arranged with Officer Slack at the Voss residence about 1:45. Mr. Voss nodded in the ***[page84]*** affirmative. He was then left alone in the office with the door open and the telephone there.

Mr. Voss says that he did not want to leave or ask if he could leave. He did not want to get up; he didn't feel well. It did not occur to him to ask to leave and he was never told he could not leave. He describes himself as preoccupied, he was staring at the floor. In his words, the issue of leaving just did not arise. He says that he felt "empty" on learning how his wife died. He remained there about 45 minutes.

In that interval Officer Lamb was in and out of the room on other business. Officer Lamb asked the accused how he felt -- if he wanted coffee or water. One or two other officers either went in the room or by the door but had no contact with the accused. Otherwise the accused remained alone in that room with the operating telephone which he apparently neither used nor asked to use, nor was refused the use thereof. He simply waited for the meeting with Officer Slack at his own residence.

Sergeant Lamb gave evidence that it did not occur to him to let the accused go -- that he could have gone had he chosen to. The house was two blocks away, about a five minute drive.

I find that in that interval there is nothing sinister implying detention. Sergeant Lamb, about 1:40, was ready to go to the residence at 263 DeWitt. He requested Mr. Voss to accompany him. Mr. Voss agreed and did so accompany him. There were two of them in the car, there were no intimidating circumstances or overtures. The car was parked; they waited for the other officers to arrive. It was hot. Officer Lamb got out. Mr. Voss chose to stay in the car although he was told he was free to get out. He said he did not feel like walking, he simply wanted to be left alone.

In about 10 minutes Officer Slack arrived. The key was still in Mr. Voss's possession. He opened the door and let Officer Slack and the two identification officers into the premises. Those identification officers took certain photos but took no part in the questioning.

When asked where his wife had fallen, Mr. Voss indicated a place on the carpet. He indicated he was helping as best he could. He sat on the couch in his own house, that being his own choice. He was not told where to go or what to do. He felt some freedom of movement in the house, getting up shortly thereafter to go into the kitchen by himself and getting a glass of water.

Officers Slack and Lamb were in the living room with him. This was a small and cluttered room and of necessity the officers were close to the accused, but I can find nothing threatening nor menacing in that aspect of the matter.

Questions were asked, some by Officer Lamb, some by Officer Slack, answers were given. At one stage Officer Lamb went into the bedroom while the questioning continued. I can find no psychological hammering or overpowering and I find the circumstances devoid of any such element. The officers were polite, the tone of voice was normal, there were no accusations, there was no repetition, the questions were relevant as to the location and possible causes or explanations for injuries, the accused at that time described himself as weak and numb.

The officers were becoming suspicious but still did not consider that they had, in their words, enough to charge, or reasonable and probable grounds to lay a charge. They asked Mr. Voss to accompany them to Central Police ***[page85]*** Station. He agreed. He apparently still considered he had freedom of movement and he, as was indicated in evidence, attended to his bird outside the front door, seeing that it had food and water. He locked the door himself, he considered he had freedom of movement in the police car when he got out at the convenience store and purchased some cigars.

At central police station information was obtained by the police officers with respect to in-put by co-workers of the deceased. It was learned that previous injuries were alleged to have been suffered by the deceased at the hands of her husband and some information as to the extent of those injuries. The officers then concluded that they had reasonable and probable grounds. The charge of manslaughter was laid about 3:35 in the afternoon. The accused was arrested for the first time, he was cautioned, he was given his 10(b) rights for the first time and very shortly thereafter he did retain and instruct counsel.

The utterances attributed to Sergeant Lamb that started out "All of us sometimes argue with our wives" etc., could constitute a threat or inducement and in result could contribute to rendering the subsequent declarations not voluntary. Importantly, there is a clear and unequivocal denial by Sergeant Lamb. Such a statement would constitute a blatant error or tactical blunder, probably rendering useless as evidence any following statement by the accused.

This is an officer of 20 years experience with the force, at that time on the criminal investigation division. I expect that such a blatant error would be unlikely. Such a statement would be totally out of harmony with the general deportment of Sergeant Lamb throughout. I have no difficulty in accepting that he was polite, courteous and considerate. His demeanour was that of quiet competence and impartiality. I found him to be a fair and reliable witness, with absolutely no reason to disbelieve him. Such a statement by Sergeant Lamb was not something that he would be expected to forget. Sergeant Lamb's state of mind, as stated by him, is supported by his actions. In his judgment, until the final stages at central police station, there were not sufficient grounds to charge Mr. Voss. The Sergeant was sensitive to the recent death and the effect that it had on Mr. Voss. He was scrupulous not to make any accusations that might not be true. He exercised discretion and clearly he was unlikely to make such an accusatory statement. It is far more probable on the evidence that the sergeant would only ask how such injuries were caused.

It must be remembered that the police in this instance were not called to the scene at the time. Their first notice was 12 hours later when a co-worker telephoned, reporting the death. The police at that time were unable to trace any death in the local hospital; Sergeant Lamb was dispatched to check on Carolina Voss. At this time it was, as Officer Slack indicated, for Hamilton, a routine sudden death investigation. It was a daily type of occurrence with a coroner's inquiry, and it was routine that the two uniformed officers should accompany Sergeant Lamb on the dispatch to be available if required.

On arrival Sergeant Lamb spoke to Mr. Voss, was told that Carolina Voss was dead, inquired as to what had happened. This was followed by the witness statement for the coroner and as matters developed further inquiries were necessary as to the possible source of the severe injuries. It is not unreasonable that the questions in those circumstances should be progressive and that they should become more penetrating as the information developed. I find that they were neither intimidating nor inducing. They were simply ***[page86]*** inquiring as to possible known causes with alternative possible theories for such injuries, the motor vehicle accident, substantial fall, or blows. As Officer Slack said, that is where the investigation took us and he (Mr. Voss) was the only available source to provide the information.

Mr. Voss, on the other hand, had a great deal to gain by attributing those words to Sergeant Lamb. I simply do not accept Mr. Voss's evidence attributing those statements to Lamb, and that evidence constitutes the principal basis for the defence argument that the statements were not voluntary. That alleged statement of Sergeant Lamb was seen as intimidating and threatening and this was alleged by the defence to be supported by the observed perspiration.

I find that the words were not said by Officer Lamb and that specifically they cannot be a threat or compulsion inducing any utterances. It still remains that Voss was seen to perspire and to turn pale. He clearly indicates that at that time he thought the cause of death was aspiration of stomach contents and at this stage things may, in his mind, have been taking an entirely different direction and that may well have resulted in his appearance of being preoccupied, shocky, pale and perspiring.

Although I find that Sergeant Lamb did not utter those words, it still remains as a Crown burden to prove voluntariness. I find that the officers were persons in authority. I recognize that the accused has a right to remain silent, and further, that the officers in trying to determine if a crime has been committed and by whom, have the right to ask questions, but they have no power to compel answers nor to detain the accused for questioning.

On that background I affirmatively find that the Crown has discharged the onus and I find that the utterances were voluntary as defined by Ibrahim and The King, [1914] A.C. 599. There is no question of any lack of operating mind as defined in Ward v. The Queen (1979), 44 C.C.C. (2d) 498, and in Horvath v. The Queen (1979), 44 C.C.C. (2d) 385, and the question of no caution, as per Boudreau v. The King (1949), 94 C.C.C. 1, [1949] S.C.R. 262, is not an important consideration in this case.

With respect to detention, the words alleged to Lamb were the principal underpinning for that allegation. I am mindful of the words of Tarnopolsky J.A. in R. v. Bazinet (1986), 25 C.C.C. (3d) 273 at pp. 283-4 :

In this vein it is important to note that Le Dain J's extension of "detention" to instances of "psychological" restraint or compulsion or coercion is predicated upon two requirements: (1) a "demand or direction", in response to which (2) "the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist". As far as the first of these two requirements is concerned, it is instructive to compare the term "demand" with the term "request". The Shorter Oxford English Dictionary defines the former as: "An act of demanding or asking by virtue of right or authority; a peremptory request or claim;" while the latter is defined as: "The act, on the part of a specified person, of asking for some favour, service, etc.; the expression of one's desire or wish directly addressed to the person or persons able to gratify it." Similarly, Webster's New World Dictionary defines a "demand" as: "A strong or authoritative request; an urgent requirement or claim;" while a "request" is defined as: "The act of asking, or expressing a desire for something; solicitation or petition."

The word "direction" has connotations of authoritative command similar to ***[page87]*** the word "demand". Thus, the Oxford English Dictionary provides the following definition: "An instruction how to proceed, an order, a precept." Similarly, the relevant definition in Webster's is : "an authoritative order or command".

At the outset, this was not a criminal investigation, seeking a wrongdoer and evidence implicating that wrongdoer. This was a legitimate and proper investigation requiring inquiry as

> the evidence developed. Hence I see no wrongdoing in the sequence of the questioning episodes. No physical control or restraint depriving the accused of liberty was exercised. There was no non-physical legal restraint, such as an obligation to give a breath sample, which would amount to compulsion rendering compliance involuntary.
>
> Mr. Voss demonstrated his awareness of an absence of compulsion by ignoring the repeated invitation to sign the three-page typewritten document. He obviously regarded himself as free not to comply with that suggestion or request, even though it was repeated. No consequences flowed from his refusal; none were suggested; there was not a remote element that he should stay until it was signed or anything of that nature.
>
> His demeanour following the death and in recounting the circumstances of the death was reflective and thoughtful but there was no suggestion that he was not in control of himself. He enjoyed freedom of choice and movement in and about his house and while with the police to the central station. He did not submit or acquiesce in any police presence, action or demands which constituted a deprivation of his liberty. There were no orders or intimidating demands to which the accused submitted, depriving him of such liberty.
>
> Mr. Voss did testify indicating that he thought he had no choice but to accompany the police to the station and to his home. He did not say that he thought he had no choice but to answer questions. His actions at the time belie his utterances now. There was not the slightest reflection in his conduct consistent with what he now says to the effect that he felt restrained or deprived of freedom, with no choice but to submit. There was no police conduct capable of supporting a reasonable belief on his part that he had no choice other than to comply.
>
> In summary, I do not accept that the intimidating utterance which he attributes to Sergeant Lamb was made. I find that his actions at the time belie his words in court. I find that the police investigation was warranted and proper and I place some reliance upon Mr. Voss's own statement that he just didn't think of leaving, that the issue just didn't arise.
>
> I, therefore, affirmatively find that he was not detained within the meaning of s. 10(b). There was no violation of his right to counsel.

In my view, there was no error made by the trial judge as to either the principles elaborated upon by this court in R. v. Bazinet (1986), 25 C.C.C. (3d) 273, 54 O.R. (2d) 129, 51 C.R. (3d) 139 (Ont. C.A.), or their application. In addition, while the judgment of this court in R. v. Moran (1987), 36 C.C.C. (3d) 225, had not been delivered at the time this case was tried, each of the facts in evidence (factors) which my brother Martin suggested was relevant to deciding if a person had been detained was in fact considered and dealt with by Donnelly J. in this voir dire. It is ***[page88]*** important to recognize in this case as my brother Martin explained in Moran, that it is for the trial judge to consider and determine what probative value, if any, the fact in evidence which he referred to may have.

I think it is clear from the argument and the reasons on the voir dire that there was no suggestion of detention until "the crucial demarcation arises". That demarcation was when and because Sgt. Lamb was alleged to have said to Mr. Voss: "All of us sometimes differ with our wives; sometimes it gets out of hand. It is better for you to tell me now. It will be harder on you if we have to prove it later." The trial judge did not believe this statement had been made by Sgt. Lamb. He disbelieved the appellant's evidence where it touched on the issue of detention. He accepted the evidence of the police officers on that issue and, indeed, on all of the issues on the voir dire. The defence on the voir dire did not contend that the conveying to Mr. Voss of the information received by Sgt. Lamb from the officer at the hospital as to the pathologist's findings of the cause of Mrs. Voss' death and asking Mr. Voss if he could explain her wounds, was the turning point between investigation and detention. There was no criticism by the defence in its argument of the police officer telling Mr. Voss what he had learned and asking him what was a perfectly natural question in the circumstances; a question which Mr. Voss answered. It is my respectful view that to put the case on the footing of the disclosure of the information and asking the question is to recast the case for the appellant on the issue of detention and to retry it in this court on a basis that was not relied upon in the court below.

Donnelly J., having rejected the appellant's evidence as to the statement which the appellant relied upon as marking the point at which he was "detained", proceeded as he was entitled to do, to judge the quality of the

appellant's evidence that the police has assumed control over his movements from that point on and found that evidence to be quite unreliable. He believed the evidence of the police officers with respect to what followed after that moment. The appellant had failed to meet the burden of proof in the circumstances. There can be no suggestion that Donnelly J. misapprehended any of the evidence which he believed and its significance as the case was put forward by the defence. To be perfectly clear there can be no suggestion of any confusion between the issue of voluntariness and detention on the voir dire. The trial judge was alive to the separate questions and was careful to deal with each of them separately and properly.

[page89] The case for the defence as to detention was prefaced on the judge believing Mr. Voss's evidence. The trial judge had the advantage of seeing the witnesses, judging their credibility and making his findings on the issue of detention. In the circumstances I think we should accept his findings on the evidence that he believed and that we ought not to draw inferences which he undoubtedly rejected or give to the evidence some other meaning.

My brother acknowledged that this was a difficult case because "It is so close to the dividing line". Its acknowledged difficulty is strong reason to recognize the significance of the advantage of the trial judge in dealing with the credibility of witnesses and the probative value of their evidence.

For these reasons I would dismiss the appeal. In so doing I feel bound to observe that if the case possessed the degree of difficulty referred to at this level where we can examine the relevant conduct in retrospect, this area of the law must pose a very difficult problem for those engaged in law enforcement who must be concerned at each step or perhaps each question as it comes along. How does one discern the dividing line between detention and mere questioning by the police of someone not yet suspected of committing a crime in order to obtain information about what might turn out to be a crime? This case is said to be close to the line. Perhaps our judgments should have clearer guidelines so that guaranteed rights will not be unwittingly infringed and to ensure police officers may proceed with their public duty with confidence. But in this case, guidelines are not for a minority judgment.

Appeal allowed; new trial ordered.