R. *v.* Feeney, [1997] 2 S.C.R. 13

Argued: June 11. 1996 Decided: May 22, 1997

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

On appeal from the Court of Appeal for British Columbia

The judgment of La Forest, Sopinka, Cory, Iacobucci and Major JJ. was delivered by SOPINKA J.

Facts

On Saturday, June 8, 1991, at around 8:20 a.m., the body of Frank Boyle, aged 85 years, was found at his home on Cedar Creek Road in Likely, British Columbia. He had died following a fierce attack involving five blows to the head, each of sufficient force to kill him, with an iron bar or similar object. While the exact time of death could not be ascertained, he was last seen alive the previous evening. The officer in charge of the investigation noted that blood was spattered everywhere at the Boyle residence, and noted also Sportsman brand cigarettes at the scene.

As a result of information provided by several bystanders, the three investigating officers went to the scene of a motor vehicle accident, which involved the deceased's red Datsun pickup truck, about half a kilometre west of the Boyle residence. Two local residents, Kelly Spurn and Cindy Potter, offered new information to the police. Cindy Potter told the police that she had seen Boyle's truck in the ditch at 6:45 that morning. Furthermore, she stated that she had seen someone she identified as Michael walking in an easterly direction along Cedar Creek Road a few minutes earlier with a beer or a coffee cup in his hand. The officer in charge testified that Kelly Spurn told him that the appellant was living on Spurn's property which he was renting out to the appellant's sister, Angela Feeney, and her spouse equivalent, Dale Russell. Spurn suggested that the police go and speak to Russell. Spurn testified that he had told the police that he assumed it was the appellant who had crashed the pickup truck because the skid marks and the location of the accident were in the same place as skid marks from another accident earlier that morning which had involved the appellant and a blue flatbed truck.

Upon arrival at the Spurn property where Dale Russell, Angela Feeney and the appellant were living, Russell told police that the appellant had stolen a truck from the Spurn property earlier that morning and that he found it just down from Boyle's residence, exactly where Boyle's truck was found later. He also said that the appellant had come home at 7:00 a.m. after a night of drinking and was now asleep in the trailer behind his residence.

The officer in charge went to the windowless trailer and knocked on the door and said, "Police". Receiving no answer, he entered the trailer with his gun drawn and pointing downward, went to the appellant's bed, shook the appellant's leg and said "I want to talk to you." The officer then asked the appellant to get out of bed and move into the better light at the front of the trailer. The officer stated in evidence that he did so in order to inspect the appellant's clothes for bloodstains. The officer conceded that he may have touched the appellant in leading him to the door. The officer noticed blood spattered all over the front of the appellant and had another officer read the appellant his rights in these terms:

> It is my duty to inform you that you have the right to retain and instruct counsel without delay. You may call any lawyer you want. A Legal Aid duty lawyer is available to provide legal advice to you without charge and can explain the Legal Aid plan to you. If you wish to contact a Legal Aid duty lawyer, I can provide you with a telephone number. Do you understand?...You are not obliged to say anything but anything you do say may be given in evidence.

The appellant was arrested and asked whether he understood his rights. He did not respond at first, but when asked again he stated, "Of course, do you think I am illiterate?" or words to that effect. The officer in charge immediately asked the appellant how he got blood on himself, to which the appellant replied that he had been hit in the face with a baseball the day before. When asked whether a particular pair of shoes were the shoes he had worn the previous evening, the appellant replied that they were the only shoes he owned. There was also some discussion with him about a package of Sportsman cigarettes observed in the trailer.

The appellant was led to the police vehicle where the tee shirt he was wearing was seized. He was taken to the Williams Lake RCMP detachment. At around 12:00 noon the appellant tried unsuccessfully several times to contact a lawyer. At 12:17 p.m. he left a message for the lawyer to call back. At 12:23 p.m. a breathalyzer sample was taken from the appellant, who was not told that he had a choice in the matter. The appellant was kept in an observation cell for over eight hours. At 9:10 p.m. two detectives began questioning the appellant. The appellant stated, at p. 231, "I should have a lawyer", but the interview continued. The appellant admitted to striking Boyle, stealing cigarettes, beer, and cash from Boyle's residence and stated that he had put the cash under his mattress in his trailer. The police then obtained a search warrant authorizing them to seize the shoes, the Sportsman cigarettes, and the money under the mattress. The appellant was interviewed again for approximately 1 1/2 hours at 3:05 a.m. on June 9. The appellant had still not seen a lawyer. On Monday, June 10, at 9:25 a.m., and again at 10:54 a.m., the accused was fingerprinted. In between these fingerprinting sessions the appellant met with a lawyer for the first time since he had been arrested.

The appellant was ultimately convicted of second degree murder following a jury trial in the Supreme Court of British Columbia. The British Columbia Court of Appeal unanimously dismissed his appeal. …

Issues

1. Did the police violate s. 8 of the *Charter* in their investigation of the appellant? …

3. What evidence, if any, should be excluded under s. 24(2) of the *Charter*?

Analysis

The Lawfulness of the Arrest

In arguing that the police conduct in the present case did not violate the *Charter*, the respondent relied heavily on the lawfulness of the arrest. Since the arrest was lawful, the argument runs, the search and seizures incidental to the arrest were lawful and complied with the *Charter* according to *Cloutier v. Langlois*, [1990]. …

The Pre-*Charter* Law of Arrests in Dwelling Houses

… [Under the pre-Charter law], a warrantless arrest following a forced entry into private premises is legal if: (a) the officer has reasonable grounds to believe that the person sought is within the premises; (b) proper announcement is made; (c) the officer believes reasonable grounds for the arrest exist; and (d) objectively speaking, reasonable and probable grounds for the arrest exist. I will consider these requirements in turn and apply them to the case at bar.

Given that Russell told him that the appellant was in the trailer, the officer had reasonable grounds to believe that the appellant was in the trailer.

[The pre-Charter law] set out the following requirement for announcements prior to entry of private premises without permission: except in exigent circumstances, police should give notice of presence by knocking or ringing the doorbell, give notice of authority by identifying themselves as law enforcement police officers and give notice of purpose by stating a lawful reason for entry. Furthermore, before forcing entry, police should, at minimum, request admission and have admission denied. In the case at bar, the police officers knocked and said, "Police", but were not denied admission nor did they announce their purpose before forcing entry. The respondent defends these apparent defects in the announcement by noting that no response was forthcoming since the appellant was asleep and by arguing that the urgency of the situation and the fear of the destruction of evidence legitimized a relatively brief announcement. In my view, this defence is largely inadequate. As I will conclude below, this situation did not appear to comprise exigent circumstances any more than any other situation following shortly after a serious crime. …

In my view, it is clear that the subjective requirement was not met in the case at bar. The officer in charge who knocked and entered, Sgt. Madrigga, testified in cross-examination that he did not believe he had reasonable grounds to arrest the appellant when he entered the trailer. …

The finding by a trial judge of whether, objectively speaking, reasonable and probable grounds for arrest existed clearly has a significant factual element and thus is owed some deference by an appellate court. In the present case, in arriving at his conclusion that objective grounds for arrest existed, in my view the trial judge committed two errors in principle that invite review of his finding. First, he considered … the need to preserve evidence. In my view, it was an error of law for the trial judge to consider the need to preserve evidence in considering whether reasonable and probable grounds, objectively speaking, existed. Whether or not there is a need to preserve evidence is logically irrelevant to the question of whether there are reasonable and probable grounds for an arrest. The trial judge thus erred in law and his view on reasonable and probable grounds is open to appellate review.

Even if the trial judge did not err in considering the need to preserve evidence, in my view the trial judge erred in failing to appreciate the evidence of the officer in charge at the scene of the trailer. …

In the present case, the officer in charge did not believe reasonable grounds to arrest existed prior to entry into the trailer. In order to explain why he ignored this evidence, or why he viewed [the officer] to be unreasonable, in my view there was a duty on the trial judge to set out his reasons for his conclusions on reasonable and probable grounds. The trial judge [gave no reasons] …

In any event, in my view the objective test was not met regardless of the officer's views. An arrest cannot be made solely for the purpose of investigation, but if grounds exist on a subjective and objective basis, the fact that police intend to continue the investigation and do so does not invalidate the arrest. A lawful arrest may be made that allows the police to continue their investigation … but it is a fundamental pre-requisite that the police have reasonable grounds to arrest prior to arrest, whether or not the investigation is ongoing, particularly where an arrest is made without the safeguards to the citizen resulting from the warrant process. …

In my view, these admonitions were not heeded by the police when they entered the trailer and arrested the appellant. The salient facts known to the police prior to their entry of the trailer are as follows: (a) it appeared that Boyle's truck had been stolen before being in an accident, and Cindy Potter claimed to have seen "Michael" walking near the site of the accident; (b) Kelly Spurn told police that he assumed the appellant had crashed Boyle's truck since the appellant had crashed earlier that morning in about the same place with a different truck; and (c) Dale Russell told police that the appellant came home around 7:00 a.m. after drinking all night and that the appellant had earlier crashed a vehicle at the spot where Boyle's truck was found. In my view, these facts did not constitute reasonable and probable grounds to arrest the appellant for the murder of Boyle. Whether or not the appellant had been involved in two similar truck accidents, or might have stolen Boyle's truck, does not raise reasonable and probable grounds to believe that he had murdered Boyle. This evidence may have pointed to the appellant as a suspect, but these facts without more do not justify an arrest. When the police entered the trailer, objectively reasonable and probable grounds for an arrest, as opposed to grounds for prima facie suspicion, did not exist.

… In any event, even if the police met the standards [the pre-Charter law] a warrantless arrest in the circumstances of the case at bar following a forcible entry is no longer lawful in light of the Charter; I turn to this issue now.

The Post-*Charter* Law of Arrests in Dwelling Houses

In my view, the conditions set out in [the pre-Charter law] for warrantless arrests are overly expansive in the era of the Charter. …

… [I]n my view, the increased protection of the privacy of the home in the era of the Charter changes the analysis ... [I]n general, the privacy interest outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited.

… The purpose of the Charter is to prevent unreasonable intrusions on privacy, not to sort them out from reasonable intrusions on an ex post facto analysis. …

I recognize that there are exceptions with respect to the unreasonableness of warrantless searches for things. A warrantless search will respect s. 8 if authorized by law, and both the law and the manner in which the search is conducted are reasonable. In R. v. Grant, [1993], for example, it was held that s. 10 of the Narcotic Control Act, which provided that a peace officer may search a place that is not a dwelling house without a warrant so long as he believes on reasonable grounds that a narcotic offence had been committed, was consistent with s. 8 of the Charter if s. 10 were read down to permit warrantless searches only where there were exigent circumstances. In the present context of searches for persons, in my view, there are also exceptions to the Charter prohibition of warrantless arrests in dwelling houses. …

[In a previous case] Dickson C.J. observed that police work might be greatly impeded by a warrant requirement. He provided the example of an officer's arriving on the scene shortly after an offender has slipped into a private dwelling. By the time the officer has discovered the suspect's name and has obtained a warrant, the criminal will have sought refuge elsewhere. In my view, in circumstances such as these there is an exception to the general rule that warrantless arrests in private dwellings are prohibited. In cases of hot pursuit, the privacy interest must give way to the interest of society in ensuring adequate police protection. This Court explicitly held this to be true in R. v. Macooh, [1993]. In Macooh, a police officer was in hot pursuit of a person he had seen drive through several stop signs when the person sought refuge in a private apartment. The officer announced his presence and eventually entered the apartment without permission and arrested the person. … [T]his Court held that the officer was acting under the well-established common law power of the police to enter private premises to make an arrest in hot pursuit. … In cases of hot pursuit, society's interest in effective law enforcement takes precedence over the privacy interest and the police may enter a dwelling to make an arrest without a warrant. However, the additional burden on the police to obtain a warrant before forcibly entering a private dwelling to arrest, while not justified in a case of hot pursuit, is, in general, well worth the additional protection to the privacy interest in dwelling houses that it brings. I leave for another day the question of whether exigent

circumstances other than hot pursuit may justify a warrantless entry in order to arrest. I do not agree with my colleague L'Heureux-Dubé J. that exigent circumstances generally necessarily justify a warrantless entry -- in my view, it is an open question. As with other matters in her reasons, I note that in reaching her conclusion she cites at paras. 153-54 a dissenting opinion: R. v. Silveira, [1995].

While I have decided that a warrant is required prior to entering a dwelling house to make an arrest, I have not yet set out the type of warrant that is required. In my view, an arrest warrant alone is insufficient protection of the privacy rights of the suspect. …

In my view, … warrantless arrests in dwelling houses are in general prohibited. Prior to such an arrest, it is incumbent on the police officer to obtain judicial authorization for the arrest by obtaining a warrant to enter the dwelling house for the purpose of arrest. Such a warrant will only be authorized if there are reasonable grounds for the arrest, and reasonable grounds to believe that the person will be found at the address named, thus providing individuals' privacy interests in an arrest situation ... Requiring a warrant prior to arrest avoids the ex post facto analysis of the reasonableness of an intrusion that … should be avoided under the Charter…

I would add that the protection of privacy does not end with a warrant … Specifically, before forcibly entering a dwelling house to make an arrest with a warrant for an indictable offence, proper announcement must be made. …

To summarize, in general, the following requirements must be met before an arrest for an indictable offence in a private dwelling is legal: a warrant must be obtained on the basis of reasonable and probable grounds to arrest and to believe the person sought is within the premises in question; and proper announcement must be made before entering. An exception to this rule occurs where there is a case of hot pursuit. Whether or not there is an exception for exigent circumstances generally has not been fully addressed by this Court, nor does it need to be decided in the present case given my view that exigent circumstances did not exist when the arrest was made. I will elaborate on this last point presently.

When the police entered the trailer where Feeney was sleeping, which constituted his dwelling house … they did not have a warrant. Consequently, regardless of whether reasonable and probable grounds existed, or whether proper announcement was made, the arrest was illegal, unless there were exceptional circumstances. This clearly was not a case of hot pursuit, nor, in my view, did exigent circumstances exist. … According to James A. Fontana (The Law of Search and Seizure in Canada, exigent circumstances arise usually where immediate action is required for the safety of the police or to secure and protect evidence of a crime. With respect to safety concerns, in my view, it was not apparent that the safety of the police or the community was in such jeopardy that there were exigent circumstances in the present case. The situation was the same as in any case after a serious crime has been committed and the perpetrator has not been apprehended. In any event, even if they existed, safety concerns could not justify the warrantless entry into the trailer in the present case. A simple watch of the trailer in which the police were told the appellant was

sleeping, not a warrantless entry, would have sufficiently addressed any safety concerns involving the appellant. With respect to concern about the potential destruction of evidence, at the time the police entered the trailer, they had no knowledge of evidence that might be destroyed; at best, they had a suspicion that the appellant was involved in the murder. Simply because the hunch may have turned out to be justified does not legitimize the actions of the police at the time they entered the trailer. …

The Constitutionality of the Initial Search of the Trailer

… In the present case … the search was performed without a warrant or any other legal authority, and was not incidental to a lawful arrest. … Consequently, the entry into the trailer and the search and seizure of the appellant's clothing violated s. 8 of the *Charter*. The other evidence, the shoes, the cash and the cigarettes, was obtained under a search warrant the following day. I will return below to the question of whether this search and seizure violated the *Charter*. …

Section 8 and the Search with the Warrant

After the initial search of the trailer and during the detention of the appellant, the police obtained a search warrant of the trailer, swearing an information that they believed they would find $300 in cash, Sportsman cigarettes, and the appellant's shoes. They then found and seized these items in the trailer. According to *Kokesch* and *Grant*, the police cannot constitutionally rely upon a search warrant issued on the basis of information obtained as the result of prior *Charter* violations. … In the case at bar, the police obtained a warrant on the basis of the initial search of the trailer (the shirt and shoes), the initial interview (the shoes) and the later interview at Williams Lake (the cash under the mattress). As I have outlined above, in my view the police came to know about these items as the result of violations of ss. 8 and 10(*b*) of the *Charter* and would not have had grounds for a warrant supporting the second search without the violations. Consequently, the search and seizure under the warrant also violated s. 8. …

Section 8 and the Fingerprints

After he was taken to the Williams Lake detachment, the appellant was fingerprinted. The fingerprints matched prints found on the deceased's refrigerator and on an empty beer can in the deceased's truck. *R. v. Beare*, [1988] held that fingerprinting as an incident to a lawful arrest did not violate the *Charter*. In the present case, however, the arrest was unlawful and involved a variety of *Charter* breaches. Compelling the accused to provide fingerprints in the present context was, in my view, a violation of s. 8 of the *Charter* …

Seriousness of the Violation

The violations were, in my view, very serious in the present case. One of the *indicia* of seriousness is whether the violations were undertaken in good. One indication of bad faith is that the *Charter* violation was undertaken without any lawful authority. … In the instant case, the police did not

even have subjective belief in reasonable and probable grounds for the appellant's arrest prior to their warrantless, forced entry into his dwelling house where he was sleeping. Aside from the impact of the *Charter* on the requirements for warrantless arrests in dwelling houses, the absence of subjective belief in reasonable grounds indicated that the police could not have lawfully arrested the appellant under s. 495 of the *Code* even had he been in a public place. That they flagrantly disobeyed the law of warrantless arrests in dwelling houses … certainly renders the more serious the violation which directly led to the taking of the bloody shirt, and indirectly led to the taking of the shoes, cigarettes and money.

… [T]he violations in the instant case that were associated with the gathering of the shirt, shoes, cigarettes and money were serious. The police flagrantly disregarded the appellant's privacy rights and moreover showed little regard for his s. 10(*b*) rights. Indeed, while such misconduct was not directly responsible for the gathering of the shirt, shoes, cigarettes and money, the fact that the appellant did not speak with a lawyer for two days following his detention, yet the police did not cease in their efforts to gather evidence from him, indicates the lack of respect for the appellant's rights displayed by the police. In light of this pattern of disregard for the rights of the appellant, in my view the obtention of the shirt, shoes, cigarettes and money was associated with very serious *Charter* violations.

Effect of Exclusion on the Repute of the Administration of Justice

While the appellant stood accused of a very serious crime, in my view the following words of Iacobucci J. in Burlingham, apply …:

> ... we should never lose sight of the fact that even a person accused of the most heinous crimes, and no matter the likelihood that he or she actually committed those crimes, is entitled to the full protection of the *Charter*. Short-cutting or short-circuiting those rights affects not only the accused, but also the entire reputation of the criminal justice system. It must be emphasized that the goals of preserving the integrity of the criminal justice system as well as promoting the decency of investigatory techniques are of fundamental importance in applying s. 24(2).

The serious disregard for the appellant's *Charter* rights in the case at bar suggests that the admission of the evidence would bring greater harm to the repute of the administration of justice than its exclusion. The shirt, shoes, cigarettes and money were inadmissible under s. 24(2), along with the statements and the fingerprints. If the exclusion of this evidence is likely to result in an acquittal of the accused as suggested by L'Heureux-Dubé J. in her reasons, then the Crown is deprived of a conviction based on illegally obtained evidence. Any price to society occasioned by the loss of such a conviction is fully justified in a free and democratic society which is governed by the rule of law.

The reasons of L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting) -- …. I have had the advantage of reading the reasons of my colleague Justice Sopinka, but am unable to agree with his disposition of this case, or with many of his conclusions. …

Analysis

The appellant's position before this Court is that the police investigation included several violations of the *Charter*. … Essentially, with the exception of the s. 10(*b*) argument, with which I propose to deal separately, the allegations focus upon the conduct of the police from the point they entered the trailer where the appellant was sleeping. According to the appellant, the police did not have reasonable and probable grounds to believe that he was the perpetrator of the crime, and thus the entry into the trailer was unlawful. As a result, the entry, along with the search that followed, contravened s. 8 of the *Charter*. The appellant also maintains that the arrest only occurred after the police officer confirmed his "hunch" by discovering new evidence, and thus violated ss. 7 and 9 of the *Charter*. Finally, the subsequent search of the trailer was performed on the basis of a search warrant obtained primarily on the strength of unconstitutionally obtained evidence and the resulting evidence should also be excluded.

As can be seen, all of these contentions are linked by a common focal point: they stand or fall on the strength of the appellant's argument that the original entry by the police into the trailer was unlawful. The trial judge, after carefully weighing the evidence, determined that the police entered the trailer in order to arrest the appellant and were justified in so doing. In my view, this finding was a proper one, and this appeal therefore need not be resolved in the manner chosen by the Court of Appeal.

(A) *Section 8 of the Charter -- The Initial Entry*

.... In analyzing a potential s. 8 breach, two inquiries must take place. The first is concerned with determining whether the police conduct, taking into account all of the circumstances, interfered with the reasonable expectations of privacy enjoyed by the appellant. If so, the second part of the s. 8 analysis relates to whether this interference was reasonable.

The first inquiry is easily satisfied here. Notwithstanding the fact that he was not the owner of the trailer, the appellant clearly enjoyed a reasonable expectation of privacy there. The facts demonstrate that he was the usual occupant of the premises, paid rent to his sister, and thus, under normal circumstances had a right to be left alone.

The second inquiry raises more cause for concern. A warrantless entry such as the one in the case at hand is presumed to be unreasonable and in contravention of s. 8 of the Charter. The Crown can rebut this presumption, and demonstrate that the invasion of privacy was reasonable if: (a) the search was authorized by law; (b) the law authorizing the search was reasonable, and; (c) the manner in which the search was conducted was reasonable.

The respondent has argued that the entry in this instance was authorized by law as a valid exercise of the police arrest power. According to this theory, [the officer's] entry into the trailer was justified on the basis of its being necessary to exercise his power of arrest without a warrant … In addition, reliance is placed upon the [pre-Charter law].

My colleague Sopinka J. has concluded that the entry and subsequent search in the case at bar did, in fact, violate s. 8 of the Charter. He comes to this conclusion essentially for two reasons: (1) the entry did not comply with the [pre-Charter law], and hence was not authorized by law and, (2) even assuming the entry was authorized by [the pre-Charter law, it] cannot withstand Charter scrutiny. With respect, I am unable to agree with either of these conclusions. As will be seen, I am of the view that the officers did, in fact, comply with the legal requirements necessary to effect an arrest upon private premises, and that arrests of this kind maintain the appropriate balance between privacy and the need to enforce the law in the Charter era.

Was the Search Authorized by Law?

As Sopinka J. sets out … the power to arrest without warrant on private premises was confirmed [in the pre-Charter law]. In [one case], Dickson C.J. set out four requirements necessary to effect a lawful arrest on private premises:

> (1) The offence must be indictable.
>
> .
>
> (2) The person who is the subject of the arrest must have committed the offence in question, or the peace officer, on reasonable and probable grounds, must believe that the person has committed the offence.
>
> (3) There must be reasonable and probable grounds for the belief that the person sought is within the premises.
>
> (4) There must be a proper announcement before entry.

I agree with my colleague Sopinka J. that both criteria 1 and 3 were fulfilled in the case at bar. Therefore, the issues remaining to be resolved are whether the requisite reasonable and probable grounds for arrest existed, and whether proper announcement was made prior to entry.

The police are never required to demonstrate that they possessed anything more than reasonable and probable grounds prior to making an arrest. …

The trial judge found that, objectively speaking, there were reasonable and probable grounds to arrest the appellant. In my view, he was justified in coming to that conclusion. A reasonable person with the officer's knowledge would have had little difficulty in believing that the appellant had committed the offence in question. The reasonable grounds could be based on the following:

> (a) the victim had been very recently murdered and his home ransacked;
>
> (b) the killing took place in a small community at a time when there would not be very many people moving around;

> (c) the victim's pickup truck was driven off the road one-half kilometer from his home at some time between 6:20 a.m. and 6:48 a.m.;
>
> (d) the circumstances of the accident made it apparent that the driver of the pickup was not the victim since he was known to be a very slow and cautious driver;
>
> (e) the garage where the pickup was normally kept was left open which, according to one witness, was rather unusual;
>
> (f) the reasonable inference from these facts that someone had stolen the victim's vehicle and that this person was also the one who had ransacked his home and killed him, or at least had been involved in the crime;
>
> (g) a witness who saw the appellant walking along the road away from the scene of the accident toward his home;
>
> (h) the fact that earlier the same morning, the appellant had stolen another vehicle and had driven it off the road in exactly the same spot;
>
> (i) the statement of a resident of the community who had examined skid marks from both accidents and based on his knowledge of the circumstances of the first accident, believed that the appellant had also taken the victim's car.

My colleague has concluded that these facts, taken together, do not constitute sufficient reasonable and probable grounds, as all the police were aware of was the following:

> The salient facts known to the police prior to their entry of the trailer are as follows: (a) it appeared that Boyle's truck had been stolen before being in an accident, and Cindy Potter claimed to have seen "Michael" walking near the site of the accident; (b) Kelly Spurn told police that he assumed the appellant had crashed Boyle's truck since the appellant had crashed earlier that morning in about the same place with a different truck; and (c) Dale Russell told police that the appellant came home around 7:00 a.m. after drinking all night and that the appellant had earlier crashed a vehicle at the spot where Boyle's truck was found. In my view, these facts did not constitute reasonable and probable grounds to arrest the appellant for the murder of Boyle. Whether or not the appellant had been involved in two similar truck accidents, or might have stolen Boyle's truck, does not raise reasonable and probable grounds to believe that he had murdered Boyle. This evidence may have pointed to the appellant as a suspect, but these facts without more do not justify an arrest.

In my view, this approach, with respect, fails to take into account the <u>combined</u> effect of the facts in light of the particular context of this case. On the contrary, it would seem that my colleague has

lifted these circumstances from where they occurred and instead, treated them as if they took place in a vacuum. Once the facts are returned to their proper setting, however, I believe a much different picture emerges.

As the trial judge recognized, this crime occurred in a very small community, at a time of day when there was not likely to be a lot of traffic on the road. For the appellant to be seen walking a short distance away from the scene of a motor vehicle accident involving the victim's car at that time of the morning, was, as three separate witnesses testified, an extremely unusual occurrence. While the mere fact of the appellant's being present at the scene of an accident involving the deceased's car might not be particularly probative in a city with thousands of people, it is extremely probative given the location, the time in which it occurred and the remote possibility, given the corroborating evidence to that effect, that someone else in the small community was the person who had driven the car off the road. I find it extremely significant that several officers as well as residents of the area all immediately came to the conclusion that it was the appellant who had taken the victim's car and driven it off the road. As one witness put it, "A led to B and C and we assumed that it was caused by him." In my view, it was a logical inference for the police to suppose that whoever had stolen the vehicle was also the person who had committed the murder. Once the police linked the appellant to the accident scene, it was obvious that he was the prime suspect.

In this regard, I note that our Court has previously discussed the different standards applicable to rural and urban settings in *R. v. Wilson*, [1990. … Here, the unusual circumstances of the offence that the officers were informed of should not be examined as if they occurred in downtown Vancouver. The trial judge demonstrated that he was sensitive to the nature of the information received and to the setting in which it was discovered. On the basis of these facts, I concur with his finding that there existed reasonable and probable grounds to conclude that it was the appellant who had committed the offence.

This finding of objectively reasonable and probable grounds is not determinative, however. As aforementioned, a peace officer, before arresting without warrant, must possess a subjective belief that reasonable and probable grounds to arrest exist. The appellant has alleged that in the case at bar, this subjective belief was manifestly lacking. …

[The officer's testimony] in [its] totality give[s] a much better impression of the arresting officer's state of mind leading up to the arrest. What [it] illustrate[s] is an officer who knew that a suspect, someone involved in a crime, was inside the trailer. These responses demonstrate that, contrary to what some of the earlier passages might suggest, the officer did indeed possess the requisite reasonable and probable grounds to enter the house. …

The existence of reasonable and probable grounds is a legal standard and is subject to interpretation. Furthermore, I believe that, at its core, reasonable and probable grounds is "a 'common-sense' concept which should incorporate the experience of the officer". There are no absolute magic words necessary to define when this standard has been reached. …

Here, an officer believed he was legally justified in entering a private dwelling to pursue a suspect whom he felt had been involved in a serious criminal offence. His belief was also supported by an objective assessment of the evidence at hand. …

In summary, I conclude that in effecting the arrest of the appellant, the officer possessed the requisite reasonable and probable grounds. As a result, it is unnecessary for me to consider the suggestion … that, had the police not possessed reasonable and probable grounds to arrest, they would have nonetheless been authorized to enter because of the presence of exigent circumstances. …

It follows, therefore, that the arrest in the case at bar complied with the second requirement [of the pre-Charter law], in that the necessary reasonable and probable grounds were present. The sole remaining factor to consider is whether a proper announcement was made before the police entered the premises.

My colleague Sopinka J. implies, albeit without firmly deciding, that the announcement in this case was somehow deficient by virtue of the fact that the police did not state their purpose prior to entry ...

This is not the first time this Court has been faced with an allegedly deficient notice requirement. [L'Heureux-Dubé, J., goes on to discuss cases in which the Court has not applied the notice requirement rigidly.] …

It is clear from the facts that the arresting officer informed the appellant of his purpose for entry, and restated his identity the moment it was feasible to do so. As he woke the appellant, [the officer] stated: "Wake up, it's the police. I want to talk to you." While this is not the most complete notice of purpose imaginable, I do not believe this requirement was ever intended to compel the police to make complex legal statements… In my view, given the circumstances of this case, the wording utilized by the officer was sufficient. …

I note in passing that my colleague Sopinka J. also appears to suggest that the announcement requirement might not have been met in this case because of the fact that the officers were not denied admission prior to entering. I disagree. … It would be a rather strange result if a person evading arrest could avoid capture merely by ignoring the request of the police for admission. Surely, where the police have reasonable and probable grounds to believe the person is actually on the premises, silence must be taken to amount to an implied denial of the request to enter.

Is the law reasonable?

As my colleague Sopinka J. points out, the law concerning warrantless arrests following forcible entry into a dwelling house was set out in [pre-Charter law]. … Sopinka J. concludes that, at least in the case of a standard arrest in which there is no urgency present, this wide discretion [of the pre-

Charter law] is "overly expansive in the era of the Charter". He explicitly refrains from deciding upon situations in which exigent circumstances exist, as he is of the view that no such circumstances are present in this case.

I am unable to agree with my colleague that exigent circumstances were not present here, especially given the conclusions of the trial judge and the Court of Appeal in that regard. …

What types of circumstances will be considered exigent? While I believe a number of factors can indicate a situation of urgency, it is best not to attempt to define conclusively every possible type of exigent circumstances, as this can preferably be determined on a case by case basis. …

The main factor relied upon by the respondent, and also cited by both the trial judge and the Court of Appeal, was that the police were gravely concerned about the potential destruction of evidence. In addition, the Court of Appeal noted the serious and violent nature of the offence, the fact that it had very recently occurred, and that a murderer was likely at large in the community. I propose to examine each of these factors.

It has been recognized on more than one occasion that the potential destruction of evidence can constitute exigent. In Silveira, I stated that this rationale necessitated an exception to the principle of the sanctity of the home …

As I stated in Silveira, preventing the removal or destruction of evidence is a legitimate law enforcement concern which warrants setting aside the strict rules concerning the sanctity of the home. Frankly, I see no reason why this rationale should be addressed any differently in the context of arrest than it is in the context of a search. Indeed, given the restrictions needed to effect an arrest in a dwelling house, it is arguable that these types of intrusion are in most cases considerably less invasive of privacy than warrantless searches. The announcement requirement, for example, allows the suspect to surrender him- or herself at the door of the residence and prevent any real intrusion of the premises. …

In my view, where there is a genuine fear that evidence of the crime will be lost, this can constitute the necessary exigent circumstances for a warrantless entry. Whether these exigent circumstances exist in a given case, is, of course, a finding of fact for the trial judge.

In this case, the trial judge, who had the advantage of hearing all the evidence, was of the view that a serious danger existed that had the police not immediately entered the trailer to arrest the appellant, evidence would have been destroyed. …

> Were there other investigatory techniques available? The answer is no, when one looks at the bloody shirt evidence. There was a real risk that that shirt would not have been available had they simply sealed the premises.

…

In any event, I would point out that it was not only the potential destruction of evidence which motivated the actions of the police in the case at bar. As stated by Lambert J.A. in the Court of Appeal, the police were investigating the commission of an extremely violent crime, and they felt an obligation to find out for certain who the offender was as soon as possible:

> The fundamental point in relation to the police conduct in this case was that there had been a savage attack on an elderly man in a small community which suggested a killer who was out of control in the community and that the police had a duty to protect the community. They also had a duty to try to locate and neutralize the killer and if possible to gather evidence that would satisfy them then and there that the killer had been apprehended, and that would later tend to establish that the correct person had been apprehended and made to stand trial. …

I completely agree. The nature of the crime is an important factor to consider. There can be little doubt that there is a greater urgency to investigate quickly in a case of violence than, for example, a case of theft. …

Sopinka J., however, suggests that simply watching the trailer would have been a sufficient response by the officers and would have prevented the appellant from committing any further harm or destroying evidence. In my view, this conclusion appears to utilize the same sort of ex post facto reasoning of which my colleague so strongly disapproves. I agree that this type of reasoning is of little help in determining whether an entry was justified; however, I believe that, in fairness, the same approach should apply to a review of the presence of exigent circumstances. My colleague's conclusion is dependant upon the fact that the appellant was actually in the trailer and not in the process of committing other harm or destroying evidence. Given the urgency of the situation, if the police had adopted the procedure suggested by my colleague and had been incorrect as to their belief of his presence inside the trailer, this error could have had grave consequences.

While it may be true that the appellant at the time of arrest was asleep, in the trailer and not in the process of destroying evidence, this does not displace the legitimate concern the police possessed. It is highly likely that, given enough time, the appellant would have destroyed the evidence.

Furthermore, the suggestion that the police could have simply watched the trailer while waiting for a warrant, fails to recognize that the nearest police station was over one hour's drive away. Even assuming that it would have been possible to see a Justice of the Peace and obtain a warrant at that time, the entire procedure of communicating with the station, conveying the necessary information and arranging for another officer to obtain a warrant and drive to Likely, would probably have taken, at a minimum, close to two hours. This would have given the appellant ample time to destroy evidence. In addition, as stated above, this delay would have had even greater significance if in actuality the police had been incorrect about the appellant's whereabouts or his involvement in the crime. In that case, the delay likely would have allowed for the offender to escape.

For all of the reasons set out above, I believe that exigent circumstances were indeed present in the case at bar. Additionally, I am of the view that where these circumstances exist, the common law authorizing entries onto private premises constitutes a "reasonable" entry for the purposes of s. 8 of the Charter.

Was the search conducted in a reasonable manner?

The entry into the trailer was conducted in as non-intrusive a manner as possible. [The officer] announced himself and waited for the appellant to answer. As he testified, he would not even have entered had the appellant answered the door. He drew his gun, an entirely reasonable decision given the circumstances, but kept it at his side. Once inside, he woke the appellant, pulled him into the light and immediately arrested him. The search the police eventually conducted was also minimally intrusive. Despite having the legal authority to do so, the officer chose not to search the premises at that time but instead decided to obtain a search warrant. The search was reasonably conducted.

Conclusion

It follows that as the police's entry was for the purpose of effecting an arrest, there was no breach of s. 8 at that time. Given my conclusion that the police lawfully entered the trailer to effect an arrest of the appellant, it naturally follows that they were entitled to search incident to arrest, and to seize the appellant's shirt as evidence. The authority to search incident to arrest is well established at common law and has withstood *Charter* scrutiny as well. …

The search of the appellant consisted mainly of the shirt that he was wearing and his immediate surroundings. While the police would have been justified in doing so, they refrained from searching the immediate area and seizing objects which obviously could have been used as evidence. This minimal search incident to arrest did not violate the *Charter*. …

This is sufficient to dispose of the appeal. Before concluding, however, I feel compelled to address some of the statements made by my colleague Sopinka J. in his reasons. Reading his assessment of the conduct of the investigation in this case, one might draw the conclusion that the police officers were operating as lawless vigilantes, flagrantly and deliberately violating the *Charter* at every turn. Frankly, I could not disagree more. As I have described above, I am of the view that this "litany" of *Charter* abuses does not stand up to close scrutiny.

Indeed, although this is in no way determinative, if the conduct of the police was truly of such a horrific nature I find it rather peculiar that neither the trial judge nor three judges of the Court of Appeal had a similar appreciation of the facts. On the contrary, they found that for the most part, the actions of the police were not such as to have been in violation of the appellant's *Charter* rights.

In my view, from the first stages of the investigation through to the apprehension of the appellant the police proceeded in a forthright and proper manner; indeed, had the police not moved immediately

to arrest, it is likely that they would have been criticized for allowing a murderer to continue to remain at large in the community. …

The police were in the process of investigating a serious crime, one which had recently been committed and involved a savage, physical beating inflicted on a helpless victim for no apparent reason. Given the brutality of the murder scene and the seeming randomness of the act, there is little doubt that the police felt obliged to act quickly in order to prevent any further violence of that nature in the community. For this foresight, they should be commended, not rebuked.

THE CHIEF JUSTICE (dissenting) -- I have had the benefit of the reasons of both of my colleagues … and cannot agree with either of them. I do agree with L'Heureux-Dubé J. in the result, but [for different reasons].