

## **R. v. Hart, 2014 SCC 52** – Mr. Big operations

### **Facts:**

On the morning of August 4, 2002, Nelson Hart took his twin three-year-old daughters to a park near their home. A short time later, he returned home alone in a panic, saying one of the girls had fallen in the lake that was near the park. When his wife asked where the other girl was, he said he had forgotten her there. They hurried back to the park and called an ambulance. First responders arrived and found both girls dead in the lake.

The police thought Hart's story was strange, and suspected he had killed his daughters. When questioned, Hart said the girls ran onto the dock and one of them fell in. Since he could not swim, he panicked and drove home to get his wife. In his panic, he forgot the other girl on the dock. He denied killing his daughters when directly asked, and he denied it again when questioned a second time about a month later.

At the end of September, Hart contacted police and told them he had not been truthful about what had happened. He said he had actually had an epileptic seizure while taking the girls out of the car. When he came to, he felt dazed and saw one of his daughters in the water. His only thought was to drive home. He said his license had been suspended in the past because of his epilepsy, and he lied because he didn't want to lose it again.

The police reopened the investigation two years later, and in February of 2005 began a "Mr. Big" operation on Hart. This is an undercover investigation where a suspect is recruited by a fictional crime organization and is gradually persuaded to confess to a past crime. In their preliminary investigation, the police learned Hart was on social assistance and was socially isolated, rarely leaving his home.

An undercover officer, "Jim", introduced himself to Hart outside of a convenience store and asked for help finding his missing sister. Hart was paid \$50. Jim asked Hart to work for him as a truck driver. Hart accepted. He was introduced to another undercover officer, "Paul", and the two officers told Hart that they were involved in organized crime. Over the next two months, Hart made deliveries that supposedly contained smuggled alcohol and stolen credit cards. He was paid more than \$4,000 for making these deliveries. Hart became close with Jim and Paul, telling them on many occasions they were like his brothers.

In April of 2005, during a dinner with Jim, the men discussed business. Jim said sometimes the organization had to "deal with" dishonest people. Hart said he had no problem getting his hands dirty. He took a picture of his daughters from his wallet and told Jim he had planned and carried out their murder.

In May of 2005, Hart was told of an upcoming deal that could earn him up to \$25,000. He would only be allowed to participate if "Mr. Big", the

### **Discussion Questions:**

1) Mr. Big operations remain very controversial, for the reasons given in this decision. Do you think the police should still be using this tactic?

### **Relevant Law:**

*The Canadian Charter of Rights and Freedoms*, section 7.

### **Resources:**

**You can read the entire case at:**

<https://www.canlii.org/en/ca/scc/doc/2014/2014scc52/2014scc52.html>

**You can find the *Canadian Charter of Rights and Freedoms* at:**

<https://laws-lois.justice.gc.ca/eng/const/page-15.html>

boss of the organization, approved. Jim told Hart there was a problem with a background check they had run on him, and he needed to meet with Mr. Big to clear it up.

Hart met with Mr. Big in June. The conversation turned to Hart's daughters. Hart said he had had a seizure, implying the deaths were accidental. After further questioning, he said he killed his daughters because he was afraid CFS was going to take them from him. Two days later, Hart went with Jim to the park and showed Jim how he had drowned his daughters. He was arrested and charged with two counts of first-degree murder.

At trial, Hart asked his confessions to be excluded from evidence. He said the Mr. Big operation was a breach of his *Charter* rights under section 7. He denied confessing to Jim in April, and he said he lied in his June confessions because he was afraid. Hart also asked to have the public excluded from court as he testified. He said speaking in front of crowds confused and flustered him, and he was worried it could lead to a seizure. The judge denied this request. As a result, Hart did not testify, the confessions were allowed into evidence, and he was convicted on both counts of murder.

The Court of Appeal found that Hart's confessions should have been excluded, because they breached his right to silence. Although he was not detained at the time of the confessions, he was under "state control." The justices also thought the trial judge had unfairly denied Hart's request to testify without the public present. They thought this request should have been granted, and ordered a new trial. The Crown appealed to the Supreme Court.

### **The Decision:**

The Court dismissed the Crown's appeal.

Section 7 of the *Charter* guarantees the right to life, liberty, and security of the person. This section encompasses many more specific rights, including the right to make important personal choices, the right to the body's privacy and health, and the right to silence. The right to silence means that if a person chooses not to make statements to the police, the police cannot use their silence to infer that they are guilty. It also means the police cannot use trickery to get an accused person to make statements. Certain infringements of this right are allowed if they are in the interests of fundamental justice.

"Mr. Big" operations have been in use in Canada as early as 1901, and in their current form since the 1990s. Past Court decisions had held that these operations did not deal with the right to silence, because the accused was not detained at the time of making a confession. As a result, confessions were typically allowed into evidence in such cases. However, when this case came before the Court, they felt it was time to rethink this approach.

The court noted three major problems with Mr. Big operations. First, the

nature of Mr. Big operations means accused persons are made to think they are involved in criminal organizations that use violence as part of doing business, and that violent behaviour is rewarded within the organization. Because of this, any confessions obtained by using one of these operations is potentially an unreliable confession given out of fear or in the hope of obtaining status within the organization.

The second issue is the prejudicial effect Mr. Big operations have on an accused. To establish trust, these operations put an accused in situations where they willingly participate in what they believe to be crimes. A judge or jury hearing the details of these actions would be more likely to think negatively of the accused's character, and therefore readier to believe any confessions obtained by the operation. It also makes the judge or jury more likely to distrust an accused when they testify.

Finally, Mr. Big operations exist outside many of the legal safeguards put in place to limit police powers. For example, the *Charter* right to counsel (section 10(b)) does not apply because the accused is not detained, or even aware they are speaking to police. The lack of accountability means a greater danger that the police will abuse their powers.

The Court established a two-pronged approach to Mr. Big operations:

- 1) Any confession made by an accused during the course of a Mr. Big operation should be presumed to be inadmissible into evidence. If the Crown wants a confession entered into evidence, they must prove that the value of the confession outweighs the prejudicial effect to the accused.
- 2) When conducting these operations, the police must be very careful that their behaviour does not approach coercion, for example by threatening the accused, or taking advantage of vulnerabilities such as addiction or mental health problems. If the police get a confession by using these tactics, the court should find that there has been an abuse of process and exclude the confession. It is up to the defence to establish that a Mr. Big operation resulted in police abusing their powers.

Applying this new approach, the Court found that Hart's confessions were unreliable. The financial rewards of the Mr. Big operation had lifted Hart out of poverty and become the primary focus of his life. The undercover officers became his "best friends", and Hart had even offered to leave his wife in order to work for the fake criminal organization full time. The June confessions came about only after prodding, and reminding Hart that he had to be honest if he wanted to continue working. The details of the confessions were also inconsistent with each other, and could not be independently verified by other evidence. Aside from the fact the police had taken advantage of Hart's poverty and isolation to gain his trust, they had also continued to send Hart on long road trips, even though they knew that he was prone to seizures and had previously had his license taken away. This potentially put the public at risk. On all the facts, the Court found it would not be right to admit the confessions into evidence.

The Court also felt the trial judge had made a mistake by not letting Hart testify without the public present. In making such a decision, a judge must consider the reasons for the request and try to balance them with the principle that court should be open to the public. Hart's testimony was essentially the only way for him to give his version of events. Being able to testify in a clear and coherent manner was crucial. In addition, Hart was not arguing that the public should never hear his testimony—he was just asking they not be physically present. The judge could have, and should have, allowed a compromise, such as broadcasting his testimony on a TV screen for the public in a separate room. The Court said that this error alone meant Hart was entitled to a new trial.

**Relevant Law:**

*The Canadian Charter of Rights and Freedoms:*

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