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R v Hart – A new rule concerning the admissibility of confessions

Before *R v Hart*, in cases where Mr. Big techniques were employed, the ensuing confessions were usually deemed admissible as evidence. This is concerning, as the purpose of these operations are used to induce confessions and they are carefully organized to achieve that end. A common recipe for a Mr. Big Operation involves under-cover police officers who pose as a “criminal organization” that use threats of violence, coercion, and powerful inducements in order to elicit confessions from an accused, who is typically; socially isolated, economically deprived, mentally unstable or a combination of all three. Mr. Big Operations present problems related to the police tactics themselves as well as the voluntariness and reliability of the elicited confessions.

Police officers use tactics that are highly controversial and cannot be monitored with the same degree as standard custodial interrogations. The right to silence only applies in situations where the accused is detained – where a state agent actively elicits incriminating statements from an accused. During Mr. Big Operations the accused is unaware that they are providing, usually, incriminating statements to police, unlike custodial interrogations where the accused knows they are speaking to authority and are aware of the gravity of their statements. Additionally, the common law confessions rule is said only to apply when the accused subjectively believes that the person they are confessing to is a person of authority, which is not the case in Mr. Big Operations, as the SCC did not recognize a “crime boss” as such. The use of Mr. Big Operations severely compromises the accused rights and poses questions regarding the constitutionality of such tactics.

Furthermore, Mr. Big Operations do more than create the conditions likely to produce incriminating statements by suspected targets. Targets typically express their willingness to participate in criminal activity during conversations with the “crime boss”. This information becomes part of the narrative for Mr. Big Operations, in which the jury hears these statements in conjunction with the confession. Possessing knowledge of the accused’s criminal activity, that is

unrelated to the alleged crime, may have a profound impact on the jury's decision. A prejudicial impact arises from the moral prejudice that emanates from the jury hearing evidence of the accused boasting about having committed a crime to gain entrance into a criminal organization.

The SCC addressed these problems concerning Mr. Big Operations in *R v Hart*. The Court proposed a solution that involves a two-pronged approach that recognizes a new common law rule of evidence and relies on a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct.

Firstly, the Court held that confessions procured through Mr. Big Operations were to be deemed presumptively inadmissible. The presumption may however be overcome where the Crown demonstrates on a balance of probabilities that the probative value of the confessions or incriminating statements outweighs their prejudicial impact. Henceforth, courts are to assess the probative value by scrutinizing the reliability of the confession evidence, the methods employed, and other relevant factors.

Secondly, the Court asserted that even where the probative value outweighs their prejudicial impact, they must assess the operation for markers of abuse of process. If the state's conduct amounted to an abuse of process – involving threats of violence, or activities that preyed on the accused's vulnerabilities to induce confessions – such incriminating statements could still be considered inadmissible.

Despite the *Hart* decision, law enforcement officials may still choose to continue to employ Mr. Big Operations and courts may find that the facts in cases before them are sufficiently distinguishable enough from *Hart* to warrant their admission.

In *R v Mack*, the SCC was able to implement the two-pronged approach, illustrating that it is possible for the Crown to utilize the confessions obtained in Mr. Big operations if they met the criteria established in *Hart*. Although the *Hart* decision created stringent requirements for admitting elicited confessions, *Mack* affirmed that there is still a possibility to use such

confessions during Mr. Big operations as evidence at trial and that Mr. Big operations can still be a useful policing tactic if implemented appropriately.

In addition, it was stated that it falls to the trial judge to adequately instruct the jury on how to approach these confessions. The SCC asserted that, the trial judge should tell the jury that the reliability of the accused's confession is a question for them. The trial judge should then review with the jury the factors relevant to the confession and the evidence surrounding. By instructing the jury the trial judge should also discuss the fact that confessions may contain markers of reliability (or unreliability).

The new rule set out in *Hart* places greater protection on the rights of the accused and limits the, often questionable, police tactics that are used to elicit confessions during Mr. Big Operations. Although this seems to be a step in the right direction in relation to the unconstitutionality of Mr. Big Operations pre-*Hart*, historically, confessions elicited during a Mr. Big Operations have never been proven to be false. Perhaps, this is due to the difficulty of finding evidence to prove such confessions are false, or maybe it's a product of Mr. Big Operations being very successful police tactics. A lingering question follows the decision in *Hart*: how will this new rule ultimately affect the future of Mr. Big Operations?

Sources

Amar Khoday, "Scrutinizing Mr Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60 Crim LQ 277 at 277 [Scrutinizing].

R v Hart, 2014 SCC 52

R v Mack, 2014 SCC 58

