SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Mudenda*, 2024 NSSC 154

Date: 20240429
Docket: CRH No. 520991
Registry: Halifax

Between:

His Majesty the King

Plaintiff

v.

Lwiimba Mudenda

Defendant

DECISION
Voluntariness of Statement

Judge:	The Honourable Justice John A. Keith
Heard:	January 12, 2024, in Halifax, Nova Scotia
Post-hearing Written Submissions:	February 20, 2024
Written decision:	April 29, 2024
Counsel:	Samantha E. Allen for the Applicant Ian Hutchinson for the Respondent

By the Court:

INTRODUCTION AND ISSUE

[1] The Defendant, Lwiimba Mudenda, is charged with:

a) Assaulting his domestic partner Ethel Mah McGill and causing her bodily harm contrary to s. 267(b) of the *Criminal Code*; and

b) Unlawfully wounding, maiming and/or disfiguring Ms. McGill thus committing aggravated assault contrary to s. 268(1) of the *Criminal Code*.

[2] Both offences are alleged to have occurred on Thursday, March 24, 2022. At the time, Mr. Mudenda and Ms. McGill were living together at an apartment in Halifax, N.S. (the "**Apartment**"). The Crown alleges that Mr. Mudenda broke Ms. McGill's arm during a domestic dispute that turned violent.

[3] The matter is scheduled to proceed by way of a jury trial beginning June 24, 2024.

[4] On Monday, March 28, 2022, Constable Stephanie Holland and Constable Dawn Perrault were dispatched to speak with Ms. McGill and begin an investigation into these allegations.

[5] Constables Holland and Perrault first spoke with Ms. McGill at her parents' home. She had moved in with her parents following the alleged assault. Constable Perrault had an audio recording device with her and recorded this interview.

[6] At about 11:18 a.m. on March 28, 2024, Constable Holland spoke with Mr. Mudenda over the phone. She read the initial police caution to Mr. Mudenda and asked if he would meet to discuss Ms. McGill's allegations. He agreed.

[7] At about 1:24 p.m. on March 28, 2024, Constables Holland and Perrault attended at the Apartment and spoke with Mr. Mudenda. Constable Holland read the initial police caution to Mr. Mudenda for a second time. Mr. Mudenda then proceeded to tell his version of the events surrounding the alleged assault. Constables Holland and Perrault both testified that the atmosphere was respectful, and that Mr. Mudenda was cooperative, seemingly anxious to tell his side of the story. They said that he walked them around the Apartment, in a form of re-enactment.

[8] Neither Constable Holland nor Constable Perrault made detailed handwritten notes while speaking with Mr. Mudenda. Constable Holland did write down a few notes in her notebook soon after the fact. In addition, within a few hours of meeting with Mr. Mudenda, Constable Holland authored a more detailed electronic "General Occurrence" Report containing details of their exchange with Mr. Mudenda. Constable Perrault neither made handwritten notes in her notebook nor created her own General Occurrence Report. In addition, although Constable Perrault used her audio recording device when interviewing Ms. McGill, neither officer gave any consideration to making a similar audio recording of Mr. Mudenda's statement. Constable Perrault agreed that this was a mistake and accepted responsibility for the lapse.

[9] After concluding their interview of Mr. Mudenda, Constables Holland and Perrault returned to speak with Ms. McGill to clarify certain details.

[10] Later that same day (March 28, 2022), they arrested Mr. Mudenda and charged him with assault causing bodily harm.

[11] The Crown brings this pre-trial application for a ruling as to the voluntariness of Mr. Mudenda's March 28, 2022 statement to Constable Holland and Constable Perrault. In doing so, the Crown also confirmed it will not proffer this statement as part of its case. Thus, I understand that neither Constable Holland nor Constable Perrault will testify as to the contents of the challenged statement by Mr. Mudenda on March 28, 2022. Rather, the Crown will "hold it back for cross-examination purposes should Mr. Mudenda choose to testify" (Crown's supplementary written submissions filed February 20, 2024 at p. 1). This decision is premised on that representation.

[12] Constables Holland and Perrault testified at the *voir dire* hearing. Mr. Mudenda did not - as was his right.

[13] Statements made by an accused to the police are presumptively inadmissible and excluded unless the Crown proves beyond a reasonable doubt that the statements were made voluntarily, as that term is understood in the jurisprudence. (*R. v. Beaver*, 2022 SCC 54 ("***Beaver***") at para. 45; *R. v. Oickle*, 2000 SCC 38 ("***Oickle***"), at para. 30; see also *R. v. Hodgson*, 1998 CarswellOnt 3418, [1998] 2 S.C.R. 449 at para. 12 ("***Hodgson***"); and *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405 ("***Singh***"), at para. 38) In this case, the Crown bears the heavy evidentiary burden of proving that the statements attributed to Mr. Mudenda during the March 28, 2022 interview at the Apartment were voluntary.

[14] Mr. Mudenda states that "[a]ll the 'essential elements' of a voluntary statement are in dispute" and he "makes no concessions or agreements as to the limbs of the voluntariness test" (Written submissions filed January 30, 2024, paras. 2 and 8). However, he focuses on a specific subset of the "voluntariness" jurisprudence: sufficiency of the record. Mr. Mudenda states that the police record of his March 28, 2022 interview is inaccurate, incomplete, suspect and unreliable in such a way as to raise a reasonable doubt regarding their voluntariness.

[15] In my view and for the reasons that follow the Crown has proven beyond a reasonable doubt that the Mr. Mudenda's statement to Constables Holland and Perrault in the Apartment beginning at about 1:24 p.m. on March 28, 2024 was voluntary.

THE LAW

Core Policy Concerns – Reliability and Fairness

[16] In medieval times, persons accused of crime could clear their names through a form of trial innocuously called "ordeals". One form of ordeal involved being subjected to acute physical trauma. Enduring the experience signified innocence; the theory being that God would intervene to protect the innocent. (John Langbein, Renee Lener, Bruce Smith, "*History of the Common Law*" (2009), pp. 43 - 54). Ordeals were eventually replaced with forms of interrogatory that involved human judgment - not divine intervention. Initial attempts at reform were not particularly enlightened. For example, an accused deemed "highly likely to be guilty" might be questioned by persons in authority using various forms of torture, with their fates being sealed if they disclosed factual details that no innocent person could be presumed to know. (John Langbein, Renee Lener, Bruce Smith, *History of the Common Law* (2009), pp. 55 - 57).

[17] Over time, these archaic and cruel methods of taking statements from an accused were rightfully condemned as patently flawed and unjust. By 1914, the common law evolved to the point that confessions could not be pried from an accused person "either by fear of prejudice or hope of advantage exercised or held out by a person in authority". (*R. v. Ibrahim*, [1914] A.C. 599 ("***Ibrahim***") at page 609)

[18] The rule in *Ibrahim* protected accused persons from having their statements extracted by persons in authority through coercion or trickery. In *R. v. Hebert*, [1990] 2 S.C.R. 151 ("***Hebert***"), the Supreme Court of Canada conceived the

concerns more broadly under the heading "voluntariness". (*Hebert* at p. 166 and *Oickle* at paras. 25 - 27)

[19] "Voluntariness" has become the "touchstone" against which statements to persons in authority are measured. (*Beaver* at para. 47) "[O]n the question of voluntariness, 'the focus is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will'". (*R. v. Tessier*, 2022 SCC 68 ("***Tessier***") at para. 11, quoting from *Singh* at para. 36) This includes related imperatives around "individual free will, the need for the police to obey the law, and the fairness and repute of the criminal justice system." (*Beaver* at para. 40. See *Oickle* where the Court refers to an examination into whether the accused's will was "overborne" in the circumstances, at para. 70. See also *Tessier* at para. 72)

[20] Voluntariness is predominantly focussed on the interests of the accused person. That said, the Court is mindful of (and balances) society's interest in the detection and prevention of crime. In *Beaver*, the Supreme Court of Canada wrote:

> At the heart of the confessions rule is the delicate balance between individual rights and collective interests in the criminal justice system (*Singh*, at paras. 1, 21, 27-28, 31 and 34; *Tessier* (SCC), at paras. 4 and 69; *Oickle*, at para. 33). The "twin goals" of the rule involve "protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes" (*Oickle*, at para. 33). On the one hand, the common law recognizes an individual's right against self-incrimination and right to remain silent, such that an individual need not give information to the police or answer their questions absent statutory or other legal compulsion; on the other hand, the police often need to speak to people when discharging their important public responsibility to investigate and solve crime. (at para. 46)

[21] Similarly, in *Tessier*, the Supreme Court of Canada wrote that:

> …the proper application of the confessions rule aspires to strike the right balance between the individual and societal interests at play in police questioning: on the one hand, protecting the accused from improper interrogation by the police and, on the other, providing the authorities with the latitude they need to ask difficult questions to investigate and solve crime… the confessions rule, properly understood, strives for a balance between, on the one hand, the rights of the accused to remain silent and against self-incrimination and, on the other, the legitimate law enforcement objectives of the state relating to the investigation of crime (*Hebert*, at pp. 176-77 and 180; *Oickle*, at para. 33; *Singh*, at paras. 43 and 45). I would add that these interests, while they often appear in competition, share a common preoccupation in the repute of the administration of criminal justice which helps direct trial judges in finding the right point of equilibrium. Justice mandates a recognition that the rights of the accused are important but not without limit; it also insists that the police be given leeway in order to solve crimes but that their conduct

> not be unchecked. Indeed, achieving the right balance between these objectives involves seeking out this common ground and, in this sense, it has been usefully described as the "mission" of the confessions rule (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 425; see also *Vauclair* and *Desjardins*, at No. 38.23). In seeking this balance, the law imposes the heavy burden on the Crown to prove voluntariness beyond a reasonable doubt, which serves as substantial protection for the accused at all stages of a criminal investigation. Unlike the burden under the Charter, where the accused must establish a breach on a balance of probabilities, the confessions rule begins from a place of heightened protection for the accused because the rigorous task of showing voluntariness lies with the Crown. (at paras. 4 and 69)

[22] Ultimately, "voluntariness" is a short-hand term designed to capture what the Supreme Court of Canada described as a "complex of values" animated by two core concerns: reliability and fairness. I elaborate on each below.

Reliability

[23] The Court inquires into whether there is any evidence which casts doubt on the reliability of this evidence and, in turn, raises questions regarding the voluntariness of the impugned statement.

[24] Note that, in the context of a voluntariness analysis, the issue is ***not*** simply whether the evidence might contain inaccuracies or deficiencies. These types of problems will frequently go to weight, not admissibility based on concerns around voluntariness. To spark a concern around voluntariness, the evidence around the statement must reveal some additional, contaminating factor such as statements taken in oppressive circumstances. The rationale is obvious: unreliable statements obtained through improper external influences could result in a wrongful conviction.

Fairness

[25] "Fairness", in the context of the voluntariness analysis, generally relates to a concern that the accused has an operating mind and be fairly afforded the free, informed and meaningful choice to speak with the police or, alternatively, remain silent. (*Beaver* at paras. 48, 51, 52 and 55 and *R. v. Whittle*, [1994] 2 S.C.R. 914 ("***Whittle***") at para. 31)

[26] Where the accused is suspected of committing a criminal offence, the opportunity to make a free, informed and meaningful choice is often (not always) linked to a proper police caution. In *Tessier*, the Supreme Court of Canada wrote that:

> If the Crown cannot prove that the absence of a caution had no impact on voluntariness, the prima facie evidence of involuntariness raised by the absence of a caution will lead to a conclusion of inadmissibility. The absence of a caution weighs heavily because, where unaddressed, it represents *prima facie* evidence that the suspect has been unfairly denied their choice to speak to the police and that, as a consequence, the statement cannot be considered voluntary. (at para. 11)

[27] Failing to properly caution an accused person is a specific factual consideration which constitutes *prima facie* evidence that they were unfairly denied the right to make a meaningful choice around whether to speak with the police or maintain their silence. (*Tessier* at para 11) To overcome this obstacle, the Crown must prove that the failure to caution had no impact on the voluntariness assessment as a whole. In *Tessier*, the Supreme Court of Canada used the metaphor of a "stain" to describe the failure to place a suspect under caution. It wrote:

> But if the Crown can prove that the suspect maintained their ability to exercise a free choice because there were no signs of threats or inducements, oppression, lack of an operating mind or police trickery, that will be sufficient to discharge the Crown's burden that the statement was voluntary and remove the stain brought by the failure to give a caution. (at para. 89)

[28] In *Tessier*, the Court also provided a practical example of how an uncautioned statement might yet be deemed voluntary where there are "strong indications" of counterbalancing evidence confirming voluntariness:

> [W]here there is evidence that the accused was aware of their right to silence or of the consequences of speaking, the weight attached to the absence of a caution becomes less important because there are other strong indications of voluntariness. An eagerness to talk, as in the case of *Pepping* (at para. 6), may or may not serve as evidence of voluntariness, depending on the circumstances. A person may appear eager to talk as a result of either a genuine interest in doing so or through a feeling of fear and compulsion. (at para. 88)

[29] However, as will be seen, there are other factual circumstances which trigger concerns around fairness and can raise a reasonable doubt around voluntariness because the accused's right to remain silent has been unfairly compromised.

Relevant Factual Considerations (e.g. Inducements, Promises, Threats, Oppression, Trickery)

[30] The Court has identified the following factual considerations which inform the voluntariness analysis:

a) Inducements offered as a quid pro quo for a confession;

b) Promises which invoke the hope of advantage should the accused provide a statement or threats which provoke the fear of prejudice should the accused not provide a statement;

c) Subjecting the accused to oppressive or inhumane conditions in order to force a statement (e.g. depriving of food, clothing, water, sleep or medical attention);

d) Circumstances (e.g. the lack of a proper police caution) which compromise the accused's ability to make meaningful, informed choices with an "operating mind". For clarity, this factual consideration "does not imply a higher degree of awareness than knowledge of what the accused is saying and that he is saying it to police officers who can use it to his detriment" (Oickle, at para. 63); or

e) Improper forms of police trickery that would shock the conscience of the community. (Oickle, at paras. 47 - 67)

[31] In *Tessier*, the Supreme Court of Canada explained how these factual considerations operate and interact with the core policy concerns described above:

> … while the doctrines of oppression and inducement are primarily concerned with reliability, other aspects of the confessions rule, such as the presence of threats or promises, the operating mind requirement, or police trickery, may all unfairly deny the accused's right to silence (paras. 69-71; *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at pp. 682-83 and 688, per Lamer J.; *Hebert*, at pp. 171-73; *Whittle*, at p. 932; *R. v. Hodgson* [1998] 2 S.C.R. 449, at paras. 21-22; *Singh*, at para. 34). A statement may be excluded as involuntary because it is unreliable and raises the possibility of a false confession, or because it was unfairly obtained and ran afoul of the principle against self-incrimination and the right to silence, whatever the context indicates. It may be excluded if it was extracted by police conduct [TRANSLATION] "[that] is not in keeping with the socio-moral values at the very foundation of the criminal justice system" (J. Fortin, *Preuve pénale* (1984), at No. 900). (*Tessier*, at para. 70. See also *Oickle* at para. 69)

[32] These core policy concerns and factual considerations are not individually examined and measured in separate conceptual containers. They intertwine with varying degrees of importance, depending on the circumstances. Thus, "[t]he application of the confessions rule is necessarily flexible and contextual". (*Beaver*, at para. 48) A simplistic, mechanical approach in which discrete elements are reviewed with "check list" formality will not suffice.

[33] The Court considers the evidence as a whole and exercises its discretion in a manner which properly recognizes how the broader policy imperatives (fairness and reliability) and the key factual considerations (e.g. promises, threats, inducements, oppression, trickery) intermingle within the unique facts of each case. The amalgam is conscientiously principled but highly fact sensitive.

Voluntariness and an Insufficient Record

[34] As indicated, Mr. Mudenda focusses on a particular subset of the voluntariness jurisprudence related to the sufficiency of the police record. He alleges that the police record is defective and insufficient – and that these problems are sufficient to raise a reasonable doubt as to voluntariness in the circumstances.

[35] Pausing briefly, the fact that the record in the case at bar was made by police officers is germane. I note that the concept of voluntariness extends beyond police officers and applies to statements given by an accused to any "person in authority". Thus, concerns around the sufficiency of the record are not limited to police records.[1]

[36] However, the fact that the record in this case was created by police officers is an important preliminary fact because questions around the sufficiency of the record attracts a heightened level of scrutiny where the statement is made to (and the record is created by) the police. The reasons relate to the unique role which police play in the investigation and prosecution of crime. For example, and among other things:

1. Police officers have the responsibility and authority to investigate crime. Where they have reasonable and probable grounds, police may also arrest persons suspected of committing a criminal offence. In short, statements given to police officers are often made in

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[1] In *R. v. Belle*, 2010 ONSC 1618, the record of statements given by an accused to bailiffs tasked with retrieving stolen vehicles was found to be completely unsatisfactory and lacked even rudimentary notetaking. The statement was deemed inadmissible. Trotter, J. (as he then was) concluded that: "… because of the state of the record, and in light of the nature of the voluntariness issues that must be resolved the Crown is unable to meet its heavy onus." (at para. 46). By contrast, in *R. v. MacDonald-Pelerine*, 2014 NSCA 6 ("***MacDonald-Pelerine***") the challenged statements were given to two accountants investigating possible fraud. The accountants kept contemporaneous notes on a computer. Beveridge, J.A. found that the notes in question were sufficiently comprehensive and accurate to be used by the accountant witnesses as an *aide memoire*. (at para. 48) He further concluded that there was a complete absence of any factual considerations that might create a reasonable doubt around voluntariness (e.g. inducements, promises, threats, trickery or oppression). See also, *R. v. Calder* ("***Calder***"), 2010 NSSC 136 involving statements made by a lawyer to officers at a correctional institution.

circumstances involving an elevated legal jeopardy - both before and after arrest;

2. Upon arrest, police officers have the authority to detain and interview accused persons. In this circumstance, an accused person cannot simply walk out of the police station. She/he is in a more vulnerable position and subject to potentially improper forms of external pressure or influence. (Singh, at para 32);

3. Police officers are trained and legally obliged to properly caution accused persons so that they may fairly assess their legal rights and make an informed, meaningful choice whether to speak or remain silent. In Tessier, the Supreme Court of Canada commented on the great importance of a proper police caution in the voluntariness assessment (at paras. 9, 11 and 89); and

4. Police stations typically contain interview rooms with audio or video tape equipment to better ensure a complete and accurate recording of the formal interactions with an accused person. Where an accused person is formally interviewed at a police station where audio or video tape recording technology is readily available yet not used, the non-recorded statement attracts considerable suspicion and concern regarding the voluntariness of that statement. (R. v. Moore-McFarlane, 2001 CarswellOnt 4242, [2001] O.J. No. 4646 (Ont. C.A.) ("Moore-McFarlane"), at para. 65 and White at para. 25)

[37] The voluntariness assessment which follows is calibrated to recognize the fact that Mr. Mudenda's impugned statement was supported by a police record.

[38] As indicated in para. 24 above, there is an important distinction between an insufficient police record which goes to the question of voluntariness and a police record which contains deficiencies. Deficiencies in the record of an accused's statement (i.e. whether the record is inaccurate and/or incomplete) are left with the trier of fact to assess for weight. The Court must be careful not to usurp the function of the trier of fact by excluding evidence where the true legal issue is the weight to be afforded the evidence - not the admissibility of this evidence. (*R. v. Learning*, 2010 ONSC 3816 ("***Learning***"), at paras. 56 - 59 and 62; and *MacDonald-Pelerine* at para. 43)

[39] However, an exception can arise if issues around the nature, accuracy and completeness of the record are sufficiently serious as to raise concerns around

voluntariness. It is not always easy to precisely locate the point at which concerns around the sufficiency of the record trigger more fundamental problems regarding voluntariness. In *MacDonald-Pelerine,* Beveridge, J.A. adopted the following comment from *Learning*, where Code, J. wrote:

> Accordingly, the current state of the law is that the accuracy and completeness of the record of voluntary statement is an issue of weight that is determined at trial period however the accuracy and completeness of the record of the circumstances surrounding the making of the statement can relate to proof of voluntariness are in the *voir dire*. This is not an easy distinction to apply, especially in a case like the one at bar where there is no evidence called by the defence on the *voir dire*. It may be unclear in such a case whether the defence is raising issues of voluntariness or issues of accuracy. (at para. 43)

[40] Despite these difficulties, the Court remains sensitive to issues in the police record which reveal (or possibly conceal) a problem with voluntariness. The difficult but practical question is: how does the Court distinguish a police record which is merely inaccurate (and goes to the trier of fact for weight) from a police record which is insufficient (and goes to voluntariness and admissibility)?

[41] Concerns around the sufficiency of the police record typically begin with problems around the <u>*method and timing*</u> of the record which, in turn, cast doubt or suspicion around the voluntariness of the statement. Common factual scenarios include:

1. Where the police fail to use a readily accessible, reliable form of recording the accused's statement (e.g. video or audio recording); or

2. Where the police fail to use a readily accessible, reliable form of recording the accused's statement (e.g. video or audio recording) and subsequently seek to preserve the accused's statement in a more reliable fashion such as a video or audio recording, if the accused is prepared to cooperate.

See, for example, *Moore-McFarlane*; *R. v. Ahmed*, 2002 CarswellOnt 4075, [2002] O.J. No. 4597 (Ont. C.A.) ("***Ahmed***"); *R. v. White*, 2003 CarswellOnt 2330, [2003] O.J. No. 2458 (Ont. C.A.) ("***White***"); *R. v. Ducharme*, 2004 MBCA 29, leave to appeal to SCC refused 2004 CarswellMan 219, 2004 CarswellMan 220, [2004] 1 S.C.R. viii ("***Ducharme***"); and *R. v. Marshall*, 2005 CarswellOnt 4716, O.J. No. 3549 (Ont. CA) ("***Marshall***").

[42] Before undertaking a more in-depth survey of the applicable jurisprudence, two preliminary comments are germane:

1. Voluntariness is driven by the same animating core principles (fairness and reliability) and sensitive to the same factual considerations (e.g. promises, threats, inducements, oppressive circumstances, police trickery, etc.) regardless of whether the issue relates to the sufficiency of the record or some other specific concern (e.g. overt acts of oppression apparent on the record). Thus, it is not enough to point out errors, gaps or basic deficiencies in the police record and ask the Court to condemn an accused's statement as involuntary. As indicated, these types of basic deficiencies in the police record will often go to weight unless the evidence also reveals concerns that cast doubt on whether the accused's statement was voluntary. Failure to create a more reliable, complete record must raise concerns or cast suspicion around those other issues that strike at the heart of the voluntariness analysis (e.g. promises, threats, oppression or police trickery were intentionally concealed or designed to prevent a fulsome judicial examination into potentially improper police conduct); and

2. As indicated, the assessment is extremely contextual and fact sensitive. The concept of voluntariness cannot be reduced into neat, conceptual bundles which are examined with a "checklist" mentality as separate items in a catalogue of potentially relevant considerations. The evidence must be reviewed in a more holistic way. To that extent, it may be more appropriate to consider the key policy considerations and relevant factual considerations as interwoven strands that form part of a larger tapestry through which concerns around voluntariness can be more properly determined.

[43] As indicated, concerns around an insufficient police record typically begins with related suspicions around how and when that record was initial created (i.e. method and timing – see para. 41 above) However, while these are critical considerations, they are neither determinative nor the only relevant factual matters. The following other issues may also bear upon the analysis:

1. Prevailing circumstances at the time the record was created. Relevant considerations include whether the accused was under arrest; whether the police intended to take a statement at the time or, alternatively, whether the accused freely offered relevant information without any

prompting; and the degree of control exercised by the police over the accused at the time the impugned statement was made;

2. Inconsistencies, gaps and other defects in the record and any related concerns around accuracy. This will include proven omissions and errors in the record and can also include concerns around the actual physical quality of the police record itself (i.e. the record is illegible or inaudible).[2] In this case, Mr. Mudenda argues that there are errors and omissions although there is no argument that the physical quality of the police record prevents meaningful scrutiny;

3. Reasons given by the police, if any, for not creating a more reliable recording; and

4. Evidence of other improper conduct.

[44] I review these matters separately below but, at the risk of repetition:

1. These matters represent a possible list of relevant considerations – not a comprehensive catalogue. As important, no one matter is necessarily determinative and they are frequently interconnected. For example, the form of the record is often connected with the nature of the exchange. Failing to create a reliable, electronic recording of a formal, in-custody interview will attract considerable suspicion. This was a key point in the seminal cases of Moore-McFarlane, Ahmed, and White;

2. Voluntariness demands a more holistic assessment which will discern the collective significance and combined impact upon the core principles (fairness and reliability) and related factual issues (inducements, threats, promises, oppression and trickery). In short, the

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[2] Compare:

1. *R. v. Hurley*, 2006 NSCA 104 ("***Hurley***") where the controversy surrounding the sufficiency of the record centred around the quality of the videotape including, for example, the fact that the accused's face (or facial expressions) could not be seen for crucial parts of the interrogation. There were related concerns about the Court's inability to properly assess the interrogating officer's position and body language in relation to the accused. The Court of Appeal confirmed that there was nothing in the actual evidence which confirmed oppressive conditions or anything else that might contaminate the voluntariness of the videotaped statement. Rather, the judge committed a legal error by excluding evidence "solely because of the poor quality of the video recording which he speculated to be inherently dangerous." (at para 22); versus

2. *R. v. Yryku*, 2022 ONCJ 342 ("***Yryku***"), the Court described the sound quality of the recording as "abysmal" and concluded that only about 50% of the recording was audible. This concern combined with the fact that the police officer only took "bare notations" in a "note taking template" led the Court to conclude that the Crown failed to prove voluntariness "because the insufficient record prevents meaningful scrutiny of the entire interaction between the officer and [the accused]." (at para. 12)

> Court's discretion is exercised in a manner that is nuanced, flexible, sensitive to the principles that drive the voluntariness assessment and responsive to the evidence as a whole.

Method and Timing of the Record

[45] That said, when the police take an accused into police custody and formally interrogate without using otherwise available recording equipment, the police record is treated as inferior and with suspicion. Without the solidity of an accurate recording, the accused person should not be unnecessarily left exposed to the elusive and potentially prejudicial contents of the interrogator's own notes and memories.

[46] In *Moore-McFarlane*, Charron, J.A. concluded that:

> … where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation *suspect*. In such cases, it will be a matter for the trial judge on the voir dire to determine whether or not a sufficient substitute for an audio or video tape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt." (at para. 65, emphasis in decision)

[47] Charron, J.A. further found that the evidence presented by the Crown (including the police decision not to create a proper record combined with vague testimony from the investigating officers) cast serious doubt around the credibility of the investigating officers and, in any event, fell far short of what was required by the Crown when seeking to establish voluntariness. The statements were inadmissible, and a new trial ordered.

[48] Similarly, in *Ahmed* Feldman, J.A. wrote that:

> The reason our courts have focused so heavily on the desirability of recording the interactions between police officers and accused persons upon arrest, is to avoid these credibility contests at trial on the crucial issue of whether any coercion, oppression or inducement led to the accused to make the impugned statement. This court held in Moore-McFarlane that as long as recording equipment is available, the failure to record will generally preclude a finding of voluntariness, except in the circumstance where the police officer did not set out to interrogate the suspect. Consequently, the question of the officer's intention is also a critical one on the *voir dire*. Therefore, where there is no recording, and the issue of the officer's intention is in dispute, that is one of the circumstances where the trial judge must carefully analyze the conflicting evidence and give reasons which clearly explain why the judge either accepts the evidence of the police officer or officers, or conversely,

> why that evidence is rejected or is insufficient to satisfy the judge beyond a reasonable doubt. (at para. 19)

See also *White* at para. 25.

[49] Here again, there is limited jurisprudence that speaks to possible exceptions. Depending on the circumstances, the lack of a complete audio or video recording may attract serious suspicion and become a serious or insurmountable problem, but it is not inescapably fatal.

[50] In *Ducharme* the accused was identified as the "get-away driver" in a masked armed robbery at a hotel. He was placed in an interview room at the police station for an hour before being interviewed by two detectives from the local Major Crime Unit. One of the two detectives made handwritten notes during the interview. They included a note where the accused confessed to playing a role in the robbery. Immediately thereafter, the accused was taken to another room for a more complete videotaped statement.

[51] The trial judge was troubled by the failure to not videotape the interview from the very beginning. However, after considering all the evidence and exhibits, the trial judge determined that the videotaped statement was voluntary.

[52] The Manitoba Court of Appeal agreed that a videotaped confession is "usually desirable" (at para. 28) and that many appellate courts "have been very critical of the police for failing to provide a neutral, reliable and accurate recording of what transpired when they had the means to do so without difficulty." (at para. 40) However, the Court concluded that "non-recorded interviews need not be automatically treated as suspect" (at para. 28) and ultimately, despite the failure by the police to make a recording, "the trial judge dealt with his dilemma in the only way he could. The concurrent video transcription of confessions is definitely to be preferred. It is, however, not an absolute legal requirement." (at para. 48)

[53] Setting aside issues of credibility, where a properly cautioned, in-custody accused insists on speaking "off-the-record", those statements may still satisfy the requirements of voluntariness even though a more reliable form of recording was easily available. (*R. v. Narwal*, 2009 BCCA 410 ("***Narwal***"))

[54] Finally, the jurisprudence also recognizes the practical realities of police work. An audio or video recording is consistently recognized as preferred but not necessarily essential or reasonably possible. Police officers are obviously not always able to create a perfect and comprehensive record of every exchange with every accused person. Contemporaneous, verbatim notes prepared by the interviewing

police officer would be the "next best thing" but, again, are not necessarily determinative. In terms of reliability, notes or summaries which are not necessarily verbatim but created shortly after the accused's statement are next in line. Depending on the circumstances, they may also be deemed sufficient if there are no other facts which cast reasonable doubt as to voluntariness. (*R. v. Menezes*, 2001 CarswellOnt 3374, [2001] O.J. No. 3758 (Ont. SCJ) ("***Menezes***") at paras. 26 – 28; *Narwal* at paras. 39 and 51; *R. v. Pauls*, 2020 ONCA 220 at para. 90; *Calder* at para. 25; *R. v. Glasgow*, 2022 NSSC 298 ("***Glasgow***") at para. 40)

[55] In short, the Courts recognize that there is a balance to be struck between voluntariness and reasonable accommodations which allow police to prevent, detect and investigate crime. Notes made during or shortly after the accused's statement may suffice, depending on the circumstances. Thus, in *Calder*, Bryson, J. (as he then was) explained:

> … If the burden on the Crown was to produce a verbatim record of every statement which it was sought to adduce, the burden could often never be met. Moreover, it would have been an impossible standard in a pre-electronic age. This is why context is important. It is one thing for a suspect under close police scrutiny to be interviewed with the benefit of a contemporary recording. It is quite another to demand this standard in other circumstances and settings such as occurred in this case. (at para. 25)

I acknowledge that Bryson, J. made this comment in a case where the impugned statement was not taken by police officers. Nevertheless, it properly recognizes that when scrutinizing alleged problems with the physical form of the police record, the Court may take certain practical realities into account.

Prevailing Circumstances at the Time of the Statement

[56] The cases around voluntariness also consider the circumstances under which the accused's statement was made. As indicated, whether the accused was properly cautioned and under arrest is relevant. In doing so, the Court considers whether the police set out with the intention to obtain a statement (i.e. conduct a formal interview) or, alternatively, whether the accused volunteered information without prompting from the police.

[57] The degree to which the accused was under police control is also significant. Generally speaking, the extent to which the police should prepare a clear and comprehensive record of their interactions with an accused is directly proportionate to the degree of power and control which the police wield over the accused at the time and, as well, whether the police intended to extract a statement from the accused

at the time. Records of unprompted or spontaneous statements made by an accused to the police in the middle of street prior to an arrest typically attracts less scrutiny than statements made by an in-custody accused person during a more formal interview process. Compare:

1. *Moore-McFarlane, Ahmed*, and *White* where the statements were given by an accused detained in a police station. Significantly, these cases all involved an in-custody interrogation where the police chose not to use readily available recording equipment. The accused's statement was deemed involuntary and inadmissible. I return to that issue below.

2. By contrast, in *Marshall,* the accused made statements to the police on May 6, June 9, 26 and 27 and July 10, 1997. With respect to the June 26, 1997 statement, only the first part of the accused's conversation with police was tape-recorded. Moreover, one of the officers who was present for the June 27, 1997 interview did not testify on the *voir dire*. Borins, J.A. dismissed the accused's appeal that challenged the trial judge's determination that these two statements were voluntary. Borins, J.A. pointed specifically to the fact that none of these challenged statements were given during a "custodial interrogation". Moreover, the only custodial interrogation was fully recorded electronically. Thus, even though the police intended to take statements from the accused on June 26 and June 27, 1997, there was no evidence that more reliable methods of recording were available. The Court referred to the decision in *Oickle* and *Moore-McFarlane* and concluded that:

> … the failure to record interrogations does not render them inherently suspect. Rather, a non-recorded interrogation becomes suspect when the following circumstances, which do not exist in this case, are all present: (1) the suspect is in custody; (2) recording facilities are readily available; and (3) the police deliberately interrogate the suspect without giving any thought to making a reliable record. The only custodial interrogation of the appellant took place after his arrest on September 29, 1997. It was completely recorded on videotape. In my view, the finding that the five impugned statements were voluntary was not tainted solely because they were not audio or videotaped, or because some of the attending officers did not testify on the *voir dire.* (at para. 98)

3. In *R. v. Groat*, 2006 BCCA 27 ("***Groat***") the police attended at the accused's residence in response to a 911 call concerning a possible break and enter. Upon arriving, one of the officers smelled cannabis and began to question the accused. During that exchange, the accused took responsibility for a significant number of cannabis plants being grown in the basement. He also consented to a search of the home. Similarly, in *R v. Remley*, 2024 ONSC 543 ("***Remley***") the accused made statements to a patrol police officer in the course of an unintended encounter during the so-called Ottawa Freedom

Convoy of 2022. In these cases, the accused's statements were found to be voluntary beyond a reasonable doubt.

Gaps, Inconsistencies, Errors and Omissions in the Police Record

[58] Police records or notes may also be vulnerable to attack for inconsistencies, gaps, and lack of care – particularly where these notes are offered as substitutes for a more reliable, accessible form of electronic recording. In *Ahmed*, the Ontario Court of Appeal observed that:

> The reason our courts have focused so heavily on the desirability of recording the interactions between police officers and accused persons upon arrest, is to avoid these credibility contests at trial on the crucial issue of whether any coercion, oppression or inducement led to the accused to make the impugned statement… (at para. 19)

[59] Similarly, in *White*, the Ontario Court of Appeal expressed concerns regarding the notes taken by the interviewing police officers, including the failure to have the accused sign notes containing inculpatory statements. (at paras. 12 – 14)

[60] As indicated, it is not always necessary or reasonably practicable to create a verbatim record of the exchange. However, even in those circumstances, failure to record basic information as comprehensively as possible may be subject to criticism.

[61] The decision of *R. v. Belle*, 2010 ONSC 1618 involved a statement given to bailiffs; however, the following comments by Trotter, J. resonate with even great force when police officers are involved:

> … I find the record completely unsatisfactory. Beyond the issue of audio or video recording, there was not even rudimentary note-taking. The interactions between [the accused] and the bailiffs at the initial meeting at [the accused's] home were not recorded in any reliable sense. Moreover, the evidence of the two bailiffs was conflicting. Both conflicted with [the accused's] evidence. [One of the bailiffs] was contradicted by some of his evidence at the preliminary inquiry. I am unable to determine with any degree of certainty what was said to [the accused] by the bailiffs, and the exact statements made by [the accused] to the bailiffs. This problem is significantly more acute in relation to the 15 to 20 phone calls that transpired between [one of the bailiffs] and [the accused] between the first meeting at his home and June 29, 2006, when things came to a head. This set of conversations was referred to in great generality by [one of the bailiffs]. I was not pointed to anything that was actually an admission, let alone anything that purported to be a direct quote from [the accused]. On this record, I am not satisfied beyond a reasonable doubt that anything that [the accused] said during these conversations was free and voluntary. (at para. 45)

Police Explanation

[62] The police explanation for not using a more reliable form of recording (having regard to the exigent circumstances) may become a relevant consideration.

[63] As mentioned, where the police choose to conduct an in-custody interview of an accused without using readily available recording equipment, the resulting inferior record (e.g. police notes in the place of an actual videorecording) will be approached with suspicion.

[64] However, the police may offer an acceptable reason for the lack of a more reliable record. Those reasons may be sufficient to prove voluntariness beyond a reasonable doubt. For example, an accused engaged in a videotaped interview while in police custody may offer to speak "off the record", at which time the conversation continues outside the room. In these types of cases and presuming there is no other evidence which undermines voluntariness, the Court has found voluntariness to be proven beyond a reasonable doubt. (See also Narwal; R. v. Letendre, 2017 SKCA 99 ("Letendre"); and R. v. Paradis (1976), 38 C.C.C. (2d) 455 (Que. C.A.) ("Paradis") at pp. 457 – 459)

[65] There are other circumstances in which an in-custody accused provides statement to the police which are not persevered on a reliable recording device, even though that technology may be readily available. In these circumstances, the explanation provided by the police provides helpful context which may eliminate any reasonable doubt.

[66] In *Glasgow*, the accused was charged with second degree murder. He made certain statements to police officers while in custody at the Toronto South Detention Centre. The accused initiated the exchange while the officers were taking a DNA sample pursuant to a DNA warrant. The police did not intend to take a statement from the accused at the time and did not intentionally bypass the use of readily available recording equipment. Immediately upon the accused starting to make statements to the police, the officers read the appropriate caution. They also began taking contemporaneous notes. It was agreed that the notes were not a verbatim record of the accused's exchange and that an audio or video recording would have been preferable. Nevertheless, Arnold, J. concluded that the Crown had proven voluntariness beyond a reasonable doubt. (See paras. 30, 38 and 60)

[67] The more exacting standards expected when the police create a record of in-custody statement may not be as strictly applied where the accused makes statements prior to being arrested. (*Remley* at para. 48)

Evidence of Other Improper Conduct

[68] Evidence of improper conduct will have a significant bearing on the Court's decision regarding voluntariness. In *Moore-McFarlane*, the accused alleged that he had been coerced into confessing and was interrogated while naked. The police denied physical violence and countered that the accused was not naked but agreed that he was questioned while wearing only underwear and socks. They stated that his clothes were seized for forensic testing. (at paras. 7 and 19) The Court was critical of police conduct in these circumstances concluding that: "Even on the Crown's evidence, taken at its highest, a serious issue arose as to the propriety of leaving a suspect scantily clad in his underwear and socks during the course of an interview with the police." (at para. 73)

[69] That said, as indicated above, there is limited jurisprudence suggesting that the issue may be contextual. In *Ducharme*, the accused was charged with armed robbery. During an unrecorded, in-custody police interview, the accused testified that he was beaten and subjected to oppression. (at para. 18) Nevertheless, the trial judge determined that the accused's statement was voluntary. The Manitoba Court of Appeal concluded that the trial judge made:

> … a careful assessment of the credibility of the appellant, but he did more than that. He determined the admissibility of all that was said to the officers, and addressed all of the testimony and all of the exhibits that were produced by the Crown and the defence, including the evidence related to the preliminary interviews that were not electronically recorded, before coming to the conclusion that he was satisfied beyond a reasonable doubt that all statements and confessions by the appellant were voluntarily made. The only hesitation expressed by the trial judge concerned the regrettable failure by Sutherland and McMillan to videotape the preliminary interview in the same way as they did with the final confession… (at para. 25)

[70] The Court confirmed the desirability of electronic recording and emphasized that any argument against that practice was "inconceivable". (at para. 46) However, in the unique circumstances of this case, the Court dismissed the accused's appeal on voluntariness as a matter of credibility. It concluded that:

> … we should not meddle with the judge's conduct of the voir dire or his declaration of voluntariness. The right questions were asked. The findings of fact and credibility were reasonably made. The correct standard of proof was applied. There is no room for appellate intervention unless we hold that the contemporaneous recording of the preliminary interview at the Winnipeg Police Service building was a legal requirement. (at para. 26)

[71] *Ducharme* was an exceptional case which emphasizes the importance of context. Generally speaking, the weight of subsequent jurisprudence suggests that the police should take every reasonable step to avoid credibility disputes between themselves and the accused – and must accept the consequences of having an accused's statement deemed inadmissible where they fail to do so. The rationale is clear. The ability of an accused person to create a record of interactions with the police is often compromised. By contrast, police officers often have the ability and capacity to create a more reliable record. The party who is in the best position to prevent a credibility contest should take reasonable steps to avoid that risk. Thus, in *Ahmed*, the Court framed the key questions as follows:

> … whether in the circumstances of the case the failure to record the interrogation made it suspect; and
>
> … whether the Crown had provided a sufficient substitute for a recording. (at para. 22)

[72] As a final comment before applying the law to the facts of this case, I note that statements to a person in authority which are deemed to be voluntary may still be excluded under the rules of evidence. In *R. v. Park* (1981), 59 C.C.C.(2d) 385 (S.C.C.) ("***Park***"), Dickson, J. (as he then was) confirmed that a voluntary statement by an accused to a person in authority may be deemed inadmissible where, for example, the prejudicial effect overcomes any probative value. He wrote:

> In every case in which the Crown seeks to adduce evidence of a statement made by an accused, there must, by definition, be "some evidence" that the statement was made. This evidence exists by virtue of the fact that a police officer (or other "person in authority") is seeking to tender direct evidence of the making of the statement. Whether or not the officer is to be believed, and the weight to be given to the statement, is a matter for the trier of fact. The special rules of evidence relating to statements made to persons in authority flow from the concern of the Courts to ensure that such statements are made voluntarily. Once the issue of voluntariness is resolved, normal principles of evidence apply. The fact that the testimony of the police officer is contradicted by the accused cannot affect the admissibility of the officer's evidence. Where there are conflicting versions of what was said by the accused, the jury will decide which is to be believed. There is no necessity for a voir dire on this issue. (at p. 395)

[73] For example, in *R. v. Ferris*, 1994 CarswellAlta 328, 1994 CarswellAlta 750, [1994] 3 S.C.R. 756 ("***Ferris***"), a police officer overheard the accused say: "I killed David". There was no issue as to voluntariness. However, applying the more general rules of evidence around admissibility, Sopinka, J. concluded that the meaning of the brief statement, without context: "… was so speculative and its

probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value." (at para. 2)

FACTS AND APPLICATION OF THE LAW

[74] The facts surrounding the impugned statement are not particularly controversial although I note the evidence before me of Constable Holland and Constable Perrault, the two officers present when the impugned statement was given. Mr. Mudenda did not testify. I make nothing of Mr. Mudenda's decision not to provide evidence. That was clearly his right and is his ongoing right to the presumption of innocence.

[75] I make the following findings of fact for the purposes of this *voir dire*:

1. The alleged assault occurred on Thursday, March 24, 2022;

2. At 9:33 a.m. on Monday, March 28, 2022, Constable Stephanie Holland and Constable Dawn Perrault spoke to Ms. McGill. The interview occurred at the home of Ms. McGill's parents, where she moved after the alleged assault. Ms. McGill told Constables Holland and Perrault that her domestic partner, the accused Lwiimba Mudenda, assaulted her and, during the course of the assault, broke her arm. Constable Perrault recorded this interview using an audio recording device which she had recently purchased. At this time, Constable Perrault testified, the Halifax Regional Police did not provide patrol officers with mobile recording devices;

3. At 11:33 a.m. on March 28, 2022, Constable Holland and Constable Perreault attended at the Apartment to speak with Mr. Mudenda. Mr. Mudenda was not home. They called Mr. Mudenda who said that he would be home within the hour and that he was willing to speak to police. Constable Holland read Mr. Mudenda the following police caution while on the phone:

> You need not say anything. You have nothing to hope from any promise or favour; and nothing to fear from any threat whether or not you say anything. Anything you do say may be used in evidence.

4. At 1:24 p.m. on March 28, 2022, Constable Holland and Constable Perrault met Mr. Mudenda at his apartment on Rosedale Avenue. They intended to take a statement from Mr. Mudenda or hear his "side

of the story" if he was prepared to speak with them. That said, Constables Holland and Perrault already concluded that they had reasonable and probable grounds to arrest Mr. Mudenda in any event. Constable Holland referred to the Halifax Regional Police Policy which, she said, directed that an arrest be made in incidents that involved alleged domestic violence. That said, she did not recall advising Mr. Mudenda that she already had reasonable grounds to arrest;

5. Before proceeding to interview Mr. Mudenda, Constable Holland read (for the second time) the same police caution quote above. Mr. Mudenda specifically stated that he understood the caution and began to recount his version of the events on Thursday, March 24, 2022 to Constables Holland and Perrault. Constables Holland and Perrault testified that Mr. Mudenda seemed anxious to provide the police with his version of the events. He walked the police around the Apartment, in a form of re-enactment;

6. Even though Constable Perrault had a mobile recording device which she used to interview Ms. McGill, she did not use it when interviewing Mr. Mudenda. The officers did not discuss using this device when interviewing Mr. Mudenda. There was no evidence to suggest that the police officers deliberately chose not to create an audio recording of Mr. Mudenda's statement. I accept the officers' testimony that they began speaking with Mr. Mudenda and simply did not give it any further consideration. In other words, I accept that the failure to use the recording device was forgetful and careless, but not part of a deliberate plan;

7. Similarly, there is absolutely no evidence to cast doubt on the circumstances under which Mr. Mudenda gave his statement. Constable Holland and Constable Perreault testified that the atmosphere was not aggressive. No interrogation strategies or investigative techniques were used. The police simply let Mr. Mudenda speak;

8. Mr. Mudenda spoke with an accent but the entire exchange with police occurred in English. There was no evidence of any miscommunication or misunderstanding due to language barriers;

9. Mr. Mudenda recounted the events of March 24, 2022, walking through the Apartment with the police officers in a form re-enactment. Neither Mr. Mudenda's statements to Constable Holland nor Constable Perrault included the details:

    a) Ms. McGill had ripped the Wi-Fi modem out of the wall and he went into his office, which was locked.

    b) Ms. McGill started banging on the office door, breaking the handle off the door.

    c) Mr. Mudenda then opened the office door.

    d) Ms. McGill entered the office with a knife and walked toward his computer, threatening to cut the cords to the computer.

    e) Mr. Mudenda grabbed the knife from Ms. McGill causing a cut on his palm.

    f) Mr. Mudenda and Ms. McGill both fell over sideways during the struggle to get the knife from her. On this, Mr. Mudenda did not know how McGill broke her arm although he did recall they both fell at one point during this interaction;

    g) Ms. McGill scratched his chest and pushed and slapped him.

10. Constables Holland and Perrault left the Apartment to speak with Ms. McGill a second time. They had additional questions for Ms. McGill which arose out of the information provided by Mr. Mudenda.

11. Later that same day (March 28, 2022), they returned to the Apartment and arrested Mr. Mudenda for assault causing bodily harm. Shortly thereafter, at about 5:00 p.m., Mr. Mudenda exercised his right to speak with counsel.

[76] With respect to the records created by the police memorializing their discussions with Mr. Mudenda in his Apartment beginning at about 1:24 p.m. on March 28, 2022:

1. Constable Holland made some basic handwritten notes in her notebook after the fact. Within a few hours of meeting with Mr. Mudenda (after his

arrest), Constable Holland created a more comprehensive written record of the exchange with Mr. Mudenda in a General Occurrence Report which was saved in the Halifax Regional Police database. She testified that it was not verbatim but it was an accurate record of what Mr. Mudenda told the officers. Constable Holland knew that Constable Perrault had an audio recording device on her person and used to it create an audio record of her discussion with Ms. McGill; and

2. Constable Perrault testified that she had a "clear and genuine" recollection of the events although she also agreed that she read Constable Holland's General Occurrence Report in preparing to testify. Constable Perrault did not make notes in her notebook and did not prepare her own General Occurrence Report. She acknowledged that this was a mistake to leave notetaking to Constable Holland who she described as the "lead investigator". Although Constable Perrault made an audio recording of the interview with the complainant Ms. McGill, she did not use it to record Mr. Mudenda's version of events.

[77] There were details which arose during Constable Holland's testimony that were not included in her original General Occurrence Report including:

1. She did not recall Mr. Mudenda playing videos showing previous disputes or confrontations with Ms. McGill. However, she did recall him saying that Ms. McGill was violent towards Mr. Mudenda in the past;

2. She accepted that Mr. Mudenda also spoke to her about Ms. McGill damaging the television in the Apartment;

3. She recalled that the doorknob to the office was broken;

[78] Counsel for Mr. Mudenda makes the following specific points in support of the argument that the Crown failed to prove voluntariness beyond a reasonable doubt:

1. Constables Holland and Perrault used a device to audio record their interview with the complainant. However, they did not use that device when interviewing the accused. Mr. Mudenda argues that this "must lead to an adverse inference." (Post-hearing submissions filed February 20, 2024 at para. 14);

2. Constables Holland and Perrault "failed to take any notes during their interview of Mr. Mudenda … despite being issued with notebooks and aware of the importance of recording accurate and contemporaneous notes." Mr. Mudenda argues that, again, this "must lead to an adverse inference." (Post-hearing submissions filed February 20, 2024 at para. 15)

3. Constables Holland and Perrault "did not record and could not recall the questions they asked our client, they nature of the questions and how they were phrased. Their evidence upon these issues was limited and lacked detail." (Post-hearing submissions filed February 20, 2024 at para. 16)

4. Constables Holland and Perrault "gave conflicting evidence". Moreover, Constable Perrault's testimony specifically is "contaminated and not reliably [sic.]" (Post-hearing submissions filed February 20, 2024 at para. 17)

[79] More generally, counsel for Mr. Mudenda submits that:

> The overall lack of reliability of the officer's evidence when combined with their failure to record our clients statement means that there is only conclusion that can be drawn - there is an insufficient record as to the circumstances surrounding the taking of our client's statement. As such our clients' statements cannot be said to be voluntary. (Post-hearing submissions filed February 20, 2024 at para. 18)

[80] I agree with counsel for Mr. Mudenda that there are troubling aspects to the Crown's position on voluntariness. They include:

1. The police intended to take a statement from Mr. Mudenda and yet lost what was otherwise a reasonably simple and available opportunity to create a better record of Mr. Mudenda's statement. Both Constable Holland and Constable Perrault agree that this would have been "best practice". The failure to make an audio recording of Mr. Mudenda's statement is problematic in this case given that:

    a. Constable Perrault had a recording device on her person and used it earlier in the day to record Ms. McGill;

b. The purpose of attending at Mr. Mudenda's Apartment on March 28, 2022 was specifically to take his statement or hear his version of events; and

2. There were omissions in Constable Holland's notes and the General Occurrence Report created shortly after Mr. Mudenda made the impugned statements. It is notable that the omissions include potentially exculpatory details regarding allegations that Ms. McGill was capable of past violent outbursts; and

3. Constable Perrault failed to make any meaningful notes of the interaction with Mr. Mudenda. It is difficult to see her evidence as little more than derivative of the information contained in Constable Holland's notes and General Occurrence Report.

[81] Constable Holland and Perrault already concluded that they had reasonable and probable grounds to arrest Mr. Mudenda before taking his statement on March 28, 2022.

[82] In my view, these problems cast a dark cloud of suspicion over the voluntariness of Mr. Mudenda's statement on March 28, 2022. However, the evidence before me is sufficient to dispel these clouds. Based on the totality of the evidence before me, I am satisfied that the Crown has proven voluntariness beyond a reasonable doubt.

[83] First, Mr. Mudenda was cautioned twice prior to providing the statement in question.

[84] Second, at the time of making the statement, Mr. Mudenda was not under arrest, was not in police custody and was not at the police station in an interview room. He was at his Apartment.

[85] Third, Mr. Mudenda's statement was exculpatory. A different perspective may be brought to bear if the police extracted an inculpatory confession.

[86] Fourth, Constable Holland made basic handwritten notes and inputted a more thorough General Occurrence Report in the police database within a few hours of Mr. Mudenda making his statement. I am not satisfied that there was any appreciable delay in creating the General Occurrence Report or that Constable Holland could somehow have accessed the police database at an earlier time. That said, the failure

to take more comprehensive notes during the interview with Mr. Mudenda was not best practice and I return to that issue below.

[87] Fifth, there was absolutely no evidence of any inducement, threats, promises, oppression or police trickery. There was absolutely no evidence of any unfairness or an undermining of Mr. Mudenda's ability to make a meaningful choice as to whether he should speak with Constable Holland and Constable Perrault on March 28, 2022. The evidence does not even allude to any such prejudice. I find as a fact that Mr. Mudenda made his statement in an environment that was calm, non-threatening and mutually respectful. There would obviously be a degree of nervousness when police appear to ask questions about an alleged assault. However, there was absolutely nothing in the evidence that would trigger a concern that Mr. Mudenda was subjected to some form of improper external influences or police tactics when giving his statement.

[88] Sixth, and turning to the crux of the matter, I agree that Constable Perrault's failure to use the audio recorder is problematic particularly where the police had already concluded that there were reasonable and probable grounds to arrest Mr. Mudenda and where they were in his Apartment with the specific intention of hearing his "side of the story".

[89] As indicated above, failing to create an electronic recording when that technology is readily available will cast suspicion over the accused's statement. There are two primary complaints:

1. Police failure to create a more reliable record was designed to conceal improper police interaction and/or preclude judicial review of improper police interaction or, at a minimum, casts sufficient suspicion over the circumstances in which Mr. Mudenda gave his statement as to create a reasonable doubt around voluntariness; and

2. Police failure to create a more reliable record unjustly exposes Mr. Mudenda to an incomplete and inaccurate record of his March 28, 2022 statement when his ability to create a more accurate record was, at the time, compromised.

[90] As to the first complaint, I do not agree with Mr. Mudenda's suggestion that the police deliberately chose to not record their interactions with Mr. Mudenda. I listened carefully to the testimony of Constable Holland and Constable Perrault. Defence counsel asked (and the constables confirmed) that "no consideration" was given to using the audio recording device. That admission does not equate with an

intentional plan or design and there is no evidence that the police were employing the sort of recording strategies used in *Moore-McFarlane*, *Ahmed*, *White* or even *Ducharme*. Having considered the police testimony, I am satisfied that the failure to use Constable Perrault's personal recording device when taking Mr. Mudenda's statement was careless - not strategic and not intentional.

[91] While it is significant that the police did not deliberately fail to create a more reliable record, police carelessness should not be considered a complete defence. The Crown must prove voluntariness beyond a reasonable doubt. That heavy burden is not discharged (and the police are not automatically excused) simply because the police record is the product of carelessness – not deliberate strategy. At the same time and in my view, an accused cannot insist that reasonable doubt be automatically inferred particularly where the evidence reveals an absence of (or dispels concerns around) issues which cast suspicion around the principles and factors that ground voluntariness.

[92] In this case, I am satisfied that, despite the police failure to create a more reliable record when it was reasonably possible to do so, the Crown has proven voluntariness beyond a reasonable doubt. My reasons include:

1. Again, in the circumstances, I have no evidence that police failure to audio record Mr. Mudenda at his Apartment engages any concern around the core policy issues or factual considerations which animate the voluntariness analysis;

2. Constable Holland did create some handwritten notes and, more importantly, prepared a more comprehensive General Occurrence Report within about 2 hours of Mr. Mudenda making his statement. I recognize that this method of notetaking is neither verbatim nor ideal. And I recognize that there is evidence of gaps in the police record and these gaps relate to matters which favour Mr. Mudenda. For example, the police acknowledge that Mr. Mudenda told them that the complainant herself was capable of violent outbursts. These statements were not included in the General Occurrence Report. See para. 80 above. However, in my view, these are the sort of deficiencies that go to weight and not admissibility. On this, again, Mr. Mudenda's statement was generally exculpatory – not inculpatory. I also note that the police do not deny or seek to somehow diminish or conceal the gaps in Constable Holland's General Occurrence Report in a way which would heighten the Court's suspicion. On the contrary, they seek to dispel any such concerns by admitting and agreeing that Mr. Mudenda made the additional statement. To the extent there are any residual

> inconsistencies, they are minor. In short, there are gaps in the police record but they do not raise a reasonable doubt around voluntariness. They may raise an issue as to weight.

[93] As to the second complaint (police failure to create a more reliable record unjustly exposes Mr. Mudenda to an incomplete and inaccurate record), this concern again goes to weight, in my view. While of lesser importance, I also repeat the Crown's representation that it will not be calling Constable Holland or Constable Perrault to provide sworn testimony as to Mr. Mudenda's March 28, 2022 statement as part of its evidence in chief. Rather, the Crown states that it will only put Mr. Mudenda's March 28, 2022 statement to him in cross-examination – if Mr. Mudenda decides to testify. The fact that Mr. Mudenda is not being compelled to respond to sworn evidence regarding his statement as part of the Crown's evidence in chief is of some relevance when assessing this particular form of potential prejudice to Mr. Mudenda.

[94] Finally, I refer to Mr. Mudenda's counsel submission that the Court "must" draw an adverse inference from the police failure to create an audio recording of Mr. Mudenda's statement. Mr. Mudenda did not provide any caselaw in support of this proposition or the drawing of adverse inferences in these circumstances.

[95] I could not find any law that suggests the Court "must" draw an adverse inference in these circumstances. However, there is jurisprudence arising from complaints around the sufficient of the police record which refers to adverse inferences.

[96] In *R. v. LaFrance*, 2004 ONCJ 302 ("***LaFrance***"), Renaud, J. states that *Moore-McFarlane* "does not support the view that an adverse inference must be drawn by the Court as to the actions and motivations of the police investigator(s) prior to the rejection of the proffered statement(s) based on grounds suggesting an inadequate record." (at para. 65) Renaud, J. declined to draw an adverse inference in that case.

[97] In *R. v. Rajab*, 2004 CarswellOnt 6394, [2004] O.J. No. 5795 ("***Rajab****")*, Horkins, J. similarly declined to draw an adverse inference on the basis of an inadequate record. He found that:

> … The maintenance of an adequate record of all of the circumstances leading up to an accused's statement to the police is a matter within the complete control of the authorities and therefore a failure to maintain an adequate record may permit the Court to draw an adverse inference with respect the voluntariness issue. In some

> circumstances, a Court might infer that evidence of inappropriate conduct was being suppressed. (at para. 23)

[98] In *R. v. Turpin*, 2005 BCSC 376 ("***Turpin***"), Ehrcke, J. accepted the possibility of drawing an adverse inference based on the police failure to record but again concluded that the evidence in that case did not support the requested inference. He wrote:

> On the facts of the present case, there is no reason to draw an adverse inference from the failure of the police to record. There is no suggestion that the police mistreated Mr. Turpin or that such mistreatment might have been captured on a videotape. There is no suggestion that there were promises, inducements, or threats that the police have not revealed in their testimony. Although a videotape might have provided some evidence of the accused's degree of intoxication, the court has the evidence of the police officers of their observations and I can find no reason to treat their testimony as inherently suspect. (at para 52)

That same conclusion was accepted in *R. v. Chen*, 2014 BCSC 1575 ("***Chen***") at para. 53. A similar conclusion was reached in *R. v. Chamberlain*, 2003 MBQB 209 at para. 34 ("***Chamberlain***").

[99] I make the same finding here. There is absolutely no evidence to suggest that Mr. Mudenda was subjected to any of the improper external influences that drive the core principles (fairness and reliability) or main factual considerations (inducement, threats, promises, oppression or trickery) that drive the voluntariness analysis.

CONCLUSION

[100] The application is allowed. The Crown has proven that Mr. Mudenda's March 28, 2022 statement was free and voluntary, beyond a reasonable doubt.

Keith, J.