SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Glasgow*, 2022 NSSC 298

Date: 20221020
Docket: CRH-495911
Registry: Halifax

Between:

His Majesty the King

v.

Devlin Tyson Glasgow

DECISION ON STATEMENT DURING TAKING OF DNA SAMPLE

Judge:	The Honourable Justice Joshua Arnold
Heard:	August 2 and 5, 2022, in Halifax, Nova Scotia
Counsel:	Rick Woodburn and Sean McCarroll, for the Crown D. Sid Freeman, for the Devlin Glasgow

Overview

[1] Devlin Glasgow is charged with the first-degree murder of Matthew Sudds. The Crown wants to introduce at trial a statement made to persons in authority while the police were obtaining a sample of his DNA. Mr. Glasgow says that the Crown has not proven that the statement was voluntary, that its probative value is outweighed by its prejudicial effect, and that because it was not video recorded it is inadmissible. Mr. Glasgow has not made a *Charter* application in relation to the admissibility of the statements, but he says the admission must nevertheless be viewed through a constitutional lens. This is the decision arising out of the *voir dire* on the statement.

Facts

[2] On November 30, 2016, at 9:00 A.M., Detective Constable Kurt Walsh and Sergeant Tony Blencowe (now retired) attended at the Toronto South Detention Centre to obtain DNA from the Mr. Glasgow pursuant to a DNA warrant. He was then in custody at the facility. The police were placed in a room with him at 9:30 A.M. They were not intending to obtain a statement, as their only purpose in meeting with Mr. Glasogow was to obtain a DNA sample. They did not arrive prepared to take an audio or video recording of anything he might say.

[3] The only evidence on the *voir dire* was that of Sergeant Blencowe. The Crown did not call Detective Constable Walsh, nor any additional evidence. Mr. Glasgow elected to call no evidence.

[4] Sergeant Blencowe testified that when brought into the interview room, Mr. Glasgow "was inquisitive right away. Wanted to know why we were there. We explained to him why we had the DNA warrant, what the DNA warrant was for, and I began the process of reading the DNA warrant to him." Mr. Glasgow continued asking questions, and Sergeant Blencowe "advised him that, if he wanted to talk to us, I was going to give him the caution, that we were there just to collect the DNA. He continued talking, so I did read him the police caution." He said Mr. Glasgow said he "didn't want to talk to counsel." Sergeant Blencowe recited the standard police caution to him.

[5] Sergeant Blencowe testified that he conducted the DNA collection in accordance with the checklist that accompanied the kit and said that the only noteworthy issue was the "pinprick" used to extract blood from the accused's finger wasn't working, and it was necessary to use a new one. He said Mr.

Glasgow's demeanour up to the time of the DNA collection was "very relaxed, like, just chill." When Crown counsel asked about the statements made by Mr. Glasgow, the following exchange occurred:

> Q. Now tell us about this conversation or statements, I guess, made by Mr. Glasgow and when they took place in this whole scenario.
>
> A. For that I would have to refer to my notes. I can give you a generality but, if you want the exact order, I'd have to refer to my notes.
>
> Q. Let's go generality and then we'll go exact order.
>
> A. Okay, so in the generality, he talked about where was his DNA and it was explained to him that it was found in a rental car. His remarks were something similar to "well, that doesn't mean anything, it's…it's in a rental car". And then explained to him, well, this happened at the time period when Matthew Sudds' homicide occurred. And he said, "I wasn't even in Halifax during that time". And then the final part was, I asked him if he had spoken to Ricardo Whynder, who was a co-accused in this particular matter, and I believe he said he didn't even know a Ricardo Whynder.
>
> Q. And when did this conversation take place…in…in kind of like the length…? Do you remember?
>
> A. It was just short like that. It wasn't a very long, we're not talking a very long time. It was just a couple minutes,…I'm good to go, and then he was escorted out.
>
> Q. Now, when you explained about the DNA in the vehicle, tell me about what you explained to him?
>
> A. That somewhere in the vehicle his DNA was found and…just in…inside the car. I don't know if I was specific to whereabouts in the car it was found, it was just that it had been found and identified in the car.
>
> Q. Okay and what was his response to that?
>
> A. Again, he said it meant nothing. He said, "it's just a rental car, that means nothing".
>
> Q. Okay and what was the next…what was the next thing that you said and the next thing that he said?
>
> A. So, the next part would have been DNA in the car, then the comment was about being in Halifax during the date that this murder had occurred.
>
> Q. So how did that come up? So, tell us from what you remember.
>
> A. So, it would have been more or less, "were you in Halifax during this time?" And he says, "no, I wasn't in Halifax during that particular period of time".

> Q. And how…what time was that? What…how…how was that explained to him? What time?
>
> A. Probably would have just said when the murder occurred and…forgive me, I don't know the date of the murder off the top of my head…it was a couple of years prior, but he said, "No, I wasn't in Halifax during this time".

[6] Sergeant Blencowe confirmed that he had read the warrant, including the date of the murder, to the accused before this comment. His direct examination continued:

> Q. Now, with regards to the last…the last, and we're not…I'm not holding you to which one took place first yet, and to the last statement, how did that go down?
>
> A. So, I would have asked him if he'd had any conversations with Ricardo Whynder, um, 'cause Ricardo had been arrested and questioned for this offence prior to us meeting with Mr. Glasgow and he stated that he did not even…didn't even know a Mr. Whynder.
>
> Q. Now were these statements made more than once or…?
>
> A. a…wasn't us sitting down doing a full interview. Like I said, our purpose wasn't to do a full interview, but these were just the little conversations that we had to answer some of the questions and then that was it.
>
> Q. And now, after that conversation, what happened then?
>
> A. So, after everything was done, he called for the guard and the guard escorted him out. We were escorted out. I maintained the sample to December the 1st and gave that as an exhibit to Detective Constable Walsh for his file and to give to the Ident. Officer, who was the main custodian for the exhibits for that file.

[7] At this point during the direct examination Crown counsel asked Sergeant Blencowe if he wanted to refer to his notes of the meeting with the accused. The following exchange occurred between both counsel and the court:

> Q. Okay and would you like to refer to your notes just about the times and time frames?
>
> A. Yes, please.
>
> Q. And you need those to refresh your memory about sequence and, maybe, length of time you were in there?
>
> A. That would be correct.
>
> Q. Okay, just one moment. My Lord?

Justice Arnold: Sure.

Mr. Woodburn: And those are notes that you made on or about…

Justice Arnold: Ms. Freeman, any comment?

Ms. Freeman: I generally don't have an objection to the officer using the notes to refresh the memory, I guess I have some concerns with this particular witness and whether we're refreshing memory or whether it's…recollection recorded, but I'm going to, for now, have no objection and I guess we'll see how it goes. Let's see how it goes.

[8] Sergeant Blencowe went on to elaborate about his evidence, adding specific times for the officer's arrival at the facility and Mr. Glasgow's arrival in the interview room. He also revised his account of the sequence of events:

Q. Alright and with regard to the statements that…that were made, could you just review your notes and tell us whether or not the sequence that you just gave us and the content of the…contents seems to be…line up with your notes?

A. So, as mentioned, when we started he had asked about…kept asking questions, I had advised that his DNA had been located inside a vehicle that was involved with the murder of Matthew Sudds in 2013. He asked, "what vehicle?" and I told him a rented vehicle. He stated, "a rental vehicle? That means nothing." He said he had nothing to do with Matthew Sudds's homicide and wasn't in Halifax in 2013. I asked him if he had spoke with Ricardo Whynder because he was interviewed in 2014. Mr. Glasgow said he didn't know anybody by the name of Ricardo Whynder. Collection was conducted. So, according to my notes, and I said this is why I want to review them, it looks like the collection was conducted afterwards, before the statements…or after the statements, I should say. And once the collection was completed, which was at 9:58, Mr. Glasgow left the room.

Q. And can you tell us…you mentioned in…sequence-wise, you mentioned reading the warrant to him and giving him the reasons that you were there…

A. Yes.

Q. …did that…was that before this…?

A. Yes. So, as soon as he came into the room, I read and explained the DNA warrant to him and provided a copy to him. He declined to call a lawyer, but asked "what if he did not wish to provide a sample?" I read him the portion of the warrant that said we could use reasonable force to obtain the sample. He started asking questions. I informed him that I was executing the warrant and that we could talk under caution if he wanted. The questions pertained to why he wanted his…why we wanted his DNA and where we found his DNA, so which time he was then cautioned and then I answered the questions in that conver…in that order that we just went through.

[9] In concluding direct examination, Crown counsel addressed the officer's use of the notes:

> Q. Okay and reading over your notes there, did that refresh your memory about what actually happened on that particular day?
>
> A. Yes, it did.
>
> Q. Okay and did it happen in that order as…as…?
>
> A. It would have happened in that order because the notebook would have been with me in the room.
>
> Q. Okay and did this refresh your memory or was there no memory of this and this just helped out?
>
> A. A little bit of both. Prior…before I had the subpoena, I would have had no memory of it, it's been quite a while ago. Once I reviewed the notes and became court prepped, it brought it back.
>
> Q. Okay, so the notes refreshed your memory?
>
> A. Yes.

[10] On cross-examination, Sergeant Blencowe confirmed that his notes were made at the time of the interview, while they were in the room with Mr. Glasgow, other than a notation of the time they finished. Defence counsel focused heavily on Sergeant Blencowe's recall of the procedures followed, the lack of a recording (the officers' lack of preparation to record), suggesting that they should have anticipated the possibility that Mr. Glasgow would make statements relevant to the investigation:

> Q. Surely in the 30 years of experience you'd had prior to executing this warrant, you would have had the experience of unexpected things happening when you interact with accused people.
>
> A. This is the first time it's ever happened on a DNA warrant but, you're right, yes.
>
> Q. And you would have realized that it was eminently possible that Mr. Glasgow may have said something of importance to the investigation during the execution of the warrant?
>
> A. Say that again?
>
> Q. You would have realized that it was eminently possible that Mr. Glasgow may have said something important to the investigation while you were executing the DNA warrant?
>
> A. He may have, or he may not have, you never know.

Q. In other words, you recognized that it was possible that he may have?

A. We weren't expecting any comments whatsoever, hence why we went in the way we did.

Q. But you realized it was possible.

A. Anything's possible.

Q. Couldn't rule it out?

A. Anything's possible.

…..

Q. Knowing that it was possible that Mr. Glasgow may have said something during the execution of the warrant, why not take recording devices?

A. We just didn't.

Q. That's your only explanation?

A. That's my only explanation. Hindsight's wonderful, but that's the only explanation. We just didn't.

[11] Sergeant Blencowe said he did not take his cell phone into the Detention Centre, having assumed that he would not be allowed to take it into a jail, as was the practice in Nova Scotia. Defence counsel went on to inquire about the quality of his notes:

Q. In your notes, which I am looking at as we speak, you do not document, forget about reading him the warrant, for the rest of the interaction, you do not document the words that you say to Mr. Glasgow.

A. I think I document the question I asked him.

Q. Where is that in your notes?

A. I asked him if he had spoke with Ricardo Whynder because he was interviewed in 2014.

Q. 'K, hang on a second. That's the very last, according to your notes anyway, that's the last question you asked him, right?

A. Right, but if you look to the…I read the caution to Devlin Glasgow as he kept asking questions, I advised him that his DNA had had been located inside a vehicle that was involved in a murder…

…

46. I advised him that his DNA had been located inside a vehicle that was involved in the murder of Matthew Sudds in 2013. He asked, "what vehicle?" and I told him, "A rented vehicle" at which point he stated, "A rented vehicle? That means nothing". He said he had nothing to do with

> Matthew Sudds' homicide and wasn't in Halifax. I asked him if he had spoken with Ricardo Whynder because he was interviewed in 2014. Glasgow said he did not anyone by the name of Ricardo Whynder. So, in terms of the questions, I was answering the questions that Mr. Glasgow had asked me and I asked him one follow-up question about Ricardo Whynder.

…

Q. … You indicate, "I read and explained the DNA warrant to Glasgow and provided a copy to him".

A. Yes.

Q. You indicate he declined to call a lawyer?

A. Yes.

Q. You do not document what he said, just what…the summary of what happened.

A. Yes.

Q. Okay, I'm going to suggest to you that what happened was he asked, "What if I don't want to participate?" You told him that you could use force and he said, "Let's just get this over with". Remember that?

A. No, I disagree.

Q. You disagree or you don't remember?

A. I disagree. He would have been read and asked about a lawyer first and he would have declined before we went any further.

Q. Okay, you said he "would have been read" and he "would have declined", which suggests to me you don't remember, you're just going on…

A. I'm going by my notes.

Q. …what you believe probably happened.

A. No, I'm going by my notes and if I say he declined to call a lawyer that means he would have been asked if he wanted to call a lawyer.

Q. It means he would have been asked, but you don't have that…

A. It means he would have been asked to call a lawyer.

Q. That's my point. You're going on what you believe you would have done instead of what's in your notes because there's nothing in your notes. That's the point.

A. I'm going by he would have declined to call a lawyer, which means I would have asked him if he called a lawyer.

Q. You understand my point, right? There's not a single thing in your notes about what you said to him about whether he wanted to call a lawyer, right?

A. If I asked him if he wanted to call a lawyer and if I didn't ask him, why would I write "he declined to call a lawyer"? Obviously, I would have asked him to call a lawyer. It is right in the DNA warrant itself about contacting counsel before…

[12] Defence counsel made much of the fact that Sergeant Blencowe's notes did not set out exactly what he said to Mr. Glasgow, or Mr. Glasgow's exact words. For instance, she queried the lack of the exact words used in reading Mr. Glasgow his right to counsel and the exact words he used in declining. Further, the precise words of Mr. Glasgow's questions were not identified by quotation marks in Sergeant Blencowe's notes. On this point, the following exchange occurred:

A. The questions pertained to why he wanted his DNA…why we wanted his DNA, and where did we find his DNA. He kept asking that question, so I read the caution before I answered. So, for any follow-up that he would say, it was under caution.

Q. And what makes you think now, eight…let me think about this…

A. Six.

Q. …six years later from the taking of this DNA…is it six years later, 2016, right?

A. Almost six years.

Q. Six years later. What makes you now so certain that the questions he was asking, that you failed to document, were of…where was…sorry, what were the questions again that you claim he asked?

A. He asked where we had found his DNA.

Q. Yeah.

A. The exact questions were: "Kept asking questions. I advised him that his DNA had been located inside a vehicle". So, let's go back to the first page: "Devlin kept…started asking questions and I informed him that after I executed the warrant and that we could talk under caution if he wanted. The questions pertained to why we wanted his DNA and where did we find his DNA".

Q. Okay and so, why now six years later, without documentation, are you telling us that those are his questions?

A. Because it's the truth.

Q. How…how is it that you can remember that, is my question.

A. Because I noted it, I wouldn't make false entries into my notebook, and I definitely wouldn't lie on the stand. It's the truth.

Q. Okay, but it's not in your notebook that those are the questions he asked, right?

A. Well, I have it written right here those are the questions he was asking me.

Q. Okay, oh I see, I should have kept reading, my apologies. "Questions pertain to why we wanted his DNA and where did we find his DNA," but you don't document his exact words.

A. That's correct.

Q. Okay, got you. Okay. Let's go to the next page. Okay, you then have…you then indicate that you advised him that his DNA had been located inside a vehicle that was involved in the murder of Matthew Sudds in 2013, right?

A. Correct.

Q. You have him saying he asked, "what vehicle?", right?

A. Yes.

Q. You didn't document his exact words there.

A. He just said, "what vehicle?". It wasn't a long conversation.

Q. Not in quotes, is it, in your notebook?

A. No, but I don't quote a lot in my notebook, but go ahead.

Q. "And I told him a rented vehicle," right?

A. Yes.

Q. "He stated quote, "a rented vehicle, that means nothing," end quote.

A. Yes.

Q. So, at some point in your notebooks…your notebook, you did make an exact note about the words Mr. Glasgow actually spoke.

A. Correct.

Q. That one time. Right?

A. Correct.

[13] Sergeant Blencowe agreed that he had not quoted in his notebook the exact words said by Mr. Glasgow that "He said he had nothing to do with the … with Matthew Sudds' homicide and wasn't in Halifax in 2013." Counsel moved on to the question asked of Mr. Glasgow by Sergeant Blencowe himself:

Q. And then you go on to elicit information from him, asking him if he had spoken with Ricardo Whynder because he was interviewed in 2014. See that in your notebook?

A. I do.

Q. You don't have that in quotes either.

A. No.

Q. I take it that's not exactly what was said?

A. I think I would have asked exactly that, if he had spoke with Ricardo Whynder 'cause he was interviewed in 2014.

Q. You would have?

A. Yes.

Q. I see and, "Glasgow said he did not know anyone by the name of Ricardo Whynder," again, you failed to document the words spoken by Mr. Glasgow.

A. I wrote what I wrote.

Q. We know that at one instance, you did make an effort to capture his exact words when you wrote, "A rented vehicle, that means nothing," right?

A. Correct.

Q. There was nothing preventing you from documenting the exact words that he spoke on the other issues, right?

A. Uh, well I'm going to disagree because I'm obviously…I'm writing at the same time as I'm trying to get a blood collection kit ready, so I am jotting my notes down. I never said at any point did I say they were done verbatim.

[14] Counsel continued to pursue the question of why there were few quotation marks in the notes, to which Sergeant Blencowe answered that he was "writing as quick as I could to get the information down" while also preparing the DNA kit.

[15] As to his state of memory, Sergeant Blencowe agreed that he had "zero memory" of the content of his notes until he received the subpoena. The cross-examination concluded with further detail about his use of the notes:

Q. You testified under oath earlier this morning that before Mr. Glasgow said words to the effect that he wasn't in Halifax at the time of the Sudds homicide, that you would have said, "Were you in Halifax during this time?". Do you remember that?

A. I said that?

Q. Earlier today in your evidence, yes you did.

A. Was that prior to my notebook?

Q. I don't recall.

A. Are you referring to my notebook?

Q. Don't know, don't remember.

A. Okay, well, I can only go by what I had written in my notebook. If I'd said that as I was going down the checklist, what are the date timeline prior to my notebook, I may have said that. But I have what I…have the notes in front of me and I've already read to you the questions that I asked him, which was one, and the rest were answers to his questions.

Q. Surely you wouldn't have said that if it wasn't true.

A. Again, I don't recall what I exactly said. If you could read it to me that would be helpful.

Q. Sure. "Then made comment with respect to being in Halifax." Would have been me asking, "were you in Halifax during this time?" Mr. Glasgow: "I was not in Halifax at that time".

A. Yes, so that's going back, though, to Mr. Woodburn asking me, kind of giving a timeline of what transpired prior to me referring to my notes for the exact order, and what I said. So, if I had said that I may have said that without having the refreshment of my notes.

Q. Did you not review your notes before you came here to testify this morning?

A. I read them last week and I haven't reviewed them until I got on the stand today.

Q. The last time you reviewed them was last week?

A. Yes.

Q. You didn't review them before you got on the stand today?

A. Not today.

Q. I see. So, you felt confident saying something under oath that you weren't sure of, then?

…

Q. Let me ask this question, then. You felt comfortable saying something that you were not sure of under oath because Mr. Woodburn pushed you to say something – even though you weren't comfortable.

A. I felt comfortable providing a summary of that particular event prior to referring to my notes to give you the exact information you asked for.

[16] Sergeant Blencowe agreed that failing to record the interview was not "the best practice", adding that "hindsight's a wonderful thing" and "I also know written notes are also acceptable."

Issues

[17] The sole issue is whether the statement is admissible. The Crown must prove beyond a reasonable doubt that Mr. Glasgow's statement to the police was voluntary. Additionally, it will be necessary to determine whether there is an adequate record of the conversation. The defence raises several additional non-*Charter* objections to admissibility that I will address after the discussion of voluntariness and adequacy.

Voluntariness

[18] The burden is on the Crown to prove beyond a reasonable doubt that the statement the accused gave to the police was voluntary. The Supreme Court of Canada considered voluntariness in *R. v. Oickle*, [2000] 2 S.C.R. 3. With respect to the origins of the doctrine, Iacobucci J. said, for the majority:

> 24 As indicated by McLachlin J. (as she then was), in *R. v. Hebert*, [1990] 2 S.C.R. 151, there are two main strands to this Court's jurisprudence under the confessions rule. One approach is narrow, excluding statements only where the police held out explicit threats or promises to the accused. The definitive statement of this approach came in *Ibrahim v. The King*, [1914] A.C. 599 (P.C.), at p. 609:
>
> > It has long been established as a positive rule of english criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.
>
> This Court adopted the "Ibrahim rule" in *Prosko v. The King* (1922), 63 S.C.R. 226, and subsequently applied it in cases like *Boudreau v. The King*, [1949] S.C.R. 262, *Fitton*, *supra*, *R. v. Wray*, [1971] S.C.R. 272, and *Rothman v. The Queen*, [1981] 1 S.C.R. 640.
>
> 25 The Ibrahim rule gives the accused only "a negative right – the right not to be tortured or coerced into making a statement by threats or promises held out by a person who is and whom he subjectively believes to be a person in authority": *Hebert*, *supra*, at p. 165. However, *Hebert* also recognized a second, "much broader" approach, according to which "[t]he absence of violence, threats and

> promises by the authorities does not necessarily mean that the resulting statement is volu"tary, if the necessary mental "lement of deciding between alternatives is absent" (p. 166).
>
> 26 While not always followed, McLachlin J. noted at p. 166 that this aspect of the confessions rule "persists as part of our fundamental notion of procedural fairness". This approach is most evident in the so-called "operating mind" doctrine, developed by this Court in *Ward*, *supra*, *Horvath v. The Queen*, [1979] 2 S.C.R. 376, and *R. v. Whittle*, [1994] 2 S.C.R. 914. In those cases the Court made "a further investigation of whether the statements were freely and voluntarily made even if no hope of advantage or fear of prejudice could be found": *Ward*, *supra*, at p. 40. The "operating mind" doctrine dispelled once and for all the notion that the confessions rule is concerned solely with whether or not the confession was induced by any threats or promises.
>
> 27 These cases focused not just on reliability, but on voluntariness conceived more broadly. None of the reasons in *Ward* or *Horvath* ever expressed any doubts about the reliability of the confessions in issue. Instead, they focused on the lack of voluntariness, whether the cause was shock (*Ward*), hypnosis (*Horvath*, per Beetz J.), or "complete emotional disintegration" (*Horvath*, *supra*, at p. 400, per Spence J.). Similarly, in *Hobbins v. The Queen*, [1982] 1 S.C.R. 553, at pp. 556-57, Laskin C.J. noted that in determining the voluntariness of a confession, courts should be alert to the coercive effect of an "atmosphere of oppression", even though there was "no inducement held out of hope of advantage or fear of prejudice, and absent any threats of violence or actual violence"; see also *R. v. Liew*, [1999] 3 S.C.R. 227, at para. 37. Clearly, the confessions rule embraces more than the narrow Ibrahim formulation; instead, it is concerned with voluntariness, broadly understood.

[19] The majority in *Oickle* identified several factors relevant to the determination of voluntariness: threats or promises (paras. 48-57), oppression (paras. 58-62), operating mind (paras. 63-64), and other police trickery (paras. 65-67). The analysis was discussed in *R. v. Brown*, 2015 ONSC 3305, [2015] O.J. No. 3046:

> 87 The contemporary voluntariness or confessions rule attempts to strike a balance between the interests of the accused and society in avoiding false confessions, while at the same time ensuring that the societal interest in the effective investigation of crime is met. As noted by Iacobucci J. in *Oickle*, at para. 33: "All who are involved in the administration of justice, but particularly courts applying the confessions rule, must never lose sight of either of these objectives." See also: *Singh*, at para. 45.

> 88 Both the constitutional right to silence and the common law voluntariness rule permit a certain amount of police persistence and persuasion in obtaining a statement: *R. v. Hebert*, [1990] 2 S.C.R. 151, [1990] S.C.J. No. 64, at paras. 73, 110, 130 [*Hebert*]. While an individual has a right to remain silent, she does not have a right not to be spoken to by the police: *Singh*, at para. 28. Police persistence, and attempts to persuade an individual to speak, will not automatically transgress the s. 7 right to silence or the voluntariness rule…
>
> 89 *Oickle* instructs that a contextual approach is to be taken to assessing the voluntariness of a statement. Where relevant, there are two stages to the inquiry. The first involves assessing whether there have been inducements, such as promises or threats, sufficient to overcome the will of the accused: *Oickle*, at para. 57. At this stage, the court also looks to whether the individual has an "operating mind" and whether there has been an atmosphere of oppression created by the police, sufficient to cast doubt on the voluntariness of the statement.
>
> 90 At the second stage, and where relevant, the court assesses whether police trickery was used in obtaining the statement and, if so, whether the trick or tricks were sufficient to shock the conscience of the community: *Oickle*, at paras. 65-67.

[20] The Crown maintains that the evidence establishes that the concerns identified in *Oickle* are not present here. The Defence does not raise any specific complaints related to *Oickle*-like considerations, but nonetheless, the Crown must prove voluntariness beyond a reasonable doubt. On threats or promises, the court in *Brown* reviewed the law as follows (some citations omitted):

> 91 As for threats and promises, they are classic inducements and it is from these facts that much of the jurisprudence evolves. The "classic" inducement involves a promise of leniency in respect of whatever conundrum the individual is facing. A promise to reduce a charge or sentence in exchange for a confession raises a question about voluntariness. As noted by Iacbucci J., explicit offers by the police to "procure lenient treatment in return for a confession" is a "very strong inducement, and will warrant exclusion in all but exceptional circumstances": *Oickle*, at para. 49. Offering lenient treatment to loved ones can also create a strong inducement, sufficient to render a statement involuntary: *Oickle*, at para. 52.
>
> 92 While statements by the police like "it would be better if you told" can raise concerns about voluntariness, they do not require exclusion. In all cases, the trial judge is duty bound to examine the entire contents of the statement and ask

whether there exists a doubt about its voluntariness: *Oickle*, at paras. 54, 57; *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500, at paras. 13-15, 19 [*Spencer*].

93 In the end, and of critical importance, the law allows police officers to offer inducements. Indeed, the jurisprudence has long recognized the importance of the police doing so in pursuit of solving crime. The voluntariness doctrine is not to be applied in a way that precludes this important investigative technique. As noted in *Oickle*, "[f]ew suspects will spontaneously confess to a crime": at para. 57.

94 The police are not required to be mute in an interview, waiting for an accused to extemporaneously decide to say something. To the contrary, the police are permitted to encourage, persuade and convince a suspect to speak. They can even try to persuade a suspect that it would be in his or her interests to confess. Indeed, in *Oickle*, Iacobucci J. commented on the fact that in the "vast majority of cases, the police will have to somehow convince the suspect that "t is in his or her best interests to confess": *Oickle*, at para. 57. In applying a contextual approach, it is important to remember that the police can speak in an accusatorial and persistent manner...

95 What the police cannot do is offer inducements, either through the form of threats or promises, that are "strong enough to raise a reasonable doubt about whether the will of the subject has been overborne": *Oickle*, at para. 57. See also: *Spencer*, at paras. 17, 19. This is often referred to as the *quid pro quo*. Deschamps J. summarized this approach in *Spencer*, at para. 15, where she held:

> ... while a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement.

As such, it is important to look for a *quid pro quo*, but to always remember that the existence of one only begins and does not end the inquiry into voluntariness which requires an assessment into the entire context of the police/suspect interaction...

96 Importantly, there are times that the police will be speaking the truth to a subject and that truth may be perceived as a strong inducement...

[21] The Crown says the evidence discloses no threats or promises by the officers who met with Mr. Glasgow that would raise a reasonable doubt as to the voluntariness of his statements. I agree.

[22] As to oppression, the majority in *Oickle* said:

> 58 There was much debate among the parties, interveners, and courts below over the relevance of "oppression" to the confessions rule. Oppression clearly has the potential to produce false confessions. If the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions. Alternately, oppressive circumstances could overbear the suspect's will to the point that he or she comes to doubt his or her own memory, believes the relentless accusations made by the police, and gives an induced confession.
>
> …
>
> 60 … Under inhumane conditions, one can hardly be surprised if a suspect confesses purely out of a desire to escape those conditions. Such a confession is not voluntary... Without trying to indicate all the factors that can create an atmosphere of oppression, such factors include depriving the suspect of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time.
>
> 61 A final possible source of oppressive conditions is the police use of non-existent evidence. As the discussion of false confessions, supra, revealed, this ploy is very dangerous... The use of false evidence is often crucial in convincing the suspect that protestations of innocence, even if true, are futile. I do not mean to suggest in any way that, standing alone, confronting the suspect with inadmissible or even fabricated evidence is necessarily grounds for excluding a statement. However, when combined with other factors, it is certainly a relevant consideration in determining on a *voir dire* whether a confession was voluntary.

[23] The Crown says the evidence revealed no circumstances of oppression as contemplated by cases such as *Oickle*, *Brown*, *R. v. Singh*, [2007] 3 S.C.R. 405, and *R. v. Garnier*, 2017 NSSC 339. While defence counsel suggested to Sergeant Blencowe that the accused might have felt oppressed by the fact that the meeting took place in a jail, there was no evidence of this, and the defence offered no authority suggesting that merely meeting the accused in a jail creates an atmosphere of oppression.

[24] As to the consideration of the accused's "operating mind", the majority in *Oickle* cited *R. v. Whittle*, [1994] 2 S.C.R. 914, where Sopinka J. said that an operating mind "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" (*Whittle* at 936, cited in *Oickle* at para. 63). The Crown submits that the evidence does not leave a reasonable doubt as to whether the accused had an operating mind when he made the statements. I agree.

[25] On the factor of "other police trickery" – a separate inquiry from the other three factors identified in *Oickle* – the majority referred to the concurring reasons of Lamer J. (as he then was) in *Rothman v. The Queen*, [1981] 1 SCR 640. Justice Lamer said, at 697:

> The judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community. That a police officer pretend to be a lock-up chaplain and hear a suspect's confession is conduct that shocks the community; so is pretending to be the duty legal-aid lawyer eliciting in that way incriminating statements from suspects or accused; injecting Pentothal into a diabetic suspect pretending it is his daily shot of insulin and using his statement in evidence would also shock the community; but generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community; nor would, as in this case, pretending to be a truck driver to secure the conviction of a trafficker; in fact, what would shock the community would be preventing the police from resorting to such a trick.

[26] The majority in *Oickle* noted that the result in *Rothman* was later overruled on *Charter* right to silence grounds in *R. v. Hebert*, [1990] 2 S.C.R. 151, but confirmed that the "shocks the community" standard remained valid: "There may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community" (para. 67).

[27] In the Crown's submission, the *voir dire* does not disclose any evidence of police trickery, let alone something that would shock the community. Once again, I agree. There was no police trickery. The police arrived at the jail to take a DNA sample. Mr. Glasgow was cautioned and also waived his right to counsel. When he unexpectedly started chatting with the Sergeant Blencowe, he was cautioned and the police took notes. The police asked Mr. Glasgow one question in the midst of the event. While the police in this case did not follow the most perfect procedures available, I am unable to find a reasonable doubt about voluntariness merely on the ground that they failed to come prepared to record the encounter. I will discuss this in greater detail below.

Adequate Record

[28] The defence does not allege that there is specific evidence supporting any of the factors identified in *Oickle*. Rather, the defence's position is that the evidence is insufficient for the court to assess voluntariness at all, given the lack of recording. Counsel relies particularly on *R. v. Moore-McFarlane* (2001), 160 C.C.C. (3d) 493, [2001] O.J. No. 4646 (Ont. C.A.). In that case, dealing with the issue of voluntariness of a statement to a person in authority, the court said:

> 64 I agree that there is no absolute rule requiring the recording of statements. It is clear from the analysis in both [*R v Hodgson*, [1998] 2 SCR 449] and [*R v Oickle*, [2000] 2 SCR 3] that the inquiry into voluntariness is contextual in nature and that all relevant circumstances must be considered. Iacobbuci J. says so expressly in *Oickle* in the following words (at para. 47, p. 345):
>
> > The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over-and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.
>
> 65 However, the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view 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.

[29] Charron J.A. (as she then was) expressly rejected the appellant's submission that the court should recognize a constitutional and common law obligation to record all custodial interrogations (paras 61-65).

[30] *Moore-McFarlane* has consistently been cited for the proposition that audio- or video-recording, while preferable, is not a prerequisite to admissibility of a statement. In *R. v. MacKay*, 2008 NSPC 8, [2007] N.S.J. No. 566, the accused had been confronted in an unrecorded exchange by an officer who was not directly involved in the investigation and who knew one of the victims of a boating accident that was the source of the charges. The accused argued, *inter alia*, "that the record of the interaction between the accused and the police is not only insufficient but that it was also the paraphrased memories of the police with them contemporaneously taking little or no notes of events, as they allegedly occurred, and with significant and critical memory gaps on their part" (para 28). The defence cited *Moore-McFarlane* in support of the claim that the interview should have been recorded. C.H. Williams Prov. Ct. J said:

> 30 … [I]n my opinion, a careful reading of *Moore-McFarlane, supra*., would disclose that the court's prognosis for admissibility was that, in the *voire dire*, there ought to be a careful scrutiny of all the surrounding circumstances and that there ought to be sufficient "circumstantial guarantees of trustworthiness" before the statement is admitted on the high onus of proof beyond a reasonable doubt. All the same, it should be noted that the case did not establish a rule that electronically unrecorded police interrogations are automatically excluded. Instead, it does strongly recommend that a practice of electronically recording interviews would be appropriate as the court is always concerned with "the completeness, accuracy and reliability of the record," (para. 67). Furthermore, without such impartial aids, the Crown could have difficulties in discharging "its heavy onus of proving voluntariness beyond a reasonable doubt where proper recording procedures are not followed." (para. 67).

[31] The decision not to record the statement in *MacKay* was characterized as a "deliberate" one; Williams Prov Ct J noted that the officer "may believe that he was just asking questions and not engaged in a formal police interrogation which in the circumstances was too fine a line for rational reasoning. Also, this does not square with his own evidence that he asked the accused whether he, the accused had been *Chartered* and warned of his rights" (para 45). He concluded that

> it must have been obvious to him that the accused prisoner was a suspect for serious major crimes and accordingly was being detained; the accused had been given his *Charter* and police cautions and Travis was a person in authority. But, despite all this, Travis observed no established departmental protocols in his

> contact with the accused. Therefore, in my view, his conduct amounted to an offensive interrogation as, in the existing set of circumstances, he knew or ought to have known that merely asking questions, as he declared he was only doing, would have put the accused in legal jeopardy. [para 46]

[32] In holding that the Crown had not established voluntariness (paras 63-67), Williams Prov. Ct. J. noted that the officer's conduct appeared to be based on a presumption of the accused's guilt and a belief that others involved in the investigation were sympathetic to his behaviour (paras 47-48) and that there were significant discrepancies in the police evidence regarding the circumstances (paras 50-60). He said:

> 61 However: Is there a sufficient substitute for an audio or video tape record to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable ground? In my opinion, in the absence of a recording the next best guarantee of trustworthiness is the procedure, where, in a controlled environment as was the police station, the interviewer follows the steps set out on Exhibit VD 7(b), the Halifax Regional Police Caution Statement Form; two officers, one acting as a monitor, are present during the interview; extensive notes are taken; a handwritten statement that is read back to the suspect is obtained and if possible signed by the suspect; the interview is initiated by the interviewer introducing him or herself, and the reason for the interview. Then, innocuous information such as name, address, telephone number marital status and date of birth are obtained from the suspect.
>
> 62 These are *indicia* that, in my opinion, would enhance a belief beyond a reasonable doubt in the circumstantial guarantees of trustworthiness of a statement and hence its threshold reliability and its voluntariness. Here, I acknowledge and understand, on the testimony of Blencowe, that the above noted are standard operating procedures that are already adopted by the Halifax Regional Police Force for use by all its personnel. Travis did not follow these standard procedures hence his conduct raised suspicions as to the voluntariness of the purported non-recorded statement.

[33] *Moore-McFarlane* was considered in the context of an interview by correctional officers of a lawyer who was seen on camera passing a package (subsequently revealed to be drugs) to her client in a prison setting in *R. v. Calder*, 2010 NSSC 136, [2010] N.S.J. No. 202. Despite the lack of recording, the statement was found to be voluntary (paras 26-31). Bryson J. (as he then was) said, *inter alia*:

> 24 Ms. Calder argued strenuously that her statements were involuntary and cited *R. v. Moore-McFarlane*, 47 C.R. (5th) 203, (Ont. C.A.) for the proposition that statements given by an accused should be recorded by videotape or at least audiotaped. But the key to voluntariness is not whether the statements are recorded. Rather, it is contextual, *Oickle*, (para. 47). In *Moore-McFarlane* the facts surrounding the giving of the alleged statements were hotly contested. Both accused testified at the *voir dire*. There was much evidence suggesting oppressive circumstances. There were substantial discrepancies in the facts. In the context, it is understandable why the court found the evidence at the *voir dire* too unreliable to determine whether the statements were made voluntarily.
>
> 25 I do not read *Moore-McFarlane* to say that in every case a statement is not admissible if there is no verbatim record. *Oickle* expressly does not say that, nor have other courts of appeal: *R. v. Crockett*, 2002 BCCA 658; *R. v. Ducharme*, 2004 MBCA 29. 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. The correctional officers were not trained investigators. They did not intend to conduct an interview of Ms. Calder and would have had to improvise the facilities to do so, had they so intended.

[34] In *R. v. MacDonald-Pelrine*, 2014 NSCA 6, [2014] N.S.J. No. 16, the accused had been interviewed in her workplace by a supervisor and accounting personnel about irregularities in transactions under her authority. The Court of Appeal affirmed the trial judge's decision that the statements were voluntary (including, implicitly, that the interviewers were persons in authority)(paras 33-39). Beveridge J.A. said, for the court:

> 41 With respect, I am not persuaded that there is any substance to the argument by the appellant. The Crown is required to prove beyond a reasonable doubt that putative statements by an accused to a person in authority were voluntary. To state the obvious: if the Crown's evidence about the circumstances surrounding the taking of the statement is marred by a lack of accuracy as to what was said to, and by, an accused, the Crown is at substantial risk of being unable to meet its burden on the issue of voluntariness or ultimate admissibility.
>
> 42 However, if a trial judge, applying the correct legal principles, and absent palpable and overriding error, determines that he or she is satisfied beyond a reasonable doubt that putative statements by an accused were made voluntarily,

> then disputes about the accuracy and existence of an utterance by an accused is generally for the trier of fact in the trial proper.

[35] As to the appellant's challenge to the accuracy and reliability of the notes documenting the interview, the court determined that she had identified only one alleged inaccuracy (paras 44-46), which "had nothing to do with inducing the appellant to give a statement by offering inducements or making threats. In these circumstances, which version was accurate was up to the trier of fact to decide" (para 47). The court went on to comment on the "overall accuracy and reliability of the notes":

> 48 As to the overall accuracy and reliability of the notes, the trial judge accepted that Ms. McGeehan took contemporaneous notes, which, while not verbatim, were comprehensive. The judge acknowledged that the notes were not a precise recording, but were sufficiently accurate and contemporaneous to be used as an *aide memoire*. He found:
>
> > The notes' reliability as a precise or near verbatim account of what took place is in doubt. I am satisfied however, that the notes address the information conveyed and are sufficiently contemporaneous and accurate to be used as aide-memoires by the Grant Thornton representative, Ms. McGeehan, who took the notes during the initial meeting and who prepared a reorganized and expanded version later that day, which she may also refer to at trial. Defence counsel have agreed that the other Grant Thornton representative, Ms. MacMillan, who reviewed and adopted the notes may also refer to them as an aide-memoire.

[36] The court thus rejected the defence argument on the issue of the accuracy and reliability of the notes (para 49).

[37] *Moore-McFarlane* was cited once more in *R. v. Ritch*, 2020 NSSC 128, [2019] N.S.J. No. 581, affirmed at 2022 NSCA 52, where the voluntariness issue related to statements originating in an undercover operation. Brothers J. remarked that "in *R. v. Moore-McFarlane* … the Ontario Court of Appeal held that there was no absolute rule requiring the recording of statements" (para 10). She added that the defence had made the "proper concession" that "the lack of recording did not bar admissibility" (para 10).

[38] In the circumstances of this case, I am mindful of the Crown's burden as described in *Moore-McFarlane* and subsequent caselaw. Obviously, it would have been preferable for the officers to arrive prepared to make a recording of Mr.

Glasgow. This must be weighed against the fact that they did not intend to take a statement from him, but only obtain a DNA sample, and that the vocal exchange was initiated by Mr. Glasgow himself. Sergeant Blencowe took notes contemporaneously with his conversation with Mr. Glasgow and he asked one question. Additionally, there is no evidence contrary to that of Sergeant Blencowe.

Police Notes: Refreshed and/or Recorded Memory

[39] As I have said, the evidence does not leave a reasonable doubt as to voluntariness on the basis of any of the *Oickle* considerations. Are the notes an adequate substitute for a recording? Defence counsel says that they are not, based on the lack of verbatim reporting and based on criticisms of Sergeant Blencowe's recall.

[40] On the first point, I reject the notion that the adequacy of the notes as a record of the conversation is seriously undermined by virtue of the notes not being in the form of a verbatim transcript of what was said. I accept Sergeant Blencowe's evidence that he was writing quickly while dealing with the DNA testing apparatus. I am not convinced that, as defence counsel implies, his notes would carry greater weight had he expanded upon them after the conversation or had he employed quotation marks more liberally.

[41] As to the officer's recall of the exchange with Mr. Glasgow, Sergeant Blencowe's evidence indicates that he refreshed his memory from his notes out of court, before testifying.

[42] On direct examination, Sergeant Blencowe asked to consult his notes on the specific detail of the name of the facility in Toronto where he met the accused. Crown counsel encouraged him to "go as much as we can without the notes." Sergeant Blencowe continued his narrative of the meeting with the accused. When Crown counsel asked about the specifics of the accused's statements, he said he could recount them in "generality," but would need his notes to recount them in "exact order." Crown counsel asked him to give the "generality and then we'll go exact order."

[43] After he described the exchange with the accused, Crown counsel asked, "would you like to refer to your notes just about the times and time frames?" Sergeant Blencowe answered in the affirmative, and agreed that he needed the notes "to refresh your memory about sequence and, maybe, length of time you were in there?" At this point defence counsel queried whether this was refreshing

memory or recollection recorded but did not formally object. Sergeant Blencowe then consulted his notes and gave the precise times and sequence of the exchanges with the accused. At the end of his direct evidence, the following exchange occurred:

> Q: Okay and did this refresh your memory or was there no memory of this and this just helped out?
>
> A: A little bit of both. Prior… before I had the subpoena, I would have had no memory of it, it's been quite a while ago. Once I reviewed the notes and became court prepped, it brought it back.
>
> Q: Okay, so the notes refreshed your memory.
>
> A: Yes.

[44] On cross-examination Sergeant Blencowe agreed that he had "zero memory" of the events before he got the subpoena. He also said he had reviewed the notes the previous week, but had not looked at them again until he was on the stand. Additionally, the following exchange occurred with defence counsel:

> Q: You felt comfortable saying something that you were not sure of under oath because Mr. Woodburn pushed you to say something – even though you weren't comfortable.
>
> A: I felt comfortable providing a summary of that particular event prior to referring to my notes to give you the exact information you asked for.

[45] In my view defence counsel's question does not accurately reflect the exchanges between Crown counsel and Sergeant Blencowe. Sergeant Blencowe's concerns were specifically with precise details that he clearly indicated he would not be able to provide without recourse to the notes. I see no indication that he actually attempted to give answers that he was "not sure of", but there were areas of his testimony for which he asked to refer to his notes and, at the request of Crown counsel, gave "generalities", until he was allowed to look at his notes.

[46] The cross-examination by defence counsel was mainly concerned with the quality of the notes. Sergeant Blencowe insisted that the notation that the accused "declined to call a lawyer" indicated that he had asked him if he wanted to call a lawyer; defence counsel suggested that this was not apparent because the notes did not specifically say he was asked. Defence counsel raised a similar question regarding notations about the questions the accused asked about where they found his DNA and why they wanted it; once again, the notes indicated responses, but did not record the exact questions. Defence counsel emphasized the general lack of

quotation marks in the notes, to which Sergeant Blencowe answered, in essence, that he was writing quickly while preparing the blood collection kit. He said, "I was writing as quick as I could to get the information down."

[47] On this form of memory refreshing, *Watt's Manual of Criminal Evidence* comments, at §19.04:

> A witness may refresh their memory out of court before giving evidence, hence do so beyond the direct scrutiny of the court. Witnesses routinely review prior statements and preliminary inquiry transcripts, are subject to cross-examination about having done so, and may be required to produce the memory refreshment materials. In general, these memory aids should be limited to writings made by the *witness* contemporaneously with the events recorded, or by another at a similar time in respect of events observed or heard by the witness, which the witness has verified as accurate when the events were fresh in the witness' mind, or previous testimony given by the witness. [Emphasis in original.]

[48] The interview notes are compliant with this framework. Sergeant Blencowe's pre-hearing review of the notes would be a textbook example of this form of refreshing of memory.

[49] As for in-court refreshing of memory, Watt says the following, at §19.04:

> Witnesses may also be permitted to refresh their memory at trial. In many cases, the witness is honest, but forgetful about a particular issue or facet of their testimony. But not in all cases. Refreshing memory may also be the first of several steps the purpose of which is to ensure that the witness gives the evidence anticipated in light of prior statements. This process may continue through the all-too-familiar steps of applications under ss. 9(2) and 9(1) of the CEA, then a declaration of adversity or hostility with ever-expanding rights of cross-examination. The final step may be a *B. (K.G.)* application to admit a prior statement as substantive evidence.
>
> When the means used for in-court refreshment is a statement in or reduced to writing, examining counsel should direct the witness' attention to the relevant passage, then tell the witness to read the passage silently to him or herself. Counsel may then proceed with the examination of the witness. But when the means used is an audio or video recording which has not been transcribed and the trial is by jury, the refreshment exercise should be done out of their presence and the procedure properly explained to them. After all, the *aide memoire* is *not* evidence, only the witness' memory-refreshed testimony is evidence. [Underlining added; italics in original.]

[50] This was a case of a forgetful witness, rather than (for instance) a potentially adverse or hostile witness. Crown counsel roughly followed the scheme suggested by Watt in directing Sergeant Blencowe's attention to the details of sequence and time.

[51] What is less clear in this case is whether the refreshing of memory amounted to "present recollection revived" or "past recollection recorded." Arguably there are passages of the transcript that could support either interpretation. Watt describes the two categories at §19.04:

> A witness who has a *present recollection* of events that the examiner seeks to revive may do so with *any* writing or material that is capable of jogging the witness' memory. The document need *not* be independently admissible or an original, but it must be authenticated. The witness' memory on the subject must first be exhausted. They should further testify that the record may *assist* in reviving their present memory of the event. The document, produced to the witness, should be read *silently* by the witness. Where it is in the form of an audio or video recording, it should be played for the witness in the absence of the jury. Where the witness indicates that their memory on the subject has been refreshed, they should be invited, in the presence of the trier of fact, to express their current memory about the subject. The document or material used to refresh memory does *not* thereby become evidence, thus is *not* filed as an exhibit.
>
> In cases of *past recollection recorded*, the witness asserts *no* present recollection of the relevant event, apart perhaps from having recorded it at a particular place or in a particular document. The recollection of the event is what has previously been recorded, hence the more stringent requirements associated with recording. The document must have been made at or within a *reasonable* time of the event recorded when the witness' memory of it was fresh. It must have been made personally by the witness or by another in the witness' presence and verified by the witness at a time when the events were fresh in the witness' mind. Where the original document is *not* available, a copy may be received if it is proven to be accurate and to have been made when the facts were fresh in the witness' mind. It is also necessary that the witness' memory be exhausted preliminary to introduction of evidence of past recollection recorded. [Italics in original.]

[52] Whether or not a witness's evidence rests on refreshed memory is a question of fact, as the court stated in *R. v. Podolski*, 2018 BCCA 96, [2018] B.C.J. No. 847, leave to appeal denied, [2018] S.C.C.A. No. 322:

> 350 We are not persuaded that the impugned evidence was inadmissible hearsay. Witnesses are entitled to refresh their memory. In [*R v Fliss*, 2002 SCC 16], the

Supreme Court discussed why a witness who testifies after refreshing his or her memory does not necessarily introduce inadmissible hearsay. At para. 8, Justice Binnie, writing for the majority, held that "[a] witness may refresh his or her memory prior to testifying, as long as he or she testifies from present memory revived by the instrument that refreshed it, whatever that instrument may be". He further explained:

> [45] There is also no doubt that the officer was entitled to refresh his memory by any means that would rekindle his recollection, whether or not the stimulus itself constituted admissible evidence. This is because it is his recollection, not the stimulus, that becomes evidence. The stimulus may be hearsay, it may itself be largely inaccurate, it may be nothing more than the sight of someone who had been present or hearing some music that had played in the background. If the recollection here had been stimulated by hearing a tape of his conversation with the accused, even if the tape was made without valid authorization, the officer's recollection – not the tape – would be admissible.
>
> ...
>
> [60] The prosecution obviously wanted more than "the gist of what transpired" on January 29th or "the general situation". The officer was quite entitled to attempt to "refresh" his memory by an out-of-court review of the corrected transcript, but in the witness box his testimony had to be sourced in his "refreshed" memory, not the excluded transcript.

351 The procedure for refreshing a witness' memory is considerably less stringent than that for admitting evidence of past recollection recorded, which does result in the record of the witness' past recollection being entered into evidence for the truth of its contents.

352 With respect to the determination of whether a witness' memory has truly been refreshed, *Wigmore on Evidence* (1970), Chadbourn Rev., vol. 3, s. 785 quoted the following passage from Sir G.A. Lewin's note to *Lawes v. Reed*, 2 Lewin 152, 153 (1835): "Whether in any particular case the witness' memory has been refreshed by the document referred to, or he speaks from what the document tells him, is a question of fact open to observation, more or less according to the circumstances" [emphasis in *Podolski*]. The question of whether a witness is relying on his or her present memory when giving evidence after having refreshed it, must be a question for the jury: *R. V. Bengert* (1978), [1979] 1 W.W.R. 472 (B.C.S.C.), aff'd (1980) 53 C.C.C. (2d) 481 (B.C.C.A.).

(Cited in Watt at §19.04.)

[53] The Ontario Court of Appeal said in *R. v. Dupuis*, 2020 ONCA 807, [2020] O.J. No. 5543:

> 46 Another situation in which a witness's prior statement may be put before the witness is where counsel is refreshing memory. This is permitted only where the witness is having difficulty remembering. Whether counsel is permitted to refresh memory in this way is in the discretion of the trial judge, and there is a procedure that must be followed. Counsel must lay a foundation by ascertaining whether the witness is having difficulty remembering. Counsel should ask the witness if they wish to refer to a prior statement. If the witness confirms he or she needs assistance remembering and wishes to refer to the prior statement, counsel should seek leave from the court to refresh the memory of the witness. The statement is produced to opposing counsel, who may object to its use. If the court permits the refreshing of memory, counsel should provide the statement to the witness, and instruct the witness to consult the relevant portion in silence. Counsel can then resume questioning the witness: see Sidney N. Lederman, Alan W. Bryant & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th Edition (Toronto: LexisNexis Canada, 2018), at ss. 16.128-16.129; Peter J. Sankoff, *The Law of Witnesses and Evidence in Canada* (formerly *Witnesses*), (Toronto: Thomson Reuters Canada Limited, 2019), at c. 11.4. If the statement does not refresh the witness's memory, "no use should be made of it unless the record is admissible under some other rule of evidence": David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020), at p. 546.

[54] In this case, Crown counsel did not specifically seek leave to refresh the witnesses memory, but there was no objection, even after defence counsel raised the issue. Sergeant Blencowe was clear about the aspects of the events he could not testify about from memory, namely, the specific timing of the meeting with Mr. Glasgow, down to the minute, and the exact sequence of the various statements. He indicated, however, that reference to his notes on the stand did refresh his memory as to these details. Defence counsel did not pursue this point in any meaningful way. Sergeant Blencowe is unlikely to have "remembered" the details of the interview down to the specific minute, even after refreshing his memory from the notes; it was apparent that he was referring to such details as recorded in the notes. But the bulk of his evidence was drawn from "refreshed memory." Aside from details of the exact timing and sequence of Mr. Glasgow's remarks, his evidence as to the substance of the meeting with Mr. Glasgow was his own evidence. I am satisfied that his memory had been refreshed prior to the hearing by reference to his notes.

[55] The notes are an adequate substitute for a recording of the conversation, and their use accorded with the rules governing refreshing memory.

Other Issues

[56] The defence submits that the statement should be ruled inadmissible on the ground that a false statement by an accused can only be used as circumstantial evidence of guilt if there is independent evidence that the statement was fabricated to avoid culpability. Counsel cites *R. v. Coutts* (1998), 126 C.C.C. (3d) 545, [1998] O.J. No. 2555 (Ont. C.A.); *R. v. O'Connor* (2002), 62 O.R. (3d) 263, [2002] O.J. No. 4410 (Ont. C.A.); and *R. v. Iqbal*, 2021 ONCA 416, [2021] O.J. No. 3297. These cases stand for the proposition that "a trier of fact cannot use their rejection of an accused's testimony as a piece of circumstantial evidence to convict in the absence of independent evidence that the testimony was deliberately fabricated or concocted to avoid culpability" (*Iqbal* at para. 52). These cases were not concerned with threshold admissibility, but with the use of the evidence at trial. The Crown has not indicated how the evidence in question will be used. Whether there will be evidence going to the alleged fabrication is not one that can be answered at this stage. I am not satisfied that the evidence should be excluded on this ground at this stage.

[57] The defence also argues that the court should exercise its residual discretion to exclude the statement in order to avoid condoning "wilful and flagrant *Charter* breaches that [constitute] a significant incursion on the appellant's rights" and which undermine "the long-term repute of the administration of justice." Counsel submits that this principle should lead the court to "exclude statements where police wilfully and flagrantly fail to comply with standards established by the Courts in relation to statements from accused persons." The cases cited in support of this position – *R. v. Grant*, [2009] 2 S.C.R. 353, and *R. v. Harrison*, [2009] 2 S.C.R. 494 – are both concerned with excluding evidence under s. 24(2), which is not the remedy being sought here. I have considered defence counsel's allegations that the police failed to comply with "standards established by the Courts" in the context of the voluntariness analysis.

[58] Setting aside the unsupportable allegations of "misconduct," the defence argues for exclusion on the basis that the prejudicial effect of admitting the statement will outweigh its probative value. In particular, counsel says it would be prejudicial for the jury to be informed that the accused was in jail when the statement was made, leading to a potential for prohibited reasoning. If the Crown

chooses to rely on this evidence, the jury will, of course, with the input of counsel, have to be carefully instructed on the use they can make of this evidence, and will be warned about prohibited reasoning regarding Mr. Glasgow's presence in jail. This in itself does not satisfy me that prejudice outweighs probative value.

[59] Counsel further submits that probative value is further undermined by the uncertainty of what was said and the police "misconduct." I have already rejected these complaints. As such, I am satisfied that the probative value of the evidence outweighs the limited prejudice potentially arising from its admission.

Conclusion

[60] The Crown has met the burden of proving beyond a reasonable doubt that the statement was voluntary. The notes constitute an adequate record of the exchange. I do not accept any of the additional objections to admissibility raised by the defence.

[61] The statement is admissible.

Arnold, J.