Case Name:

R. v. Delmorone

Between
Her Majesty the Queen, and
Deny Delmorone

[2002] O.J. No. 3988

Ontario Court of Justice
Toronto, Ontario
Libman J.

October 9, 2002.
(127 paras.)

Counsel:

R. Direnfeld, for the Crown.
M. Engel, for the defendant.

Ruling on Admissibility of Accused's Statement
at Preliminary Inquiry

LIBMAN J.:—

Introduction

¶ 1 At his preliminary inquiry for dangerous driving causing bodily harm, the principal evidence relied upon by the Crown is the defendant's statement taken by two police officers who were investigating a serious motor vehicle accident involving Mr. Delmorone.

¶ 2 The accused had struck a pedestrian after losing control of his truck in an intersection. Both parties required medical attention. However, the accused who declined to speak to the police at the hospital, was not interviewed by the police until several days later when they attended his place of work.

¶ 3 No audio or video recording was made of this conversation.

¶ 4 The accused's statement is written on a document entitled "Motor Vehicle Collision Field Notes". [See Note 1 below] It does not contain any questions that the accused was asked prior to commencing the interview nor any indication that it was read to or by him afterwards. It is not signed or initialled by anyone. Although it contains the date of the accident, there is no indication of the time or date it was taken, its duration, the location where the interview was conducted, the identity of the officers present or

its author.

Note 1: This statement, Exhibit "A", is attached to this Ruling. [Quicklaw note: Exhibit A - City of Toronto Police - Motor Vehicle Collision Field Notes, cannot be reproduced online. Please see paper copy.]

¶ 5 Neither was a caution given to the accused respecting any driving offence prior to the taking of this statement.

¶ 6 At issue, and the subject of conflicting evidence, is what the accused was told about the officers' investigation, and his reasons for agreeing to speak to them. At the time of the accident the accused was on bail for other driving offences and not permitted to drive a motor vehicle; however, this term was varied to allow him to drive for employment purposes.

¶ 7 The police officers themselves gave conflicting evidence as to what the accused was told about their investigation other than they wished to confirm that he was the driver of the truck involved in the accident. The accused produced an amended bail paper for them, indicating that he could drive his truck for work. Nonetheless, he was arrested for breach of bail, and subsequently for the dangerous driving charge.

¶ 8 In this province, there have admonitions from judges of every level of court, as well as the Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (the Martin Committee) and the Commission on Proceedings Involving Guy Paul Morin (the Kaufman Report), emphasizing the importance of police officers taking careful, accurate and contemporaneous notes during their investigation.

¶ 9 In particular, statements made to persons in authority by individuals being investigated must be properly recorded.

¶ 10 Yet this case constitutes another instance of experienced police officers disregarding this obvious salutary investigative procedure. As a result, there has been, at this preliminary inquiry, a wholly unnecessary credibility contest on a voir dire respecting the circumstances in which the accused's statement was taken, including the very words uttered by the respective parties.

¶ 11 In an age of instantaneous communication, digital recording, computerized record keeping and the like, the comment by MacDonnell J. in R. v. D.N., [1994] O.J. No. 3118 (Prov. Div.) at para. 33 that, "Quite literally, audio recording has been child's play for many years", appears to me to be even more self evident today.

¶ 12 Audio recording, if not video recording, is "readily available, very reliable, relatively inexpensive, and usable even by the electronically illiterate": R. v. Lim (No. 3) (1990), 1 C.R.R. (2d) 148 (Ont. H.C.J.) at p. 152, per Doherty J., as he then was. It is difficult to understand why a permanent and independent recording of the interview process would not be made.

¶ 13 Convenient, simple, inexpensive and ubiquitous, what reason can there possibly be in the twenty-first century for law enforcement officers to not at least tape record an interview with a cooperative suspect, taken in a controlled setting or location of their choosing.

¶ 14 While there is no absolute rule requiring the recording of statements, the concept of voluntariness is

broadly defined to address both reliability and fairness concerns. The latter extends not only to the potential unfairness caused by the admission of the evidence at the trial itself, but also to the protection of the accused's rights during the investigative process: R. v. Moore-McFarlane (2001), 56 O.R. (3d) 737, 47 C.R. (5th) 203, 160 C.C.C. (3d) 493 at [C.C.C.] p. 514; Paul Calarco, "What Happens When Evidence Has Not Been Recorded? Staying Charges to Ensure a Fair Trial" (2001), 44 C.L.Q. 514.

¶ 15 Where the authorities can easily obtain a reliable and permanent recording of an interview with an accused person who agrees to speak to them, and they elect not to do so, it must be emphasized that they run a very real risk of a finding by the court that the reason they did not do so is that they did not wish such a reliable and independent account to be made available for subsequent scrutiny. Indeed, such a context serves to make "the resulting non-recorded interrogation suspect": R. v. Moore-McFarlane, supra, [C.C.C.] p. 517.

¶ 16 For the reasons which follow, I draw such an inference in this case. Indeed, where the evidence of the police officers differs from that of the accused as to what impression they left as to the reason for questioning him, I reject their evidence and accept the evidence of Mr. Delmorone. This is particularly so given that the interview took place at the accused's work place, in view of his co-workers, where the accused was left with the impression that all the police were doing was clarifying his driving status in view of his bail conditions, and he was obliged to cooperate with them so that they could complete their accident report. This is exemplified by his going to his truck, with their permission, and retrieving his amended bail paper for them; the accident report was completed in April, 2001. [See Note 2 below]

Note 2: See Exhibit 1. [Quicklaw note: Exhibit 1 - Accident Report, cannot be reproduced online. Please see paper copy.]

¶ 17 The accused's statement sought to be tendered into evidence against him at this preliminary inquiry has not been proven to be voluntary: the lack of making a proper record of this statement, and the circumstances surrounding its taking, are very important factors in my reaching this conclusion. Stated shortly, a sufficient substitute for an audio or videotape record has not been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt: R. v. Moore-McFarlane, supra, [C.C.C.] p. 517.

The Motor Vehicle Accident

¶ 18 Nemicio Molena was waiting for the bus on 15 March 2001 at the north-west corner of Keele and Lawrence streets in Toronto, at approximately 11:00-11:30 p.m. He was standing beside the bus shelter. At that time he noticed lights coming across his right, going from east to west. Within seconds he was hit by what he realized was a motor vehicle. All he saw before impact was the headlights of the truck. He had no chance to avoid the collision.

¶ 19 Mr. Molena was thrown about five to six meters away. When he tried to stand up, his right leg would not respond; he fell down, landing on his back.

¶ 20 A number of persons came running over to him, asking if he was okay. They called the ambulance; it arrived about ten minutes later. He was taken to the hospital.

¶ 21 The witness was in pain and shock. His right hand, right knee and neck were sore. He was given pain killers at the hospital and x-rays were taken. No bones were broken. He was released the next

morning. His right knee continues to bother him, as well as his lower back. He has difficulty walking for long periods or climbing stairs.

¶ 22 The only eye-witness to the accident was Anthony Da Silva. He was returning from his son's hockey game at the time, travelling south on Keele Street, approaching Lawrence Avenue. As the light changed to red, he came to a stop. He estimated the time to be between 11:00-11:30 p.m.

¶ 23 According to the witness, he noticed a blue van coming "relatively close" to his car, travelling on an angle, from east to west, towards the bus shelter on the north-west corner of the intersection. This vehicle, which was ahead of his car, was not in its lane. It gradually crossed into the walkway for pedestrians and hit the curb. It then went over the curb and struck a person standing outside the bus shelter. He estimated that the vehicle was travelling approximately 40 kilometres per hour at the time.

¶ 24 Mr. Da Silva described the actual impact as involving the pedestrian sticking out his arms in protection in front of him. He landed on top of the grill of the van and was carried a short distance until the van hit a tree. The collision with the tree projected the man to where he landed, about 10 to 15 feet away.

¶ 25 As a result, the witness exited his car and ran towards Mr. Molena, telling him not to move. The latter was in obvious pain but coherent and conscious.

¶ 26 Mr. Da Silva then went to check on the driver of the van. This party, whom he identified as the accused in court and the sole occupant in the vehicle, appeared to be passed out and did not respond; his eyes were not open. His head was against the head-rest of the driver's seat. When the accused did not respond to his further queries, he left the van and returned to the injured party. A number of people had gathered in the area by this time. He told them not to touch Mr. Molena and to wait for the ambulance.

¶ 27 An ambulance arrived shortly thereafter. While the paramedics were treating the parties, Mr. Da Silva spoke to a police officer who was looking for witnesses. It was his recollection that road conditions that night were dry and the intersection was pretty well lit.

¶ 28 In cross-examination, the witness agreed that while it did not take long for the accused's van to travel through the intersection it was proceeding through a green light, and travelling under the posted speed limit of 60 kilometres per hour. At the time he told the police that the van was going straight but it then drifted to the right.

¶ 29 Mr. Da Silva could not tell if the van went out of control prior to the accident. He did not observe its brake lights go on. Neither were there any evasive manoeuvres by it, such as sounding its horn. It hit the tree "quite hard" after striking the curb.

¶ 30 He estimated that he remained at the accused's van for about 10 to 15 seconds. Other than noticing that his eyes were closed and that he was slumped back, the witness could not recall whether the accused was wearing a seat belt. There were no apparent injuries to him, or the windshield of the van.

Police Investigation at the Accident Scene

¶ 31 Constable Petrie arrived on scene at 11:12 p.m. He noticed the accident scene while driving north on Keele Street, near Lawrence Avenue, in his marked cruiser. There was a blue van over the sidewalk, up against the bus shelter, located on the north-west side of the intersection. The officer pulled his cruiser into

position to protect the area, and approached the van.

¶ 32 The driver, whom the officer identified as the accused, appeared to be unconscious. He was slumped over the steering wheel. Constable Petrie requested that an ambulance be dispatched to the scene. In the meantime, he was unable to get any response from the driver when he tried to speak to him. There was no visible blood or trauma. Neither would he respond when he grabbed his arm. At one point his eyes open and closed, fluttering.

¶ 33 Subsequently, Constable Petrie learned that there was an injured pedestrian in front of the vehicle. This party had been moved and was leaning against a tree. He assessed his injuries and waited for the arrival of the ambulance.

¶ 34 The officer also canvassed the scene for witnesses and spoke to Mr. Da Silva. He advised the traffic investigators, Sgt. Sorgo and Constable Windmoller, of his observations. While the majority of his time was spent with witnesses, he did recall that there was some minor damage to the front of the accused's van. He did not remember if Mr. Delmorone was wearing a seat belt.

Police Evidence on the Voir Dire

¶ 35 Sgt. Sorgo and Constable Windmoller are traffic investigators. They each have approximately 15 years experience as Toronto police officers. They became involved in the investigation shortly before 11:30 p.m. on 15 March 2001.

¶ 36 After attending the accident scene, Sgt. Sorgo observed a 1989 Ford Arrowstar minivan resting against a tree in the north-west corner of the Keele Street and Lawrence Ave. West intersection. The van, which was also facing north-west, had heavy damage to its front end. There appeared to be a "vee" indentation where it struck the tree. The officer learned from Constable Petrie that the "possible driver" of this vehicle was in the ambulance, as he was not responding; the injured pedestrian was on a backboard. Both parties were transported to the hospital.

¶ 37 After noting that the road was dry and in good condition, and that the traffic signals were operating properly, Sgt. Sorgo left for Humber Hospital, arriving a few minutes after midnight. He attended the room in the emergency department where the occupant of the van had been taken. The accused identified himself verbally to the officer, stating his name, date of birth and address. Sgt. Sorgo identified him as the accused before the court.

¶ 38 The accused appeared confused. He was unable to express his thoughts. Sgt. Sorgo asked him, "Do you recall what happened tonight?" There was no response.

¶ 39 During the time that they were together, the accused sighed and rubbed his face with his hands, squinting. The officer did not observe any injuries on him. He then left the room to speak to the accused's father who was waiting in the emergency department. Sgt. Sorgo explained that he did not continue speaking with the accused as he could not tell him anything.

¶ 40 Subsequently, Sorgo returned to the accused's room. However, he was no longer there. The officers searched the room and then returned to their car where they conducted a search for Mr. Delmorone in the immediate area. They were unable to locate him. After returning to the hospital to look for him again, without success, they went to the station and concluded their shift. He did not know whether the accused

signed himself out of the hospital.

¶ 41 On 23 March 2001, the two officers attended the accused's place of employment in Etobicoke. They located him through his employer. Sgt. Sorgo was asked what the purpose was of speaking to the accused at this time. He replied that the investigation was now "more of a criminal nature". That is, the officers had received information that the accused may have breached his recognizance conditions by operating a motor vehicle. According to Sorgo, their information, to this point, was that the accused was at the scene, but they wanted to make sure that he was the driver.

¶ 42 The interview took place in a vacant factory office where there was a table. The officers were taken there by "management". They were in uniform.

¶ 43 According to Sgt. Sorgo, he told the accused that he was investigating the motor vehicle collision that occurred last week. He recorded the statement which followed on his "field notes". Prior to taking the statement, the officer stated that he read a caution from the back of his memo book, advising the accused that he may be charged with failing to comply with a recognizance and that he was not required to say anything in answer to the charge. The statement commenced at this point, at 8:34 a.m.

¶ 44 The statement, which contains the accused's explanation for the accident, took about eight minutes, concluding at 8:42 a.m. Sgt. Sorgo testified that he showed it to the accused but did not know if he read it over. It was not signed by Mr. Delmorone. It appeared to the officer that the accused was very cooperative and his thoughts "organized"; he was concerned but not nervous.

¶ 45 Following the taking of the statement, they continued having a conversation. Sorgo produced a copy of the accused's recognizance which prohibited him from driving. The accused explained that it had been changed a few weeks ago, allowing him to drive to work, and that he had a copy of it in his truck. They then went to his truck where the accused produced the amended bail papers. Sgt. Sorgo was not aware of this exemption, as shown on the accused's bail.

¶ 46 At 8:45 a.m., the accused was arrested for failing to comply with a recognizance. He was handcuffed and read his rights to counsel. He indicated that he wished to speak to his lawyer. Mr. Delmorone also commented that he considered the charge "stupid" as he was on his way home from work and it was embarrassing being arrested at work. He was subsequently taken to 12 Division and escorted to the detective office.

¶ 47 In cross-examination, Sgt. Sorgo agreed that he was aware of the accused's driving status the night of the accident after returning to the station and checking CPIC. It was his information that the accused was prohibited from driving a motor vehicle due to his bail terms. He had a copy of the accused's bail faxed to him. Prior to attending his place of employment, the officers tried to speak to him at his home, but he did not return their call.

¶ 48 The officers took a copy of the accused's bail with them on 23 March. They were aware that he was prohibited from driving. However, Sgt. Sorgo testified that there was no positive information that he was the operator of the vehicle involved in the accident, although he had a "strong suspicion" that he was. Neither did he have any information that there was more than one person in the vehicle.

¶ 49 The accused was told that the officers wanted to speak to him in private. He was not told that he did not have to speak to the police. According to his notes, Sgt. Sorgo told the accused that they wanted to speak

to him about a pedestrian being struck and a collision investigation. There was nothing noted about cautioning the accused for the breach of bail charge. Instead, he was cautioned in relation to the "events of that night".

¶ 50 There was no caution given to the accused about any type of driving offence.

¶ 51 The police impounded the accused's vehicle the night of the accident, but did not have it inspected. Sgt. Sorgo's accident report was concluded on 7 April 2001. The officer's conclusion was that the accused's vehicle lost control and struck a pedestrian.

¶ 52 Sgt. Sorgo could not recall whether he went over the accused's statement with him. The thought of recording the statement did not occur to him or his escort. He explained that such equipment was for the use of the detectives.

¶ 53 Against the backdrop of the accident, the officer was asked why the accused was initially charged with breach of bail. He explained that he only considered the dangerous driving charge upon learning the extent of the victim's injuries. He did not know the extent of them at the time; he thought they showed the severity of the impact and speed of the accused's vehicle.

¶ 54 With respect to the absence of a caution respecting the accident investigation, Sorgo acknowledged that he was reasonably certain that the accused was the driver of the motor vehicle, contrary to the bail order that he was aware of. The accused was read a caution in relation to the breach of recognizance charge. The officer believed that he did caution him about his being involved in a motor vehicle collision, although not the accident investigation itself. At no time did Mr. Delmorone indicate that he did not want to speak to the police.

¶ 55 Constable Windmoller's testimony regarding the interview with the accused on 23 March was as follows. Sgt. Sorgo explained the investigation to the accused in his presence. However, he did not recall what was said. He believed the accused was cautioned beforehand.

¶ 56 Following the interview, the accused was shown his bail conditions. Mr. Delmorone explained that it had been changed and he had a copy in his truck. He showed them the amended bail order which allowed him to drive to and from work, the variation having been made on 1 February 2001.

¶ 57 According to this witness, it would have been standard procedure for the accused to have read over his statement, although he did not have this noted. The conversation about his recognizance was not recorded.

¶ 58 Constable Windmoller testified that prior to taking the statement the officers explained the investigation and cautioned the accused. When asked what was said, he replied that he had nothing noted in his note book, but they explained there had been an accident involving the accused's van.

¶ 59 In cross-examination, the officer testified that he believed Sgt. Sorgo cautioned the accused from the back of his note book. His recollection was that the accused was cautioned "if he understood the investigation". He did not recall any charges being mentioned. His notes referred to the accused as being a "wanted party", that is, as the possible driver.

¶ 60 He believed that the accused read over his statement and asked if there was anything he wished to

add, and to sign it. However, when he was shown the statement in court, he did not see any indication of this, and was unable to recognize the document.

The Accused's Testimony

¶ 61 Mr. Delmorone is 39 years old. He has a criminal record dating back to 1982. His employment at Mathews Equipment was terminated after 8 years, following his arrest on 23 March 2001.

¶ 62 With respect to the events of this day, the accused testified that he was very concerned when the police showed up at his work place, in front of his boss. He asked them why they were here. They told him that they needed to speak to him so that they could complete their accident report, and that it could not be completed without him.

¶ 63 The accused believed he was cautioned for driving under suspension. He thought that the police were not aware that his bail had been varied, and were speaking to him for this reason. He hoped that by talking to them, he could get their report done and return to work after being released from the station. As the driver of the motor vehicle in question, he believed he was under this obligation. He was also required to report and appear in court on the outstanding charges.

¶ 64 Mr. Delmorone volunteered to go to his truck and show the police the bail variation. However, his manager at work commented that the accused had lied to him about his licence. The accused tried to explain that he was permitted to drive for employment purposes. He felt embarrassed as the interview was being done in the main office and all the sales representatives and managers were there.

¶ 65 He did not recall being informed by the police that they were taking a statement from him. He thought it was just a "q and a report". He thought he looked it over afterward, but was not sure.

¶ 66 In summary, the defendant did not think he was in any trouble, but there appeared to be some urgency for this accident report to be "processed". He could potentially be charged with driving under suspension or failing to comply.

¶ 67 Mr. Delmorone was cross-examined about his conversation with the police officers at his place of work. He stated that it was Sgt. Sorgo who told him that there was a pretty good possibility that he would be released from the station as the staff sergeant was a "pretty good guy" and it would be his decision.

¶ 68 The accused also recalled that he was cautioned until after he was hand-cuffed. He asked if he could be escorted out of the building but he was "cuffed" in front of everyone. He maintained that there was no caution in relation to the accident report. Sgt. Sorgo had told him that it was just a report pertaining to the accident and they needed to fill it out. He was trying to be honest in what he told the police.

¶ 69 He felt obligated to assist the police in the report as it related to an accident in which he was involved. He had no prior involvement in motor vehicle accidents, other than a "fender bender". However, when he was arrested in the past and given his rights for criminal offences, he always asked for his lawyer and exercised his right to remain silent. Conversely, he was just telling the officers "my story" and what happened on the evening of the accident. He told them the details of the mechanical difficulties he had been having with his vehicle. He felt bad that someone had been hurt in the accident.

¶ 70 The accused was also aware that the police wanted to speak to him about the accident but there did

not seem to be any urgency to do so. He was told that he could stop by and talk to the officers and complete the report; however, he did not make it in before the officers went off duty.

Position of the Parties

¶ 71 It is the position of Crown counsel that notwithstanding the lack of a caution and complete record of the accused's conversation with the police, the evidence establishes that he voluntarily spoke to the police. The accused would have been aware that he was being investigated both in relation to his status to drive a motor vehicle, given the bail order, as well as the accident itself. The narrative form of the statement, in Ms. Direnfeld's view, supports the view that it is voluntary in nature, as does the accused's admission that he was cooperating and telling the police the truth.

¶ 72 Mr. Engel, on the other hand, submits that given the obvious problems surrounding the taking of the statement, it has not been proven to be voluntary. He notes, in this regard, the lack of a caution and audio recording of the statement itself. He adds that there was no real doubt that the accused was the driver of the motor vehicle involved in the accident, that he was on bail, and there was thus no reason for the police to have even gone to his workplace since he was already subject to court appearances and reporting requirements on the outstanding charges. The accused's testimony should therefore be accepted that he was under the impression that the police needed to complete their accident report by talking to him, and he spoke to them for this reason, unaware of the true state of affairs and the jeopardy he was in.

Analysis of Law

¶ 73 The confessions rule requires that, before a statement made by an accused to a person in authority may be admitted in evidence, it must be proven beyond a reasonable doubt that it was given voluntarily. The onus on the Crown is a "heavy one". See, most recently, R. v. Sabri (2002), 159 O.A.C. 192 (C.A.) at p. 196.

¶ 74 The concept of voluntariness is broadly defined to address both reliability and fairness concerns. These concerns blend together so as to ensure fair treatment to the accused in the criminal process by deterring coercive state tactics: R. v. Hodgson, [1998] 2 S.C.R. 449, 18 C.R. (5th) 135, 127 C.C.C. (3d) 449 at [C.C.C.] p. 463, per Cory J.

¶ 75 It is also important to keep in mind the twin goals of the confessions rule, namely, protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes: R. v. Oickle, [2000] 2 S.C.R. 3, 36 C.R. (5th) 129, 147 C.C.C. (3d) 321 at [C.C.C.] p. 341, per Iacobucci J.

¶ 76 While it is not essential in all circumstances that the accused's statement, to make it admissible, shall have been preceded by a caution, neither is the giving of such a caution in all cases adequate to satisfy the Crown's burden to establish that the statement is a voluntary one: R. v. Dick (1947), 2 C.R. 417, [1947] 2 D.L.R. 213, 87 C.C.C. 101 (Ont. C.A.) at [C.C.C.] p. 112; leave to appeal to S.C.C. refused, [1947] S.C.R. 211, 4 C.R. 32, 89 C.C.C. 252; F. Kaufman, The Admissibility of Confessions, 3rd ed., (Carswell: 1979), pp. 142-146.

¶ 77 Where a caution is given with regard to an offence with which a person is charged, although a statement made afterwards might be admissible as a voluntary statement at the accused's trial for that offence, it cannot be admitted as a voluntary statement on the trial of the accused person for "an entirely different offence": R. v. Dick, supra, [C.C.C.] p. 113.

¶ 78 Neither should an arrest on a charge amount to a mere vehicle to expand the investigation of the charges against the persons who have already been arrested: R. v. Young (1993), 12 O.R. (3d) 529, 20 C.R. (4th) 81, 79 C.C.C. (3d) 559 (C.A.) at [C.C.C.] p. 565.

¶ 79 There is a strong judicial preference for the growing practice of recording police interrogations, preferably by videotape. While non-recorded interrogations may not be inherently suspect, when a recording is made, it can greatly assist the trier of fact in assessing the confession: R. v. Oickle, supra, [C.C.C.] pp. 344-345, per Iacobucci J.

¶ 80 Given that the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police, Charron J.A., for the court, observed in R. v. Moore-McFarlane (2001), 56 O.R. (3d) 737, 47 C.R. (5th) 203, 160 C.C.C. (3d) 493 at [C.C.C.] p. 517:

> 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 videotape record has been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt.

¶ 81 A police officer who questions an accused without keeping a contemporaneous record of the interrogation risks an adverse finding on the accuracy of what the witness recalls. This applies not only in respect of the content of the accused's statement, but also on the question of the sequence in which matters were discussed: R. v. Bunn (2001), 153 Man. R. (2d) 264, [2001] 7 W.W.R. 32 (C.A.) at [Man. R.] p. 268; R. v. Barrett (1993), 13 O.R. (3d) 587, 23 C.R. (4th) 49, 82 C.C.C. (3d) 266 (C.A.) at [C.C.C.] p. 275, per Arbour J.A., rev'd on other grounds, [1995] 1 S.C.R. 752, 38 C.R. (4th) 1, 96 C.C.C. (3d) 319.

¶ 82 To put it another way, the presence of such a contemporaneous record assists the prosecution to prove affirmatively all the surrounding circumstances leading up to the making of the confession: R. v. Koszulap (1974), 27 C.R.N.S. 226, 20 C.C.C. (2d) 193 (Ont. C.A.) at [C.C.C.] p. 197, per Martin J.A. A statement of a police officer's "interpretation of the substance of the answers to the interrogatories administered" will not suffice: R. v. Thiffault, [1933] S.C.R. 509, [1933] 3 D.L.R. 591, 60 C.C.C. 97 at [C.C.C.] p. 100.

¶ 83 An audio or video recording can be useful in supporting the contentions raised by the parties, thereby assisting in determining the credibility of the various witnesses: R. v. Barrett, supra, [C.C.C.] p. 277.

¶ 84 Even where notes are accurate concerning the content of what is said, notes "cannot reflect the tone of what was said and any body language that may have been employed": J.J. Furedy and J. Liss, "Countering Confessions Induced by the Polygraph: Of Confessionals and Psychological Rubber Hoses" (1986), 29 C.L.Q. 91 at p. 104.

¶ 85 The introduction of a confession "is sufficiently reliable evidence of the defendant's guilt to deserve consideration by the jury": McCormick on Evidence, 4th ed., (West Publishing Co.: 1992), p. 554. A confession, if freely and voluntarily made, is evidence "of the most satisfactory character": Hopt v. Utah, 110 U.S. 574, 584-585 (1884), per Harlan J.

¶ 86 However, concerns have been expressed by trial courts in this country since 1978 as to the failure by the police to use simple and available electronic recording devices, thereby resulting in the best evidence of the police interrogation not being made available for subsequent scrutiny. Hence, in R. v. Vangent and Green (1978), 42 C.C.C. (2d) 313 (Ont. Prov. Ct.) at pp. 328-329, Langdon J. stated the court is entitled to "the best evidence that can be got, not just in accordance with what happens to be convenient".

¶ 87 With depressing frequency, similar observations have been made by trial courts, many years after the Vangent decision.

¶ 88 Doherty J., as he then was, noted the illogicality of the situation where the police, who are in "total control of the interview process", and were dealing, on their evidence, with a cooperative accused, and have resort to devices which could have provided a video or audio record of the procedure, and yet elect not to make an independent electronic record of that process. See R. v. Lim (No. 3) (1990), 1 C.R.R. (2d) 148 (Ont. H.C.J.) at p. 153.

¶ 89 Thus, failure by the police to use readily available recording equipment inevitably leads to suspicion as to their version of events respecting the interrogation: R. v. Falcher, [1994] O.J. No. 1922 (Gen. Div.) at paras. 22-23, per O'Connor J.

¶ 90 It also places in question the integrity of the police, and, ultimately, the administration of justice itself. As Caswell J. noted in R. v. Coke (1996), 4 O.T.C. 210 (Gen. Div.) at para. 18, "Courts will continue to find reasonable doubt where none need be found, but for the failure of the police to ensure an independent objective and impersonal record of the statement taking process".

¶ 91 The frequency of judicial experience of concern and criticism over the failure of investigative authorities, in tendering "admissions against interest by accused persons in criminal trials", to employ the most reliable tools available to verify the accuracy of those admissions, was lamented more recently by Whealy J. in R. v. Haynes, [2001] O.T.C. 853 (S.C.J.) at para. 21, rev'd on other grounds, [2002] O.J. No. 955 (C.A.).

¶ 92 Neither have trial judges in the Ontario Court of Justice been receptive to the excuse that police officers did not tape record the statements of accused persons because tape recording is a "hi-tech" exercise and they have been denied the sophisticated equipment necessary to perform it: R. v. D.N., [1994] O.J. No. 3118 (Prov. Div.) at para. 33, per MacDonnell J. See further R. v. Luong, [1995] O.J. No. 1430 (Prov. Div.) at para. 19, per Bentley J.; R. v. Isse, [2002] O.J. No. 2900 (C.J.), per Feldman J.

¶ 93 Indeed, Renaud J. noted the irony of the situation where well-resourced police forces or specialized tactical units are equipped with modern and sophisticated equipment, such as video recording apparatus in their police cars, if not computerized communications equipment, yet fail to have readily available a relatively inexpensive device such as a tape recorder for interviewing accused persons. See R. v. Li (1997), 11 C.R. (5th) 357 (Ont. Prov. Div.) at p. 365.

¶ 94 A complete audiotape record of what transpires from the time of the accused's arrest, to the time he left the police station to go before the courts, is of benefit in removing any factual dispute about the circumstances surrounding the statement, even when there is little or no conversation involving the accused. A video record of the actual interview with the accused at the police station serves further to provide a reliable and accurate record of everything that happened. See R. v. Morrissey, [2000] O.J. No. 4396 (C.J.) at paras. 9-11, per Kenkel J. See also R. v. Deokie, [2001] O.J. No. 5616 (C.J.) at paras. 30-33,

per Kenkel J., considering videotaping of the breath testing procedure.

¶ 95 The failure by the police to take notes properly or record the best evidence has also been the subject of comment by commissions of inquiry in this province. See Paul Calarco, "What Happens When Evidence Has Not Been Recorded? Staying Charges to Ensure a Fair Trial" (2001), 44 C.L.Q. 514 at 526. The importance of the prosecution presenting before the court a record that sets forth "as completely and as accurately as possible" the contents of a statement and the circumstances in which it was taken was also noted by the Law Reform Commission of Canada's Working Paper 32, Questioning Suspects (Ottawa: 1984), pp. 59-61.

¶ 96 The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions (the Martin Committee) recommended that the Attorney General request that the Solicitor General issue a statement to all police officers emphasizing the importance of taking careful, accurate and contemporaneous notes during their investigation.

¶ 97 Police videotaping and audiotaping of suspects was also the subject of comment by the Commission on Proceedings Involving Guy Paul Morin (the Kaufman Report). The Commission's findings in this regard noted the following at Vol. 2, p. 779:

> Inadequate records not only hindered the ability of officers to recollect the substance of their interviews or activities, they seriously affected the ability of any trier of fact to assess whether the interview process was done in a way to enhance or detract from the reliability and/or accuracy of the witness' account. Where records do not disclose potentially inculpatory aspects of a witness' later testimony, legitimate concerns are raised as to whether the testimony represents an honest and accurate reflection or, instead, testimony coloured by later events (such as the identification of a suspect or criminal defendant) or worse. A serious commitment to proper records therefore protects the officer and assists the Crown attorneys, the defence and the triers of fact, and makes it more difficult to consciously or subconsciously provide unreliable evidence.

¶ 98 With respect to the use of tape recorded interviews, the following benefits were noted:

> A tape-recorded interview illuminates the way in which the interviewing process enhanced or detracted from the reliability and accuracy of the evidence. It helps identify the reasons that a witness changes testimony. It reveals bias, both on the part of the witness and the interviewer, where bias exists. It protects the officer against allegations which are groundless, or it substantiates such allegations. It inhibits impropriety on the part of the authorities.

¶ 99 The Kaufman Report went on to recommend that all interviews conducted with suspects within a police station be videotaped or audiotaped, absent "truly exigent circumstances". [See Note 3 below] The practice of the Australian Federal Police of carrying tape recorders on duty for use when interviewing in other locations, or for use when executing search warrants in analogous situations was recommended for adoption. [See Note 4 below]

Note 3: Recommendation 96(a).
Note 4: Recommendation 96(b).

¶ 100 As for oral statements, which are neither videotaped or audiotaped, and allegedly made by a suspect outside of the police station, it was recommended that such statements should be re-read to the suspect at the police station on videotape, and his or her comments recorded. Alternatively, the alleged statement should be contemporaneously recorded in writing and the suspect ultimately permitted to read the statement as recorded, and sign it, if it is regarded as accurate. [See Note 5 below]

Note 5: Recommendation 96(c).

¶ 101 In support of these recommendations concerning police videotaping or audiotaping of suspects, the Kaufman Report observed:

> Videotaping or audiotaping ultimately narrows trial issues, shortens trials, protects both the interviewer and interviewee from unfounded allegations and encourages compliance with the law; such a policy also enables the parties and the triers of fact to evaluate the extent to which the interviewing process enhanced or undermined the reliability of the statement. [See Note 6 below]

Note 6: Recommendation 96(a).

¶ 102 The 2001 report of the Hon. Peter Cory respecting his inquiry into the wrongful conviction of Thomas Sophonow in Manitoba (the Sophonow Inquiry) is also illuminative on this issue.

¶ 103 With respect to the issue of police interviews with suspects, the following comments and recommendations were made:

> The evidence pertaining to statements given by an accused will always be of great importance in a trial. The possibility of errors occurring in manually transcribing a verbal statement by anyone other than a skilled shorthand reporter is great; the possibility of misinterpreting the words of the accused is great; and the possibility of abusive procedures, although slight, exists in those circumstances. That, coupled with the ease with which a tape recording can be made, make it necessary to exclude unrecorded statements of an accused. It is the only sure means of avoiding the admission of inaccurate, misinterpreted and false statements.
> I would recommend that videotaping of interviews with suspects be made a rule and an adequate explanation given before the audiotaping of an interview is accepted as admissible. This is to say, all interviews must be videotaped or, at the very least, audiotaped.
> Further, interviews that are not taped should, as a general rule, be inadmissible. There is too great a danger in admitting oral statements. They are not verbatim and are subject to misinterpretation and errors, particularly of omission. Their dangers are too many and too serious to permit admission. Tape recorders are sufficiently inexpensive and accessible that they can be provided to all investigating officers and used to record the statements of any suspect. [See Note 7 below]

Note 7: See p. 19 of the Report.

¶ 104 Subsequently, it was noted by Commissioner Cory that the Winnipeg Police Service confirmed that interviews with suspects are now videotaped whenever possible; if not videotaped, they are audiotaped. According to the Commissioner, "This is a very sound and progressive step in the interview procedure ... taping is an essential element of the interview." [See Note 8 below]

Note 8: Ibid. See also R. v. Kjelshus, [2001] S.J. No. 693 (Prov. Ct.) at paras. 31-32 where Halderman J. described these recommendations as being "persuasive, and are entitled to great weight".

¶ 105 Other jurisdictions have also been proactive, recognizing that videotaping can deter coercive police conduct and provide a more complete audiovisual record for the judge and jury to evaluate the voluntariness and veracity of the defendant's statement. In Great Britain, the Police and Criminal Evidence Act of 1984 built certain protections into the questioning process, including the requirement that all suspect interviews be taped. [See Note 9 below] In the United States, 97% of the police departments that have videotaped at least some confessions have found them useful. [See Note 10 below]

Note 9: See Part V of the Act, entitled, "Questioning and Treatment of Persons by Police", s. 60(1).

Note 10: See Saul M. Kassin, "The Psychology of Confession Evidence" (1997), American Psychologist 221, cited in Christine Boyle, Marilyn T. MacCrimmon and Dianne Martin, The Law of Evidence (Emond Montgomery Publications Ltd: 1999), p. 786.

¶ 106 McCormick on Evidence, supra, notes that the Model Code of Pre-Arraignment Procedure, s. 130.4(3) (Official Draft 1975) proposed requiring sound recordings of warnings, waivers, questioning and any statement made in response to questioning, adding at p. 668:

> Whether or not constitutionally required, proof of confessions by means of audio or video recordings might reasonably be encouraged as a matter of prosecution policy or even demanded as a matter of evidence law. Such recordings are probably quite valuable in presenting juries, trial judges, and appellate courts with as accurate as possible a re-creation of the circumstances of defendants, statements; video recordings are especially valuable in this regard. The advantages are not one-sided; such recordings may be valuable to the prosecution in establishing that defendants did in fact waive their rights and that they did so voluntarily. [See Note 11 below]

Note 11: The Law Reform Commission of Canada's Working Paper 32, Questioning Suspects, supra, p. 60, notes that its provisions on tape-recording statements are based upon the provisions contained in the Model Code of Pre-Arraignment Procedure.

¶ 107 In summary, police policy on statement taking and the use of recording devices must reflect the concerns of the authorities set out above. It is long past the time to defend an indefensible policy; investigators must be brought into the modern era on this issue. In the words of O'Connor J. in R. v. Webber, [1995] O.J. No. 2189 (Gen. Div.) at para. 17, var'd, [1996] O.J. No. 2745 (C.A.), "Public respect for the administration of justice, the protection of the rights of accused persons and the cost savings to the system demand no less".

¶ 108 Crown counsel can play an important and meaningful role in this regard by very closely scrutinizing cases where such evidence is proffered by police investigators, and being particularly mindful of the role that such unrecorded statements have played in wrongful conviction cases, as the Morin and Sophonow Commissions of Inquiry clearly document.

¶ 109 It is only by watching interrogations, if not at least listening to them, that one can both appreciate and experience the "full flavour" of the intensity of the questioning: R. v. M.J.S. (2000), 263 A.R. 38, 32 C.R. (5th) 378 (Prov. Ct.) at [C.R.] p. 385. This is not to say, as Ketchum J. went on to note, that police interrogations have to be conducted according "to some sort of unstated equivalent of the Marquis of Queensbury Rules" and that the law is such that "the only acceptable interrogation is an ineffective one": R. v. M.J.S., supra, [C.R.] p. 391.

¶ 110 And in cases where a written statement is being challenged, it may be particularly difficult to assess where it is more an interpretation of what was said, there being no independent or neutral record of the events which transpired. See, for a recent example, R. v. Hann, [2002] N.J. No. 177 (S.C.) at para. 81, per Dymond J.

¶ 111 The words of Justice Langdon in the Vangent case, supra, p. 328, which were uttered almost twenty-five years ago, bear repeating, especially as it appears that the authorities, for the main, continue to ignore its refrain:

> The question that continually arises in the mind of the Court in these situations is: Why in this day and age, in this urban jurisdiction, is the Court required to wrestle unassisted to this extent with such issues?

¶ 112 I would respectfully add that continued inaction suggests indifference to the proper administration of justice.

Application of Law to Facts of the Case

¶ 113 In this case, the events surrounding the taking of an eight minute statement from the accused have resulted in several days of testimony and use of precious court time at this preliminary inquiry concerning a serious motor vehicle offence.

¶ 114 The making of a record of these events would likely have occasioned an expenditure of only a few dollars, at the investigative stage, while removing any uncertainly as to the nature and substance of the events which transpired.

¶ 115 It seems ironic that a specialized police unit, such as traffic investigators, who are called upon to do highly skilled and complex work, responding to motor vehicle collisions and engaging in complicated tasks such as accident reconstruction and re-enactments with the benefit of the modern investigative tools and technology, would not see fit to make an independent and permanent record of their dealings with those they consider responsible for such accidents, with a device as simple and basic as a tape recorder.

¶ 116 Surely it is not too much to expect trained and experienced police officers who are in the habit of noting and making a permanent record and written report of measurements of traffic lanes, point of impact, road conditions, operability of signal lights and the like, to also carry a tape recorder for use when speaking to those they consider responsible for the motor vehicle offences they are investigating. They are equipped

with tools in respect of recording the former; why should the latter be any different.

¶ 117 With respect to the events of 23 March 2001, I cannot accept the evidence of Sgt. Sorgo and Constable Windmoller as to what they say they told the accused prior to the taking of the statement at Mr. Delmorone's place of employment. The absence of any independent and reliable record of this conversation is a significant factor in this regard.

¶ 118 According to Sgt. Sorgo, the accused was cautioned for failing to comply with bail. His notes, however, contain nothing to this effect, just that the accused was spoken to about a pedestrian being struck and their motor vehicle collision investigation.

¶ 119 Constable Windmoller, in turn, could not recall what the accused was told, other than his partner explained the investigation to him. His notes were also silent on point. He believed the accused read over the statement, was asked if there was anything he wished to add, and signed it. There is nothing in the statement indicating same. Indeed, the opposite appears to be the case.

¶ 120 As for the accused, he thought he was being charged with driving under suspension, and retrieved his bail papers from his truck to show the officers that he was, in fact, permitted to drive. To him, he was merely assisting the police complete their accident report, since it was necessary that they speak to him; he felt embarrassed having to speak to the police at work and being arrested in front of his co-workers, his boss saying that he had lied about being able to drive. The accident report itself was completed in early April, following the officer's interview with the accused. This sequence of events tends to support the accused's testimony.

¶ 121 The above graphically illustrates the dangers of unrecorded statements, specifically the absence of a reliable, independent record. The three witnesses on the voir dire might as well have been speaking of three separate interviews, so different are their respective recollections and interpretation of what was said.

¶ 122 I consider, in any event, that the accused's version of events is the more reliable of the three. It is significant that the interview took place at his workplace, at a time the police obviously knew he was the driver involved in the accident. Their conversation, which followed the taking of the statement, and was not added to it, only then concerned his bail variation which allowed him to drive for employment purposes. This is a clear indication that the statement reduced to writing had little, if anything, to do with a fail to comply charge, contrary to the testimony of Sorgo and Windmoller.

¶ 123 Moreover, the statement taken by these traffic investigator officers is written on a document entitled, "Motor Vehicle Collision Field Notes". There is no reference anywhere in the document to the breach of bail charge. A fair reading of this statement, in my respectful opinion, is that it solely relates to the accident of 15 March 2001, and the reasons the accused thought he may have passed out while driving.

¶ 124 What is also particularly noteworthy about this statement is what it does not contain. Not only is there a no reference to any caution, for any offence, but it does not contain any questions that the accused was asked prior to commencing the interview nor any indication that it was read to or by him afterwards. It is not signed or initialled by anyone. Although it contains the date of the accident, there is no indication of the date or time it was taken, its duration, the location where the interview was conducted, the identity of the officers present or its author.

¶ 125 In short, under the guise of speaking to the accused about his status to drive a motor vehicle, the

authorities took a statement from him solely in respect of his manner of driving, including his explanation for the cause of the accident. No independent and neutral record was made of this conversation because the authorities, in my view, wished there not to be one for subsequent scrutiny.

¶ 126 In light of the deficiencies in recording the circumstances surrounding the taking of this statement, I have concluded that the accused's statement sought to be tendered into evidence against him at this preliminary inquiry has not been proven to be voluntary. I am particularly of the view that a sufficient substitute for an audio or videotape record has not been provided to satisfy the heavy onus on the Crown to prove voluntariness beyond a reasonable doubt: R. v. Moore-McFarlane, supra, [C.C.C.] p. 517.

Disposition

¶ 127 The statement alleged to have been taken from the defendant has not been proven to be voluntary by the Crown. Accordingly, it will not be admitted into evidence at these proceedings.

LIBMAN J.

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EXHIBITS

[Quicklaw note: Exhibit A - City of Toronto Police - Motor Vehicle Collision Field Notes, and Exhibit 1 - Accident Report, cannot be reproduced online. Please see paper copy.]

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