**Her Majesty the Queen v. Moore-McFarlane et al.**
**[Indexed as: R. v. Moore-McFarlane]**

**56 O.R. (3d) 737**
**[2001] O.J. No. 4646**
**Docket Nos. C31374 and C30881**

**Court of Appeal for Ontario**
**Charron, Sharpe and Simmons JJ.A.**
**November 30, 2001**

Criminal law -- Evidence -- Confessions and admissions -- Voluntariness -- Modern rule regarding admission of statement concerning reliability and procedural fairness -- Crown bearing onus of proving adequate record of circumstances surrounding taking of statement -- Sufficiency of record relevant to Crown's onus to prove threshold reliability on voir dire and to its burden to prove ultimate reliability to trier of fact -- No absolute requirement that statement be audiotaped or videotaped but failure to do so where facilities exist making statement suspect -- Accused claiming that confessions coerced by hold-up squad -- Part of interrogation not audiotaped and record of arrest for both accused mysteriously lost -- M alleging he was beaten before audiotaped statement taken and that he was interrogated while naked -- B alleging that he repeatedly asked to speak to lawyer before statement made -- Trial judge ruling statements voluntary -- Trial judge foreclosing questions regarding interaction between police and accused before recorded statement and stating evidence about whether threats made or accused clothed during interview not relevant to issues on voir dire -- Trial judge's interventions and ruling on voir dire reflecting misapprehension of test for voluntariness or failure to apply test to evidence -- Trial judge did not deal with concerns about voluntariness arising from the evidence adduced during voir dire -- Evidence on voir dire regarding statement taken at police station falling short of proof required to prove voluntariness -- Statements inadmissible -- Appeal allowed and new trial ordered.

Criminal law -- Jury selection -- Challenge for cause -- Within trial judge's discretion to determine if jury panel may remain in court while challenge for cause taking place -- Trial judge's instructions to panel regarding process of challenge for cause inadequate -- Instructions failing to assist triers regarding meaning of partiality -- Triers not told that standard for successful challenge was balance of probabilities or that they could retire to jury room to confer -- Within trial judge's discretion to determine whether defence counsel may address jury panel -- Defence counsel could have assisted jury with procedural matters omitted in trial judge's instructions -- Instructions to panel inadequate -- Appeal allowed -- New trial ordered.

The accused M and B were charged with robbery and other offences arising out of the armed robbery of a convenience store. M denied any involvement in the robbery. He testified that the police approached him in the vicinity of the robbery, drove him to the spot where they later claimed to have apprehended him, and arrested him for robbery. On a voir dire to determine the voluntariness of inculpatory statements allegedly made by M, M testified that he was hit in the jaw with a walkie-talkie by the police on the way to the station. When they arrived, the police waited in the car for 30 minutes before bringing M into the station. That delay was unexplained. The trial judge did not permit counsel for M to ask

questions relating to the events prior to the actual interview. Counsel did not correct the trial judge's assumption that those events were not relevant to the issue of voluntariness. M also testified that he gave three audiotaped statements during the interrogation, although the police said that only one was made. He stated that his confession was false, that he had been coerced into giving the statement after being assaulted during the interrogation by members of the hold-up squad and that he was questioned while naked. M's statement was not videotaped, nor was the first half-hour of his interrogation by the police audiotaped. The trial judge ruled that the statements were voluntary.

B also testified on the voir dire and denied any involvement in the robbery. He was pepper-sprayed by the police prior to his arrest at the scene of the robbery. The arresting officer testified that he advised the accused of his right to counsel and asked him if he wanted to contact a lawyer, to which B replied, "No, because my eyes are killing me." The arresting officer continued to question B while taking him to the hospital to get his eyes washed out. B responded to the questions and continued to complain about the effects of the pepper spray in his eyes. B testified that he was struck in the face after being placed in the police cruiser. The officer in charge at the police station testified that B had a cut lip when he arrived. Counsel for B began to cross-examine that officer on the issue of lost records of arrest, but the trial judge cut off that line of questioning. G, the officer who tackled B at the scene of the robbery, testified that he had a brief conversation with B shortly after B's arrival at the police station. He claimed that he made a remark to B about letting an old man take him down, to which B replied, "It would be different if I had my crew backing me up." B was interrogated by two members of the hold-up squad. One of those officers testified that B stated, "You got us and the gun. I'm fucked. You know what you need to know." The interrogation was not videotaped. Counsel for B sought to cross-examine this officer on his knowledge of recent remarks by the judiciary, primarily directed at the hold-up squad, concerning the need to videotape interrogations. The trial judge interrupted counsel mid-sentence and instructed the officer that he did not need to answer that question. When counsel submitted that it was relevant to his cross-examination, the trial judge ruled that it was a matter for argument before him and not for the witness to answer. The officer confirmed that B was not given an opportunity to check the notes of the conversation for accuracy and that he was not asked to initial them. B testified that he was told upon arrival at the police station that he could not phone his lawyer as there were no telephones in the booking area. He testified that he made repeated requests to speak to a lawyer during the interrogation and that he was not given an opportunity to do so. He testified that the police took his clothes and that he was left in his shorts during the interrogation. The trial judge ruled that the statements made by B were voluntary. Although B had raised the issue of a violation of his rights under s. 10(b) of the *Canadian Charter of Rights and Freedoms* and had sought to exclude the statements under s. 24(2) of the *Charter*, no adjudication was made on the *Charter* application.

There was a challenge for cause process based on the accused's race. The accused argued that the process was fatally flawed as the trial judge allowed the panel to remain in the courtroom during the challenge process, his instructions to the triers were inadequate and he erred by refusing to let defence counsel address the triers.

B and M were both convicted. They appealed.

Held, the appeals should be allowed.

Both elements of the modern confession rule, the absence of threats or promises and the principles related to the "operating mind", are closely related to the predominant concern for reliability. Since voluntary confessions are admitted as an exception to the hearsay rule, concerns over reliability of the evidence are at the root of the confessions rule. In turn, the reliability of the evidence is intrinsically connected to trial fairness, the second rationale for the confessions rule. The concern over fairness 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. Because the admission of a confession may prove conclusive of the guilt of the accused, the higher onus of proof beyond a reasonable doubt must be met before the evidence will be admitted.

One of the main issues raised was the police officers' failure to make an audiotape or videotape record of the statements allegedly made by the accused. There is no absolute rule regarding the audio or video recording of statements. 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. 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. The sufficiency of the record does not go exclusively to the question of ultimate reliability and weight. The completeness, accuracy and reliability of the record have everything to do with the court's inquiry into and scrutiny of the circumstances surrounding the taking of the statement. It is difficult to see how the Crown could discharge its heavy onus of proving voluntariness beyond a reasonable doubt where proper recording procedures are not followed.

Many of the trial judge's interventions and rulings during the course of the voir dire strongly suggested that the trial judge either misapprehended the governing test on voluntariness, or failed to apply it to the evidence. On more than one occasion, the trial judge questioned the relevance of the evidence presented by the Crown in relation to anything that transpired before the interrogation in the interview room actually commenced. These interventions suggested a lack of appreciation of the need to scrutinize all of the circumstances surrounding the taking of a statement. The trial judge directed Crown counsel not to examine the police witnesses on whether there had been any threats because "this was not a judge alone trial". The inquiry into whether any threats or promises were made to induce the confession lies at the core of the confessions rule and is not simply a matter going to the ultimate reliability or weight of the evidence. The trial judge expressed agreement with Crown counsel's com ment early on in the voir dire that "not much turned" on the question of M's possible state of undress during the interrogation. This comment suggested that the trial judge misapprehended the compelling nature of this evidence on the question of whether the alleged confession was given in oppressive circumstances that negated any voluntariness. The trial judge curtailed defence counsel's cross-examination on the paucity of the notes taken by one of the recording officers in the interview room on the basis that this line of questioning was not helpful on the voir dire and that it was a matter for the jury. As stated above, the completeness, accuracy and reliability of the record is intrinsically related to the Crown's onus on the voir dire and is not simply a matter going to the ultimate reliability and weight of the evidence. The trial judge directed counsel for M to make his submissions mid-way through the voir dire notwithstanding the indication from counsel that other witnesses who were going to be called by the Crown with respect to B's alleged statements were expected to give evidence relevant to his client's position. Although the trial judge told counsel that the issue could be revisited later if need be,

he immediately ruled on the issue of voluntariness before hearing those additional witnesses. This approach suggested that the trial judge failed to consider all relevant circumstances in determining voluntariness. It caused actual prejudice to M because the evidence adduced by the Crown that directly concerned B was capable of lending credence to the position advanced by M on the treatment he received that night. The trial judge's curtailment of defence counsel's cross- examination of the police officers on the lost records of arrest suggested that the trial judge misapprehended the significance of this evidence on the question of waiver of the right to counsel. In the absence of any audiotaped or videotaped recording of the interrogations, the records of arrest wou ld have provided the only confirmatory evidence of each accused's waiver of his right to counsel. The trial judge's failure to refer to or even adjudicate on B's s. 10(b) *Charter* application further suggested that he was not alive to this issue. In the circumstances of this case, the trial judge's curtailment of defence counsel's cross-examination on the police officers' knowledge of the legal requirement that a proper record be made undermined the significance of the officers' decision not to record some of the statements. The trial judge's apparent pre-judgment that the testimony of one police officer would necessarily corroborate that of his fellow officer before hearing the testimony in question further compromised the appearance of fairness in the conduct of the voir dire.

Quite apart from these errors in the conduct of the voir dire, the evidence gave rise to a number of issues that required proper consideration and adjudication, such as the casual and poor recording of the events between the time of M's arrest and his booking at the police station; his allegation that he was naked during the interrogation (which raised a serious concern that his statement was taken in oppressive conditions that may have impacted on its voluntariness); the mysterious loss of the arrest records; B's answer to the police officers' questions about the robbery in the police cruiser en route to the hospital when he was in obvious pain and discomfort; and B's allegation that his repeated requests to speak to a lawyer were denied.

The trial judge's findings on voluntariness could not stand. This was not a proper case for the application of the curative proviso. There was a very real danger that the jury convicted the accused on the basis of their alleged confessions alone without giving proper consideration to the other issues raised by the defence at trial.

The trial judge had discretion to permit the jury panel to remain in the courtroom while the challenge for cause process took place. A trial judge will consider the need to prevent abuse as well as the need to ensure that the process is fair to the accused and to the prospective jurors. It was not shown that the trial judge erred in principle in exercising his discretion or that its exercise resulted in a miscarriage of justice. The jurors were not told that the standard to be applied when deciding a challenge was that of a balance of probabilities, about the meaning of partiality, that the decision was to be that of both triers or that they could retire to the jury room to consider their decision. Although it was also within the trial judge's discretion to prevent defence counsel from addressing the panel, had he allowed it, defence counsel may have assisted the jury with a fuller explanation of the nature of the challenge for cause process and the procedure they were to follow. The trial judge's instructi ons to the panel were inadequate.

APPEAL from convictions for robbery and other offences.

*R. v. Hodgson*, 1998 CanLII 798 (SCC), [1998] 2 S.C.R. 449, 163 D.L.R. (4th) 577, 230 N.R. 1, 127 C.C.C. (3d) 449, 18 C.R. (5th) 135 (sub nom. *R. v. H. (M.C.)*); *R. v. Lapointe*, 1987 CanLII 69 (SCC), [1987] 1 S.C.R. 1253, 21 O.A.C. 176, 76 N.R. 228, 35 C.C.C. (3d) 287, affg (1983), 1983 CanLII 3558 (ON CA), 1 O.A.C. 1, 9 C.C.C. (3d) 366 (C.A.), consd

Other cases referred to *R. v. Barrett*, 1995 CanLII 129 (SCC), [1995] 1 S.C.R. 752, 21 O.R. (3d) 736n, 179 N.R. 70, 96 C.C.C. (3d) 319, 38 C.R. (4th) 1, revg (1993), 1993 CanLII 3426 (ON CA), 13 O.R. (3d) 587, 82 C.C.C. (3d) 266, 23 C.R. (4th) 49 (C.A.); *R. v. Bell*, [1996] O.J. No. 4903 (Prov. Div.); *R. v. Coke*, [1996] O.J. No. 1926 (Gen. Div.); *R. v. Egger*, 1993 CanLII 98 (SCC), [1993] 2 S.C.R. 451, 103 D.L.R. (4th) 678, 153 N.R. 272, 15 C.R.R. (2d) 193, 82 C.C.C. (3d) 193, 21 C.R. (4th) 186, 45 M.V.R. (2d) 161; *R. v. Falcher*, [1994] O.J. No. 1922 (Gen. Div.); *R. v. Haynes*, [2001] O.J. No. 73 (Gen. Div.); *R. v. Hubbert* (1975), 1975 CanLII 53 (ON CA), 11 O.R. (2d) 464, 31 C.R.N.S. 27, 29 C.C.C. (2d) 279 (Ont. C.A.), affd 1977 CanLII 15 (SCC), [1977] 2 S.C.R. 267, 15 O.R. (2d) 324, 38 C.R.N.S. 381, 15 N.R. 139, 33 C.C.C. (2d) 207; *R. v. Li*, [1997] O.J. No. 4237 (Prov. Div.); *R. v. Lim* (No. 3) (1990), 1 C.R.R. (2d) 148 (Ont. H.C.J.); *R. v. Longman*, [1993] O.J. No. 4109 (Gen. Div.); *R. v. Luong*, [1995] O.J. No. 1430 (Prov. Ct.); *R. v. N. (D.)*, [1994] O.J. No. 3118 (Prov. Ct.); *R. v. Nelson*, [1999] O.J. No. 4377 (Gen. Div.); *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, 187 N.S.R. (2d) 201, 190 D.L.R. (4th) 257, 259 N.R. 227, 585 A.P.R. 201, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129; *R. v. S. (M.J.)* (2000), 2000 ABPC 44 (CanLII), 80 Alta. L.R. (3d) 159, 32 C.R. (5th) 378 (Prov. Ct.); *R. v. Starr*, 2000 SCC 40 (CanLII), [2000] 2 S.C.R. 144, 148 Man. R. (2d) 161, 190 D.L.R. (4th) 591, 258 N.R. 250, 224 W.A.C. 161, [2000] 11 W.W.R. 1, 147 C.C.C. (3d) 449, 36 C.R. (5th) 1; *R. v. Thompson* (June 28, 2000), Bellamy J. (Ont. Gen. Div.); *R. v. Tsai*, [1995] O.J. No. 3413 (Gen. Div.); *R. v. Vangent* (1979), 1978 CanLII 2525 (ON CJ), 42 C.C.C. (2d) 313 (Ont. Prov. Ct.)

Statutes referred to *Canadian Charter of Rights and Freedoms*, ss. 10(b), 24(2)

Lisa Joyal, for respondent.
Scott K. Fenton, for appellant Moore-McFarlane.
David M. Tanovich, for appellant Bogel.

The judgment of the court was delivered by

CHARRON J.A.: --

**I. OVERVIEW OF THE APPEAL**

[1] Following their trial by judge and jury, the appellants Gregory Charles Moore-McFarlane and Paul Anthony Bogel were convicted of robbery with a firearm, using a disguise in the commission of an offence and other related weapons offences arising out of the robbery of a convenience store in Toronto on March 26, 1997. McFarlane was sentenced to a total of four years' imprisonment and Bogel to nine years in addition to the 13 months they each spent in pre-trial custody. They appeal against their convictions and sentences.

[2] The grounds of appeal against conviction relate to the challenge-for-cause process and the admissibility of statements allegedly made by each appellant to the police. On the first issue, both appellants contend that the challenge-for-cause process was fundamentally flawed because the trial

judge (a) refused to exclude the jury panel during the process; (b) gave inadequate instructions to the triers; and (c) denied defence counsel's request to make submissions to the triers. On the second issue, each appellant contends that the trial judge's ruling on the voluntariness of his alleged statements to the police was unreasonable. In addition, Bogel submits that the trial judge erred in failing to consider and adjudicate upon his application to exclude his statement under s. 24(2) of the *Canadian Charter of Rights and Freedoms* on the ground that it was obtained in violation of his s. 10(b) right to counsel.

[3] In my view, the evidence adduced on the voir dire with respect to the voluntariness of the statements allegedly made by each accused cannot reasonably support the trial judge's conclusion that the statements were voluntary except for one spontaneous utterance allegedly made by McFarlane upon his arrest with respect to lottery tickets found in his coat. All other statements should have been excluded. Since I am not satisfied that this is an appropriate case to apply the curative proviso, I would order a new trial.

[4] It is also clear from the record that the trial judge erred in failing to consider and adjudicate upon Bogel's application to exclude his statement under the *Charter*. However, given my conclusion on the issue of voluntariness, it will not be open to the Crown to adduce the evidence of Bogel's statements at the new trial and Bogel's *Charter* application therefore becomes moot.

[5] In view of my conclusion with respect to the appellants' statements, it is not necessary for me to deal with the grounds of appeal that relate to the challenge-for-cause process in any detail. I will, however, make general comments on the process that was followed in this case at the conclusion of this judgment. Finally, as there will be a new trial, I will simply give a brief overview of the evidence and relate in more detail only the facts that are relevant to the admissibility of the appellants' statements.

**II. OVERVIEW OF THE EVIDENCE**

[6] It was the theory of the Crown at trial that McFarlane and Bogel were involved in the armed robbery of a convenience store in the west end of Toronto on the evening of March 26, 1997. The Crown also alleged that Bogel twice fired a gun at Peter Mills, a CFTO cameraman who got involved in a chase of the getaway van. In support of its theory, the Crown relied on inculpatory statements allegedly made by each appellant to Metro Toronto hold-up squad detectives following his arrest. The statements in question and the circumstances surrounding their taking will be reviewed later in this judgment. In addition, the Crown relied on the following evidence:

> -- McFarlane's arrest in the vicinity of the convenience store within a couple of minutes of the robbery, running away from the scene and in possession of lottery tickets that were similar in kind to the lottery tickets stolen by the robbers;
>
> -- items of clothing worn by McFarlane that matched the description given by an eyewitness to the robbery;
>
> -- pieces of identification in the name of the person who drove the getaway van found in [the] possession of McFarlane at the time of his arrest;
>
> -- Bogel's presence in the getaway van;

-- the gun and clothing allegedly worn by the shooter found in the vicinity of Bogel's arrest;

-- Mills's identification of Bogel as the person who shot at him.

[7] McFarlane testified and denied any involvement in the robbery. At the time of the incident, he was a 19-year-old teenager with no criminal record. He testified that he was in the vicinity of the robbery waiting for his girlfriend when a police officer approached him, drove him to the spot where police later described apprehending him, and later arrested him for robbery. He also testified that the lottery tickets found in the coat he was wearing belonged to his friend whose jacket he had borrowed earlier that night to impress his girlfriend. McFarlane testified that his confession was false and that he had been coerced into giving it after having been assaulted and interrogated by the officers of the hold-up squad while he was naked. The detectives denied assaulting McFarlane and testified that they interrogated him in his underwear and socks.

[8] Bogel also testified. He admitted to being in the vicinity of the robbery to purchase some drugs. However, he denied any involvement in the robbery and shooting. He further denied giving any statement to the police. He presented a defence of mistaken identification and police corruption. In support of his theory of mistaken identification, Bogel relied on the following evidence:

-- no gunshot residue was detected on his hands;

-- upon his arrest, Bogel was wearing a bandana different in colour from the bandana Mills described the shooter as wearing. In addition, Bogel's height and weight did not match the description provided by Mills;

-- Mills's direct identification was based on his sighting of Bogel sitting in the police cruiser while under arrest.

In support of his theory of police corruption, Bogel relied on the following evidence and argument:

-- the police failed to videotape or audiotape their questioning of Bogel despite the availability of recording equipment at the police station;

-- the original record of arrest had been lost;

-- the police notes concerning what Bogel was wearing were altered and augmented to correspond to the description provided by Mills;

-- the evidence that the police found a glove in the back pocket of Bogel's pants, used by the Crown to rebut the significance of the absence of gunshot residue on Bogel's hands, was a fabrication since those pants had no back pockets.

**III. THE VOIR DIRE**

[9] After the arraignment of both appellants but before the selection of the jury, Crown counsel sought a voir dire "as to voluntariness" with respect to statements allegedly made by each appellant to the police. While the purpose of the voir dire was thus identified by Crown counsel solely in terms of

voluntariness, it is clear from the record and from the fresh evidence adduced on appeal that both Crown counsel and the court were aware that Bogel was also seeking to exclude the statement under s. 24(2) of the *Charter*. Hence, I see no merit to the argument advanced by Crown counsel on appeal when she states in her factum that there was no indication anywhere on the record that the voir dire, insofar as Bogel was concerned, was intended to be a blended voir dire on both the issue of voluntariness and the allegation of a *Charter* breach. While it would appear that no written notice was served upon the Crown and no application material was filed wit h respect to the *Charter* application, no objection was raised by Crown counsel at trial on these procedural defects. It is also clear from the record that evidence was adduced and argument was made with respect to both issues.

[10] The fact that both issues (voluntariness and the allegation of a s. 10(b) *Charter* violation) were before the court with respect to Bogel becomes particularly relevant because the trial judge, in his brief ruling at the conclusion of the voir dire, did not deal with the Charter application. The Crown relies on the presumption that the trial judge knows the law and that he must therefore be taken to have applied it correctly to the evidence on both issues. The trial judge's ruling with respect to McFarlane's statements was also very brief and the Crown relies on the same presumption in support of the trial judge's ruling in his case. It therefore becomes important, in this court's assessment of the reasonableness of the trial judge's ruling, to consider the actual conduct of the voir dire as well as the evidence that was adduced where it may shed some light on the trial judge's appreciation of the issues before him. The relevant facts can be summarized as follows.

A. Evidence in Relation to McFarlane's Statement

*1. At the scene and en route to the police station*

[11] Detective Lajeunesse testified that he arrested McFarlane shortly after 10:16 p.m., running down a street close to and heading away from the scene of the robbery. Lajeunesse had but a brief contact with McFarlane at this point in time before he turned him over to Detective May. May testified that he informed McFarlane of his rights to counsel, that McFarlane indicated to him that he understood, and that he did not wish to speak with a lawyer. May searched McFarlane and found four lottery tickets in the pocket of his coat, at which time McFarlane immediately indicated that he found those on the street. This statement was one of the statements later introduced at trial. As indicated earlier, it is my view that this statement was properly admitted in evidence. None of the arguments advanced on appeal have any bearing on the admissibility of this statement. Hence the following analysis does not pertain to this statement.

[12] May then read to McFarlane the caution from his memo book. McFarlane acknowledged that he understood and denied robbing anyone. After other officers arrived on the scene around 11:00 p.m., May and Lajeunesse left with McFarlane and arrived at 12 Division a few minutes later. They then waited approximately half an hour in the car before bringing McFarlane in the station. May could not explain the delay but thought it was possibly because someone else was being booked at the time. He testified that he had no conversation with McFarlane in the car.

[13] McFarlane testified that he was hit in the jaw with a walkie-talkie by the police on the way to the police station and that the police kept asking him who was involved in the robbery. He testified that he was not hit hard - "trying to get me scared; nothing hard". He was not injured but felt "kind of stunned".

*2. The booking*

[14] May and Lajeunesse brought McFarlane before the officer in charge at the station, Staff Sergeant Pinfold, where he was booked at approximately 11:33 p.m. When Crown counsel sought to elicit testimony from the first witness, Lajeunesse, on what transpired at the time of booking, the trial judge intervened and the following dialogue ensued:

> The Court: Where is the issue here, [counsel]?
>
> Defence Counsel: Voluntariness.
>
> The Court: The statement in the Interrogation Room?
>
> Defence Counsel: Yes.
>
> The Court: Why go through all this? They are not taking issue with you.
>
> Crown Counsel: I will move on.

[15] Later during the examination-in-chief of Lajeunesse, when Crown counsel asked the officer, as part of a series of questions concerning threats, promises and inducements, whether he had made any threats to McFarlane during the time he was with him, the trial judge intervened and said:

> The Court: This is judge alone. Don't go into that. [Defence Counsel] isn't concerned about that. He wants to know what goes on in the interview room.
>
> Crown Counsel: As long as that is clear. Those are my questions.

[16] Counsel for McFarlane did not correct the trial judge's assumption that the events prior to the actual interview were not relevant to the issue of voluntariness. The booking officer, Pinfold, did not testify on the voir dire with respect to McFarlane, counsel for McFarlane having confirmed, in answer to the trial judge's query on the relevance of this witness, that he did not require him.

*3. In the interview room*

[17] Lajeunesse and May testified that McFarlane was escorted from the booking area to the interview room in the criminal investigation office, where he was strip-searched. Lajeunesse testified that McFarlane was strip-searched for weapons, and that at the time he left him, McFarlane was seated on a bench in the interview room and that he was "re-clothed". Lajeunesse did not remember when he seized McFarlane's clothes but he had a note that he handed the clothes to a detective from the forensic identification services at 5:15 a.m. In re- examination, Crown counsel sought to elicit from the officer evidence that he had given McFarlane new clothes. The trial judge intervened and correctly noted to Crown counsel that she could have dealt with this in chief. Crown counsel did not pursue her questions, commenting that "Not much turns on it." The trial judge replied "You are right on that assumption."

[18] May was then called as the next witness. With respect to McFarlane's state of dress when he left him in the interview room, he was not sure what McFarlane was wearing but believed that he was "partially clothed" and that he may have had his shirt and pants on.

[19] At approximately 11:50 p.m., Detectives Peter Lacey and Doug Yarenko entered the interview room where McFarlane was seated. Yarenko testified that McFarlane was dressed in white socks and a pair of yellow boxer shorts and that the rest of McFarlane's clothing was outside in a container. Yarenko testified that he had directed that McFarlane's clothes be seized so that they could be submitted for forensic testing. He confirmed that McFarlane was not given other clothes until after the interview was completed.

[20] Yarenko testified that he acted as a witness to the interview conducted by Lacey. He stated that Lacey conducted a question-and-answer period from about 11:50 p.m. until about 12:22 a.m. at which time Lacey exited the room to obtain a tape recorder. At 12:24 a.m., Lacey returned to the room and a taped conversation was commenced, finishing at 12:46 a.m. Yarenko took no notes of the conversation but later reviewed Lacey's notes and initialled them. When Yarenko was cross-examined on the paucity of his notes taken between 11:50 p.m. and 12:22 a.m., the trial judge intervened and stated: "Isn't that something for the jury? He said he read Lacey's book and signed it. You can do that with the jury. It doesn't help on the voir dire."

[21] Yarenko was then cross-examined by counsel for Bogel with respect to records of arrest that had been prepared in relation to both appellants. In particular, counsel noted the reference on the usual form to the prisoner's right to make reasonable use of the telephone, the space for his signature and the box indicating "call not desired". Yarenko confirmed that records had been signed by both appellants on the evening in question, each indicating a waiver of his right to counsel, but that these records were subsequently lost.

[22] Lacey testified that although at the preliminary hearing he could not recall what McFarlane was wearing, he had since thought about it and now remembered that McFarlane was in his jockey shorts and a pair of socks. He testified that he conducted the interview and took notes of the questions and answers in his notebook. He testified that the following questions and answers represented a full account, albeit not verbatim, of the half-hour conversation that took place between 11:50 p.m. and 12:22 a.m.:

> Q. Do you know why you are under arrest?
>
> A. Yes, they said robbery.
>
> Q. Do you want to talk to us?
>
> A. Sure, I'll tell you what happened.
>
> Q. Before you do, I want to warn you that you don't have to talk to us unless you want to. Do you understand?
>
> A. Yes.
>
> Q. Do you want to call a lawyer?
>
> A. No, that's not necessary.

Q. Did the officer read you your rights, and all that?

A. Yes.

Q. So you know you don't have to talk to us if you don't want to?

A. Yes.

Q. What happened?

A. Well, I ran and I got caught.

Q. Where did you run from?

A. The store, people were coming, it was my job to watch.

At that point I asked him, "Before we go any further, I would like to give you a couple of choices. If you wish, I can take you to a place where we can continue this conversation on television or I can just get a tape recorder. What do you want to do?"

He replied, "Whatever you want." I said, "Well, I have a tape recorder in my briefcase." He replied, "Okay."

[23] Lacey testified that he then left the room to get a tape recorder and then took a taped interview from 12:24 a.m. to 12:42 a.m. The transcript of this taped interview was later introduced at trial.

[24] Crown counsel announced after Lacey's testimony that these were all her witnesses with respect to McFarlane. Defence counsel elected to call his client.

[25] McFarlane testified that he was left naked after the strip-search throughout the entire interview. He stated that when Yarenko and Lacey came in to speak with him, one of the officers punched him in the face. The officers told McFarlane to tell them what happened. McFarlane told them that he didn't know anything. The officers kept hitting and punching him. The hits and punches were rapid. They kept landing on the same side of his face. McFarlane testified that the record of the audiotaped statement before the court was actually his third attempt at an audiotaped statement. The first one "didn't take" because McFarlane was crying and sniffing too much. The second one didn't work out because McFarlane was complaining too much. McFarlane stated that he was hit after each of the first two tapes until he got the story straight. The officers fed him the lines and the information. The statement wasn't true. He just gave the statement so that he could go home.

B. The Trial Judge's Ruling on McFarlane's Statements

[26] At the conclusion of McFarlane's testimony, the trial judge asked counsel for their submissions. Counsel for McFarlane indicated that some of the witnesses that would be called with respect to Bogel's statements would have some bearing on his position and hence sought leave to reserve his submissions until the end of the voir dire. The trial judge directed counsel to make his submissions now indicating "If it changes, we will revisit it."

[27] Counsel argued that the circumstances surrounding the taking of McFarlane's statement gave rise to a reasonable doubt on its voluntariness. Counsel relied mainly on the suspicious sequence of events from his client's denial of any knowledge about a robbery to his alleged full cooperation with the police and on the conflicting evidence with respect to McFarlane's state of dress during the police interrogation. He submitted that the officers' own evidence on this issue should raise a concern with the court.

[28] Counsel for the Crown submitted that McFarlane's version of events was incredible. She relied on unlikely aspects of his story, his failure to complain about any injuries, and the absence of cross-examination of Crown witnesses by his counsel concerning his allegations.

[29] Following the submissions of both counsel, the trial judge made the following ruling on the admissibility of McFarlane's statements:

> I am satisfied the statement is voluntary in the circumstances of this particular case. I am satisfied Mr. Moore-McFarlane was given his rights, cautioned properly, and he gave the statement. I find it was given by an operating mind, and I am satisfied it was voluntary under the circumstances. Accordingly, it will be admitted.

[30] Upon counsel seeking clarification, the trial judge confirmed that his ruling applied to both the conversation with May "in the police cruiser" (presumably a reference to the statement made at the scene upon arrest) and to his statement at the police station. The voir dire then continued.

C. Evidence in Relation to Bogel's Statements

*1. Before the arrival at the police station*

[31] Bogel was first in contact with the police on the night of the robbery when he was tackled to the ground by Detective Robert Gallant following a car chase and a foot chase. Bogel struggled with the police officer and a number of other officers came to assist. Bogel was finally subdued when he was pepper sprayed by Officer William Gueran. He was then led to the police car.

[32] Gueran testified on his own past experience with pepper spray and its effects. He stated that, when he had been pepper- sprayed on one occasion as part of his police duties, it had had an immediate immobilizing effect and that he had experienced burning in his eyes with decreasing intensity for up to ten hours after that. He had not had his eyes washed on the occasion in question.

[33] Officer Steven Srenensky testified that he had a conversation with Bogel in the police car. Srenensky testified that he asked him his name and, at 10:31 p.m., he advised him that he was under arrest for robbery. When asked if he understood, Bogel replied "Yes. My eyes are killing me." Srenensky testified that he then informed Bogel of his rights to counsel and asked him if he wanted to contact a lawyer, to which Bogel replied "No, because my eyes are killing me."

[34] Bogel was then transported by Gueran and Srenensky briefly to the police station and then to the hospital in order to get his eyes washed out from the pepper spray. Srenensky testified that he continued to question Bogel on the way to the hospital, asking him his full name, date of birth, the names of the guys who were with him that evening, their nicknames, and who was driving the getaway

van. Bogel responded to the questions as he continued to complain about the effects of pepper spray in his eyes.

[35] Bogel testified on the voir dire. He stated that he had never been pepper-sprayed before. When asked to describe the effect, he stated: "To put it in a nutshell, I lost control of my body. I couldn't move or see. My knees were hurting. I couldn't breathe." He also stated that he felt a lot of pain and discomfort, that the effects had subsided somewhat by the time he reached the hospital but that they continued for some time after. Bogel's account of the conversation with the police officer immediately following his arrest was as follows:

> Q. What happened when you were placed in the cruiser?
>
> A. He came in and said, "What's your name?" and I said, "Paul."
>
> Q. Who came in?
>
> A. The officer. Who the officer was I don't know because I couldn't see.
>
> Q. What was the nature of the conversation?
>
> A. The first thing he said was, "You got pepper sprayed?" and I said, "Yes, my eyes are burning." He says, "Stay calm. Don't move around. Just let the pepper spray take its effect and it will go away."
>
> He started to ask me, "Who were you involved with in the robbery?" and I said, "What robbery? What are you talking about?"
>
> I got backhanded, and he said, "Don't play smart with me." He said, "Who are your friends?" and I said, "What do you mean? What friends? I have a lot of friends." He said, "The friends who were with you at the robbery," and I said, "I don't know what friends you're talking about." He says, "Who was the driver of the vehicle you were in?" I said, "Paco", and I gave the name because I knew the driver.
>
> Q. When you were backhanded, what portion of your body was struck?
>
> A. To my chin, bottom lip, because I had a cut inside my lip.
>
> Q. The lower lip or upper lip?
>
> A. Lower lip.
>
> Q. From the backhand?
>
> A. Yes.
>
> Q. Struck any other times in the back of the cruiser?
>
> A. He was saying, "Don't play smart with me. He knows what went down. Tell me what happened," and I said, "I don't know what you're talking about."
>
> Q. How long did the conversation last for?
>
> A. I wasn't keeping track of it.

Q. Any further conversation in the back of the cruiser, or was that it?

A. I was telling him, "I want to talk to my lawyer. I want a phone call, and I want to talk to my lawyer. I have nothing to say to you."

*2. The booking*

[36] Both Gueran and Srenensky testified that Bogel was brought back to the police station and taken before the officer in charge, Sergeant Pinfold, at 11:06 p.m. Pinfold, on the other hand, noted his first contact with Bogel at 11:29 p.m. Pinfold testified that Bogel was exhibiting signs consistent with having been pepper-sprayed and that he had a cut lip. Pinfold described that as a prisoner goes through the booking process, he makes sure that the prisoner has been advised of his rights to counsel and that he has been cautioned. Pinfold testified that prisoners are also advised that they can use the phone and that he would not deny a request for the telephone. Pinfold believed that this process had been followed that night. He stated that Bogel had been quiet and had made no complaints or requests at that time.

[37] Counsel for Bogel cross-examined Pinfold on the issue of the lost records of arrest. Pinfold testified that he did not remember signing a record of arrest. He was then referred to his preliminary hearing testimony where he had stated that he believed he had signed a record of arrest. The trial judge intervened in the cross-examination and asked of counsel if his argument was that there was a loss of the record of arrest. When counsel confirmed that that was his argument, the trial judge stated, "You can go to the Court of Appeal on that." Counsel insisted on putting his position on the record. After a further exchange between counsel and the court, the trial judge directed defence counsel not to pursue his cross-examination on that issue. Counsel abided by the ruling.

[38] Bogel's version of the booking process was as follows. He confirmed that Pinfold inquired whether he had been given his rights. Bogel stated that he had not and Pinfold therefore read him his rights. Bogel confirmed that he understood and testified that he asked to talk to his lawyer. Bogel testified that Pinfold told him that he could not phone his lawyer at that time because there were no telephones in the booking area.

*3. Alleged statement to Gallant*

[39] Gallant testified that at approximately 11:08 p.m., shortly after Bogel's arrival at the police station, Bogel asked to speak to him. Gallant went to the interview room to speak to him. Officers Gueran and Srenensky were in the interview room with Bogel. Gallant testified about his brief conversation with Bogel as follows:

P.C. Gueran and P.C. Srenensky were present. They were in the process of starting to search Mr. Bogel. His basic comment to me was, "Good tackle, man," at which point he stuck out his hand to shake my hand.

Q. Did you shake his hand?

A. I subsequently did. I made a response to his comment.

Q. What was your response?

A. "You're a bad guy, I'm a good man, and I have to do what I have to do," and at that point I shook his hand.

I then asked him, "How old are you?" and he responded 25, at which point I stated, "You let an old man like me take you down?"

Q. Did he respond to that?

A. Yes.

Q. What did he say?

A. "It would be different if I had my crew backing me."

[40] Gueran initially testified that he strip-searched Bogel and then Gallant came in the room and had "a short conversation" with Bogel. Gueran made no notes of the conversation and did not recall its contents. When asked specifically what Bogel was wearing at the time this conversation took place, Gueran said that Bogel was dressed and that it was after this encounter that he was strip-searched. Srenensky confirmed that a conversation had taken place between Gallant and Bogel but did not know how it had come about nor could he testify as to its contents. Srenensky took no notes of this encounter.

[41] Bogel confirmed that Gallant came in to see him when he was in the interview room with the other two officers but denied making any statement to him. Bogel testified that he repeatedly asked to speak to his lawyer and told Gallant that he wanted to speak to his lawyer, not to him. Bogel testified that the officers then took his clothes and he was left in his boxers and shorts.

*4. Interview with investigating officers*

[42] Bogel was subsequently interviewed by two detectives of the hold-up squad, MacCallum and Short. The interview commenced at 11:40 p.m. It was MacCallum's recollection that Bogel was wearing a dark T-shirt and a pair of pants at the time of the interview. MacCallum testified as to the following exchange:

A. I said, "You are charged with robbery, wearing disguise, possession of unregistered, restricted weapon, possession of a firearm while prohibited, and an attempt murder," and I asked him the question, "Do you understand these charges?" and he replied, "Yes, sir."

The next question, "You were already given your rights to counsel?" and he replied, "Yea." I asked, "You understood those rights?" and he replied, "Yea." I said, "Do you wish to call a lawyer or speak with duty counsel?" and he replied, "No, not now."

I read from the rear of my book the caution to Mr. Bogel, and I asked if he understood it, and he replied, "Yes, sir."

I read him the secondary caution and asked him if he understood that, and he replied, "Yea."

> I then said, "It is my understanding you were the fellow who was caught with the gun tonight?" and he replied, "Yes, sir." I asked, "Do you want to give a statement as to what happened at the variety store tonight?" and he replied, "You got us and the gun. I'm fucked. You know what you need to know. I'm not giving a statement."

[43] Counsel for Bogel sought to cross-examine MacCallum on his knowledge of recent remarks by the judiciary, primarily directed at the hold-up squad, concerning the need to videotape interrogations. The trial judge interrupted counsel mid- sentence and instructed the witness that he didn't need to answer that. When counsel submitted that it was relevant to his cross-examination, the trial judge ruled that it was a matter for argument before him and not for the witness to answer. Counsel accordingly moved on with his cross-examination and simply obtained a confirmation from MacCallum that there had been no discussion with fellow officers prior to questioning Bogel whether audio or videotape facilities would be used, that there was nothing preventing the use of a recording device, and that it had been the officer's choice not to tape the interview. MacCallum also confirmed that Bogel had not been given an opportunity to check the notes of the conversation for accuracy and that he had not been asked to initial them.

[44] In re-examination, the Crown asked MacCallum why he had chosen not to use the videotape facilities. MacCallum answered:

> The initial introduction to the man, if he was going to give a formal statement, we would ask him and take one, and he said yes.

[45] Crown counsel then announced that the last witness on the voir dire was Officer Short. The trial judge asked Crown counsel if this witness would say anything different from the last one. Crown counsel indicated that she did not expect so. The trial judge thereupon directed that the witness be put in the witness box for cross-examination only, stating that there was no need for the Crown to examine the witness in chief because the witness "is not going to add anything different than what was said". Defence counsel objected, indicating that this was a matter that should be disclosed in the evidence whether the witness would add or detract from what had already been said by the previous witness. Despite defence counsel's objections and Crown counsel's indication that she was prepared to examine the witness in chief, the trial judge directed that Crown counsel not examine the witness and that counsel for Bogel proceed with his cross-examination.

[46] Short testified that he was present during the interview with Bogel as a witness. However, he took no notes of the interview and simply referred to MacCallum's notes to refresh his memory. He confirmed that there had been no discussion about using any recording device. Crown counsel re-examined the witness on this point. Short's explanation for not using any recording device was the following:

> When we entered the room, we went in to investigate and interview him. During the course of our investigation he stated he didn't wish to give a statement at that time.

[47] Crown counsel asked further what would have been done had Bogel wished to give a statement. Short replied that he would have been given a choice of "audio/video or typewritten or handwritten" and that they would have respected his choice.

[48] Bogel denied saying anything to any of the police officers. He testified rather that he made repeated requests to speak to a lawyer but that he was not given an opportunity to do so. After this encounter, he was given back his clothes.

D. The Trial Judge's Ruling on Bogel's Statements

[49] Counsel for Bogel argued that his client's statements should be excluded both under the *Charter* and at common law. With respect to the *Charter* argument, counsel relied on his client's assertion that his repeated requests to speak to a lawyer were denied and on the total lack of confirmation of the police officers' testimony on the issue of waiver. Counsel placed much reliance in his argument on the fact that several copies of the arrest record which purportedly confirmed that Bogel did not wish to speak to a lawyer had been mysteriously lost. With respect to voluntariness, counsel placed considerable emphasis on the police's failure to record any of the alleged statements. He submitted that the police officer's deliberate decision not to record the statements gave rise to a reasonable doubt on their voluntariness particularly given the discrepancies and conflicts in the evidence. Counsel also submitted with respect to the statement allegedly made to Gallant that it was highly prej udicial and unrelated to the matters under investigation. Counsel further submitted that any statements allegedly made by his client while suffering from the effects of pepper spray could not be held to be voluntary.

[50] Crown counsel submitted that Bogel was not a credible witness and that there was no independent evidence corroborating his version of events. She argued that there was no obligation on the police to videotape any interview with a suspect and that, in any event, the officers had simply inquired from Bogel whether he wished to make a formal statement.

[51] The trial judge's ruling on the admissibility of the alleged statement to Gallant was as follows:

> In the circumstances of this particular case, as I indicated to [Crown counsel] that she need not comment on the statement made to Officer Gallant, I find that statement was free and voluntary under the circumstances. Whether it is used by [Crown counsel] in the end result, I do not know. I do not know if it advances her case. It may. I find it was voluntary.

[52] In relation to Bogel's alleged statement in the interview room, the trial judge also ruled that it was voluntary. On the issue of the officer's failure to record the statements, the trial judge held that, while it may have been wise to record the statements and perhaps the officers should do that in the future, he accepted the explanation given by the officers that had Bogel wanted to give a formal statement, they would have recorded it. On the question of the lost records of arrest, the trial judge dismissed counsel's argument as irrelevant to the issue of voluntariness. The remaining arguments were not expressly dealt with in the reasons for the ruling. No reference was made to the s. 10(b) application and no adjudication was made on the *Charter* application.

**IV. ANALYSIS**

[53] 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. It is my view that the evidence adduced on the voir dire fell far short of meeting the requirements of the

confessions rule. The circumstances surrounding the alleged statements of each appellant gave rise to numerous concerns and it is apparent from the record that the evidence was not subjected to the scrutiny mandated by well-established jurisprudential principles. Before dealing with the evidence, it may be useful to repeat some of these principles here.

[54] The rationale for the rule and its scope have been recently reiterated by the Supreme Court of Canada in *R. v. Hodgson*, 1998 CanLII 798 (SCC), [1998] 2 S.C.R. 449, 127 C.C.C. (3d) 449 and *R. v. Oickle*, 2000 SCC 38 (CanLII), [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321. In *Hodgson*, Cory J., writing for the majority of the court, reviewed the historical rationale for the rule and its significance in these words (at paras. 14 and 15, pp. 460-61 S.C.R., p. 460 C.C.C.):

> Evidence of a confession has always been accorded great weight by triers of fact. This is a natural manifestation of human experience. It is because of the tremendous significance attributed to confessions and the innate realization that they could be obtained by improper means that the circumstances surrounding a confession have for centuries been carefully scrutinized to determine whether it should be admitted. A confession is not excluded, however, simply because of the risk that a conviction may result, but because of the greater risk that the conviction will be unfairly obtained and unjust. The unfairness of admitting a confession has historically been addressed by a consideration of two factors, First, the voluntariness of the statement; and second, the status of the receiver of the statement, that is to say, whether the receiver was a person in authority.
>
> As to the first factor, a statement is said to be voluntary when it is made without "fear of prejudice or hope of advantage": [citations omitted]. In *Boudreau v. The King*, 1949 CanLII 26 (SCC), [1949] S.C.R. 262, at p. 269, Rand J. explained that "the rule is directed against the danger of improperly instigated or induced or coerced admission". Voluntariness also requires that the statement must be the product of an operating mind:
>
> [citations omitted]. Voluntariness is determined by a careful investigation of the circumstances surrounding the statement of the accused, and involves a consideration of both objective and subjective factors.
>
> (Emphasis added)

[55] Cory J. went on to discuss how the confessions rule is historically rooted in two concerns. The first concern related to the reliability of the evidence. He stated (at para. 17, pp. 462-63 S.C.R., p. 461 C.C.C.):

> Indeed, the basis for the admission of a statement of the accused as an exception to the rule against hearsay is that what people freely say which is contrary to their interest is probably true. However, where a statement is prompted by a threat or inducement held out by a person in authority, it can no longer be presumed to be true.

[56] Cory J. noted that the second concern is related to the administration of justice and fundamental principles of fairness, in particular the principle against self- incrimination. After reviewing further authorities, Cory J. observed (at para. 18, p. 464 S.C.R., pp. 461-62 C.C.C.):

> Thus, it is apparent that from its very inception, the confessions rule was designed not only to ensure the reliability of the confession, but also to guarantee fundamental fairness in the criminal process.

[57] Iacobucci J., in writing for the majority in *Oickle*, set out the scope of the confessions rule. He reviewed much of the same historical development of the confessions rule from the initial focus on the unreliability of a confession arising from threats or promises, to the broader notion of voluntariness that embraces the notion of procedural fairness. He noted that this latter approach is most evident in the "operating mind" doctrine that concerns itself with the coercive effect an atmosphere of oppression created by the police authorities may have on an accused. Iacobucci J. reiterated that one of the predominant reasons for the concern with voluntariness, broadly defined, "is that involuntary confessions are more likely to be unreliable" (para. 32, p. 25 S.C.C., p. 341 C.C.C.).

[58] Hence it is clear from the discussion in *Oickle* that both elements of the modern confessions rule, the absence of threats or promises and the principles related to the "operating mind", are closely related to the predominant concern for reliability. Since voluntary confessions are admitted as an exception to the hearsay rule, it should come as no surprise that concerns over the reliability of the evidence are at the root of the confessions rule. In turn, the reliability of the evidence is intrinsically connected to trial fairness, the second rationale for the confessions rule. Again here, it is noteworthy that the relationship between reliability and fairness underlies the modern principled approach to hearsay exceptions in general. As noted by the Supreme Court of Canada in *R. v. Starr*, 2000 SCC 40 (CanLII), [2000] 2 S.C.R. 144, 190 D.L.R. (4th) 591, it would compromise trial fairness and raise the spectre of wrongful convictions, if the Crown were allowed to introduce unreliable hearsay against the accused.

[59] The admission of a confession, as an exception to hearsay, is of course subject to more complex and more stringent requirements than other traditional exceptions. The confessions rule has been adapted and refined in order to address the particular problems raised by the nature of this evidence. As discussed above, the concept of voluntariness is broadly defined to address both reliability and fairness concerns. The concern over fairness 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. As Cory J. noted in *Hodgson*, the two rationales (reliability and fairness) "blend together, so as to ensure fair treatment to the accused in the criminal process by deterring coercive state tactics" (at para. 21, p. 465 S.C.R., p. 463 C.C.C.). And, as noted by Iacobucci J. in *Oickle*, it is also important in defining the confessions rule "to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes" (para. 33, p. 26 S.C.R., p. 341 C.C.C.). Finally, because the admission of a confession may prove conclusive of the guilt of the accused, the higher onus of proof beyond a reasonable doubt must be met before the evidence will be admitted: *R. v. Egger*, 1993 CanLII 98 (SCC), [1993] 2 S.C.R. 451 at pp. 474-75, 103 D.L.R. (4th) 678.

[60] It is important to distinguish between reliability as a concept underlying the notion of voluntariness at the admissibility stage and the ultimate questions of reliability and weight that remain, as with all evidence, determinations for the triers of fact. The first has been commonly referred to as the "threshold reliability" in the general context of the principled approach to hearsay exceptions. In the particular context of confessions, Cory J. in *Hodgson* referred to the "putative reliability" of the evidence. Hence, he noted that the purpose of the confessions rule was to exclude statements that

were inherently unreliable because they were obtained by force, threats, or promises (or in an atmosphere of oppression) but that it did not inquire into the truth or falsity of the statement. "Rather it focuses on putative reliability, by analysing the circumstances surrounding the statement and their effect on the accused, regardless of the statement's accuracy" (para. 21, p. 465 S.C.R., p. 463 C.C.C.). Hence, it is only consonant with the general principled approach to hearsay exceptions that the court, as part of its inquiry into the voluntariness of a confession, should look for circumstantial guarantees of trustworthiness that sufficiently address the dangers associated [with] this kind of evidence.

[61] One of the main issues raised on these appeals is the police officers' failure to record the statements allegedly made by either appellant. Counsel for the appellants submit that there should be both a common-law and a constitutional obligation on the police to create a record, preferably by videotape, of all custodial interrogations and waivers of the s. 10(b) right to counsel. The appellants have noted some of the numerous decisions in Ontario where courts have either excluded confessions where the failure to videotape was deliberate or have strongly urged the recording of interrogations: *R. v. Nelson*, [1999] O.J. No. 4377 (Gen. Div.) (Whealy J.); *R. v. Haynes*, [2001] O.J. No. 73 (Gen. Div.) (Whealy J.); *R. v. Li*, [1997] O.J. No. 4237 (Prov. Div.) (Renaud J.); *R. v. Falcher*, [1994] O.J. No. 1922 (Gen. Div.) (O'Connor J.); *R. v. N. (D.)*, [1994] O.J. No. 3118 (Prov. Ct.) (MacDonell J.); *R. v. Lim* (No. 3) (1990), 1 C.R.R. (2d) 148 (Ont. H.C.J.) (Doherty J.); *R. v. Oickle*, *supra*, at pp. 30-31 S.C.R., pp. 344-45 C.C.C.; *R. v. Thompson* (June 28, 2000) (Ont. Gen. Div.) (Bellamy J.); *R. v. Coke*, [1996] O.J. No. 1926 (Gen. Div.) (Caswell J.); R. v. Bell, [1996] O.J. No. 4903 (Prov. Div.) (Wallace J.); *R. v. Luong*, [1995] O.J. No. 1430 (Prov. Ct.) (Bentley J.); *R. v. Tsai*, [1995] O.J. No. 3413 (Gen. Div.) (Wren J.); *R. v. Barrett* (1993), 1993 CanLII 3426 (ON CA), 13 O.R. (3d) 587 at p. 593, 82 C.C.C. (3d) 266 at p. 275 (C.A.); *R. v. Longman*, [1993] O.J. No. 4109 (Gen. Div.) (Wren J.); *R. v. Vangent* (1979), 1978 CanLII 2525 (ON CJ), 42 C.C.C. (2d) 313 at p. 328 (Ont. Prov. Ct.) (Langdon J.); *R. v. S. (M.J.)* (2000), 2000 ABPC 44 (CanLII), 32 C.R. (5th) 378, 80 Alta. L.R. (3d) 159 (Prov. Ct.).

[62] The Crown submits that there should be no firm rule on the issue of recording. Crown counsel submits that the Supreme Court of Canada in *Oickle*, while commenting on the desirability of video records, was clearly reluctant to go further and impose an obligation on the police to make such records. Iacobucci J., writing for the majority, stated as follows (at para. 46, pp. 30-31 S.C.R., pp. 344-45 C.C.C.):

> Before turning to how the confessions rule responds to these dangers, I would like to comment briefly on the growing practice of recording police interrogations, preferably by videotape. As pointed out by J.J. Furedy and J. Liss in "Countering Confessions Induced by the Polygraph: Of Confessionals and Psychological Rubber Hoses" (1986), 29 Crim. L.Q. 91 at p. 104, even if "notes were accurate concerning the content of what was said . . ., the notes cannot reflect the tone of what was said and any body language that may have been employed" (emphasis in original). White [W.S. White, "False Confessions and the Constitution:
>
> Safeguards Against Untrustworthy Confessions" (1997), 32 Harv. C.R.-C.L. L. Rev. 105], at p. 153-54, similarly offers four reasons why videotaping is important:
>
>> First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords

> with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.

> This is not to suggest that non-recorded interrogations are inherently suspect; it is simply to make the obvious point that when a recording is made, it can greatly assist the trier of fact in assessing the confession.

[63] Crown counsel submits further that the appellants have confused issues of weight with issues of admissibility. Since it is for the trier of fact to determine the ultimate reliability of the statement, including whether it was in fact made, and the weight that should be attached to it, it is submitted that a failure to accurately or completely record an accused's statement should not render the statement inadmissible.

[64] I agree that there is no absolute rule requiring the recording of statements. It is clear from the analysis in both *Hodgson* and *Oickle* that the inquiry into voluntariness is contextual in nature and that all relevant circumstances must be considered. Iacobucci J. says so expressly in *Oickle* in the following words (at para. 47, p. 31 S.C.R., p. 345 C.C.C.):

> 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.

[66] The sufficiency of the record does not go exclusively to the question of ultimate reliability and weight as contended by the Crown. One of the cases relied upon by the Crown on this point is the decision of this court in *R. v. Lapointe* (1983), 1983 CanLII 3558 (ON CA), 9 C.C.C. (3d) 366, 1 O.A.C. 1 (C.A.), affd, 1987 CanLII 69 (SCC), [1987] 1 S.C.R. 1253, 35 C.C.C. (3d) 287, where the [Ontario Court of Appeal] stated as follows (at para. 37, p. 380 C.C.C.):

> Questions regarding the accuracy of the recording of an accused person's words by reason of unconscious editing on the part of the police have to do with the authenticity of the statement and do not fall to be decided by the judge on the voir dire. If he does so, as apparently the learned trial judge did in the present case, he is usurping the function of the trier of fact. The 12 bilingual jurors at this trial were eminently capable of resolving the issues of accurate or inaccurate recording of the respondents' words, of unconscious or deliberate inaccuracy, editing

> or deliberate fabrication. They are issues of authenticity and are not to be confused with issues of admissibility.

[67] It is important to read this statement of principle in context. The issue that arose in *Lapointe* -- whether the accused's capacity to understand English was sufficient for him to have given the statement alleged by the police officers -- was one that related to the ultimate reliability of the statement and the weight that was to be attached to it. As the court stated, it was only where an accused's capacity was so deficient as to make it impossible for him to have given a statement that the trial judge would be justified in excluding the statement on that basis. Hence the court concluded that, in this case, this issue was not a matter to be determined at the voir dire stage of the proceedings. The decision in *Lapointe* does not stand for the proposition that all issues of accuracy and completeness of recording are left to the triers of fact. Such an interpretation would run contrary to centuries of jurisprudence that require careful scrutiny of the circumstances surrounding the taking of a statement by persons in authority. And, in my view, the completeness, accuracy and reliability of the record have everything to do with the court's inquiry into and scrutiny of the circumstances surrounding the taking of the statement. Indeed, it is difficult to see how the Crown could discharge its heavy onus of proving voluntariness beyond a reasonable doubt where proper recording procedures are not followed.

[68] It is clear that, while determining the legal test of voluntariness is a question of law, its application to the evidence is a question of fact or of mixed law and fact. A trial judge's finding of voluntariness is entitled to deference in this court and should not be interfered with in the absence of legal error in determining the test, or overriding and palpable error with respect to the facts.

[69] As noted earlier, in this case, Crown counsel urges this court to apply the presumption that the trial judge knows the law and that he has correctly applied it to the facts. She notes that the trial judge is not obligated to provide reasons on every issue raised by counsel or by the evidence and that an appellate court should not conclude, on the basis of a lack of reasons alone, that the trial judge misapprehended the issue of voluntariness or misapplied any legal principle relating to that issue. However, the usual presumption cannot be relied upon where the record reveals that the trial judge has founded his decision on incorrect principles of law or has misapplied the correct legal test, or where the evidence does not support the trial judge's conclusion.

[70] In this case, many of the trial judge's interventions and rulings during the course of the voir dire strongly suggest that the trial judge either misapprehended the governing test on voluntariness, or failed to apply it to the evidence. I note the following in support of this conclusion:

> (i) On more than one occasion, the trial judge readily questioned the relevance of the evidence presented by the Crown in relation to any of the events that transpired before the interrogation in the interview room actually commenced. These interventions suggest a lack of appreciation of the need to scrutinize all of the circumstances surrounding the taking of a statement.
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> (ii) The trial judge directed Crown counsel not to examine the police witnesses on whether there had been any threats because "this was not a judge alone trial." As noted earlier, the inquiry into whether any threats or promises were made to induce the confession lies at the core of the confessions rule and is not simply a matter going to the issue of ultimate reliability or weight of the evidence.

(iii) The trial judge expressed agreement with Crown counsel's comment early on in the voir dire that "not much turned" on the question of McFarlane's possible state of undress during the interrogation. This comment suggests that the trial judge misapprehended the compelling nature of this evidence on the question [of] whether the alleged confession was given in oppressive circumstances that negated any voluntariness.

(iv) The trial judge curtailed defence counsel's cross- examination on the paucity of the notes taken by one of the recording officers in the interview room on the basis that this line of questioning was not helpful on the voir dire and that this was a matter for the jury. As discussed earlier, the completeness, accuracy and reliability of the record is intrinsically related to the Crown's onus on the voir dire and is not simply a matter going to the ultimate reliability and weight of the evidence.

(v) The trial judge directed counsel for McFarlane to make his submissions mid-way through the voir dire, notwithstanding the indication from counsel that other witnesses who were going to be called by the Crown with respect to Bogel's alleged statements were expected to give evidence that would be relevant to his client's position. Although the trial judge told counsel that the issue could be revisited later if need be, he immediately ruled on the issue of voluntariness before hearing those additional witnesses. This approach suggests that the trial judge failed to consider all relevant circumstances in determining voluntariness. In this case, it caused actual prejudice to the appellant McFarlane because the evidence adduced by the Crown that directly concerned Bogel was indeed capable of lending credence to the position advanced by McFarlane on the treatment he had received that night.

(vi) The trial judge's curtailment of defence counsel's cross- examination of the police officers on the lost records of arrest suggests that the trial judge misapprehended the significance of this evidence on the question of waiver of the right to counsel. In the absence of any recording, the records of arrest would have provided the only confirmatory evidence of each appellant's waiver of his right to counsel. The trial judge's failure to refer to or even adjudicate on Bogel's s. 10(b) *Charter* application further suggests that he was not alive to the issue.

(vii) In the circumstances of this case, the trial judge's curtailment of defence counsel's cross-examination on the police officers' knowledge of the legal requirement that a proper record be made undermined the significance of the officers' decision not to record some of the statements.

(viii) The trial judge's apparent prejudgment that Short's testimony would necessarily corroborate that of his fellow officer before hearing the testimony in question unfortunately further compromised the appearance of fairness in the conduct of this proceeding.

[71] Quite apart from these errors in the conduct of the proceeding, the evidence gave rise to a number of issues that required proper consideration and adjudication. I note the following.

[72] An issue arose as to what transpired in the police cruiser when McFarlane was transported to the police station. McFarlane alleged that he was hit with a walkie-talkie. He also alleged that he was aggressively questioned by the police about the robbery without having had the opportunity to consult counsel. The police officers denied any acts of violence or conversation in the cruiser. However, the

police witnesses presented a very casual and poor recording of the events between the time of arrest at 10:16 p.m. and the appellant's booking at the station close to one-and-a-half hours later at 11:33 p.m.

[73] McFarlane's allegation that he was naked during the interrogation at the police station raised a serious concern that his statement was taken in oppressive conditions that may have impacted on its voluntariness. Even on the Crown's evidence, taken at its highest, a serious issue arose as to the propriety of leaving a suspect scantily clad in his underwear and socks during the course of an interview with the police. One additional factor in particular should have heightened the concern on this issue: McFarlane was a young black male, with no apparent experience with the criminal justice system; the officers were white. Further, the serious inconsistencies in the police officers' evidence on the question of McFarlane's state of dress and the vagueness of their testimony raised serious credibility issues. Finally, the evidence on this point had to be considered in the context of the police officers' decision not to videotape the interview.

[74] The police officers' allegation that their notes contained a complete, albeit not verbatim, account of the conversation and of the events that transpired during the first part of the interview with McFarlane, between 11:50 p.m. and 12:22 a.m., raised a serious issue of credibility given the short conversation that was noted. The concern over the reliability of the record was further heightened by McFarlane's allegation that he had given three statements on tape, the third one alone finding its way into court because he had finally got it right. Finally, the officers' decision not to videotape the interview or audiotape the first part of the interview was a very important factor to consider.

[75] The mysterious loss of the arrest records that purportedly would have confirmed each appellant's waiver of his right to counsel raised another concern. The significance of this evidence was heightened in the circumstances of this case where little, if any, effort was made to create a reliable record.

[76] Bogel's statement in answer to the police officers' questions about the robbery in the police cruiser en route to the hospital when, according to everyone's account, he was in obvious distress over the pain and discomfort caused by the pepper spray, raised an issue on the voluntariness of his answers.

[77] Bogel's allegation that his repeated requests to speak to a lawyer were denied required that a determinative finding be made on this issue. The loss of the record of arrest, the decision not to record the interview and the failure to present Bogel with a copy of the officer's notes for verification were all relevant factors to be considered on this issue.

[78] It is clear in these circumstances that the trial judge's findings on voluntariness cannot stand. Further, given the importance of this evidence in the context of the other evidence at trial, this is not a proper case for the application of the curative proviso. There is a very real danger that the jury convicted each appellant on the basis of their alleged confessions alone without giving proper consideration to the other issues raised by the defence at trial. Hence, there must be a new trial.

[79] In the usual case, the new trial would include a voir dire to determine the admissibility of any alleged confession. However, in this case, it is my view that the evidence falls far short of meeting the test of voluntariness. Quite apart from any question of credibility of the appellants' testimony and the police officers' evidence on the voir dire on issues related to voluntariness, a matter that would require a determination by a trial judge, it is my view that the Crown cannot meet its heavy onus of proving voluntariness based on the evidence adduced in this case. The serious deficiencies alone in the overall

recording by the police authorities of the events that transpired while the two appellants were in police custody on the evening in question militate against any reasonable finding that the statements were voluntary.

[80] In addition, irrespective of the question of voluntariness, I agree with the appellant's submission that Bogel's alleged statement to Gallant to the effect that things might have been different if "he had had his crew behind him" should not have been admitted at trial. The alleged statement was suggestive of a general involvement in crime and constituted evidence of bad character. It was highly prejudicial, of no probative value to any of the issues at trial, and inadmissible.

[81] I would therefore give effect to this ground of appeal, declare that the statements allegedly made by each appellant are inadmissible (with the exception of McFarlane's alleged utterance to May at the scene of the crime as noted earlier) and order a new trial.

**IV. THE CHALLENGE FOR CAUSE PROCESS**

[82] The trial judge granted the defence counsel's request for challenge for cause on the following question:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the two persons charged are black?

[83] As indicated earlier, both appellants contend that the challenge-for-cause process was fundamentally flawed because the trial judge (a) refused to exclude the jury panel during the process; (b) gave inadequate instructions to the triers; and (c) denied defence counsel's request to make submissions to the triers.

[84] Given my conclusion on the first ground of appeal, it is not necessary for me to deal with this second ground of appeal in any detail. However, I find it important to note the following.

[85] I do not agree with the appellants' contention that there should be any firm rule on whether the jury panel should be excluded from the courtroom during the challenge-for-cause process. This matter falls within the trial judge's discretion in controlling the challenge-for-cause process so as to prevent its abuse and ensure that the process is fair to the prospective juror as well as to the accused person. On appeal, the trial judge's decision is entitled to deference and should not be interfered with unless the appellant can demonstrate that the trial judge committed a clear error in principle in the exercise of his or her discretion, or that the trial judge's decision resulted in a miscarriage of justice. In this case, I am not persuaded that there is any cause to interfere with the trial judge's decision not to exclude the entire panel.

[86] I agree with the appellants' submission that the trial judge's instructions to the triers of the challenge for cause were deficient. The trial judge provided the following instructions to the jury panel concerning the challenge for cause process:

> Members of the jury panel, we are now going to embark upon a jury selection of 12 of you. We will go through a process called challenging for cause, and there will be a question asked of you by counsel as to whether you have any prejudice and if you do have prejudice, can you put it

> aside and try this case on its evidence alone without any bias, or prejudice, or alleged prejudice, from the fact that the accused are black persons. That question will be asked of each and every one of you and depending upon your answer, you then may be chosen or not chosen as a juror. . . .
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> The challenging for cause, that is the question that will be asked of you, and this is how we will do it. The Registrar will call two names and those two people will come and sit in the jury box. They are called triers. They are sworn to try the juror who is going to be asked that question to see whether that juror is acceptable to sit on the jury that will try the two accused persons on the charges. If they are found acceptable, and they are accepted by counsel, that potential juror goes on to be jury member. That particular juror takes over the place of one of the triers. The No. 1 trier goes back into the jury panel, so there is No. 1 juror and the No. 2 trier who are the triers of the second potential juror, to see if that potential juror is accepted. If that juror is accepted, those two jurors become the triers of the third, and then three and four do five, and four and five do six, until we have twelve picked. It takes about an hour. That is how we will do it for the challenge for cause.

The trial judge then provided the following instructions to the first two triers:

> Each potential juror will come up here and they will be asked a question and on their answer you will be asked do you find that juror acceptable or unacceptable to try the two people before the court. If you find them acceptable, counsel will say they find them acceptable.

[87] No further instructions were given during the course of the challenge-for-cause process.

[88] These instructions, in my view, did not adequately assist the jury in understanding the nature of their task and the procedure they were to follow. The triers were not told that they were to decide the question on the balance of probabilities, that the decision had to be that of both of them, that they could retire to the jury room or discuss the matter right where they were and that if they could not agree within a reasonable time, they were to say so: see *R. v. Hubbert* (1975), 1975 CanLII 53 (ON CA), 11 O.R. (2d) 464 at p. 480, 29 C.C.C. (2d) 279 at p. 294 (C.A.), affd 1977 CanLII 15 (SCC), [1977] 2 S.C.R. 267, 33 C.C.C. (2d) 207. It would also have been preferable if the jury had been provided more assistance in understanding the meaning of partiality or acceptability, and the importance and purpose of the challenge for cause process.

[89] Finally, with respect to the denial of defence counsel's request to make submissions to the triers, I do not agree that counsel's request should have been granted as of right. As with the issue of excluding the jury panel, this is a discretionary matter for the trial judge to determine depending on the circumstances. Absent an error in principle or a demonstration of a miscarriage of justice, appellate intervention is unwarranted. In this case, I find it sufficient to note that any need for submissions that may be apparent from the record could have been alleviated by proper instructions to the triers from the trial judge.

[90] I would therefore also give effect to this ground of appeal on the basis of the inadequacy of the instructions.

**V. DISPOSITION**

[91] For these reasons, I would allow each appellant's appeal against conviction, quash the convictions and order a new trial.

Appeal allowed.