

CANADA / JUDGMENT

R. v. Bona

2021 BCSC 230

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 230 R. v. Bona

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bona,

2021 BCSC 230

Date: 20210208

Docket: X081395

Registry: New Westminster

Regina

v.

Rizig Hamet Bona

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Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

Re: Voir Dire #1 and #2

Admissibility of "Exhibit B" and "Exhibit C"

Counsel for Crown:

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Vicki M. Williams

J. Douglas Jevning, QC

Place and Date of Trial:

New Westminster, B.C.

February 2,5,8, 2021

Place and Date of Judgment:

New Westminster, B.C.

February 8, 2021

I. Introduction

- [1] Rizig Bona is charged with second-degree murder of his wife Anida Magaya. He is being tried by a court composed of judge and jury.
- [2] An issue has arisen concerning the admissibility of certain papers found by the police at the scene of the crime. The Crown seeks the admission of one of these items, but the defence objects. The defence seeks admission of another item to which the Crown objects. Voir dres were held to determine the admissibility of the two items. A set of admissions amounting to an agreed statement of facts was marked as "Exhibit A" on the voir dres. A copy of the item that the Crown sought to have admitted was marked as "Exhibit B," and a copy of the item that the Defence sought to have admitted was marked as "Exhibit C." These are my reasons on those two voir dres.
- [3] Mr. Bona and Ms. Magaya lived together in the basement suite of a residential home in Surrey, British Columbia. The landlord and his family lived upstairs. Police were called in the early morning hours of October 5, 2018. The basement door was locked. After breaking down the locked door, the police found Ms. Magaya's body lying in a pool of blood on the floor in the spare bedroom. Near her body on the floor were a baseball bat and a machete. Paramedics attended and concluded that there was no possibility of resuscitating the deceased.
- [4] Police obtained a search warrant for the basement suite, and on October 6, 2018, Cpl. Pacholuk found, among other things, a handwritten note on a single sheet of paper that appeared to have been ripped out of a notebook. That became police Exhibit 31, which is Exhibit B on this voir dire. Also found, was a folder labeled "Apartments," which contained various papers. That folder of papers became police Exhibit 51, which is Exhibit C on this voir dire. The Crown seeks admission of police Exhibit 31, and the defence seeks admission of police Exhibit 51. I shall deal with each in turn.

II. Police Exhibit 31

[5] Police Exhibit 31 is a hand-written note on a single piece of paper. So far as I can make out the handwriting, it reads as follows:

Removing the car from the drive way made me to suspect that my wife who knew how upset I was when I saw that car in the driveway told him to remove it. That in addition to the sex tapes that I recorded confirmed to me the affair though my wife remain adamant it did not happened, which is contrary to what I have in the tapes.

[6] The location where Cpl. Pacholuk found the note is described in the Admissions at paras. 6-9:

6. On October 6, 2018 at 1:25 p.m., Cpl. Pacholuk began searching the living room of the scene. There was a table pushed up against the south wall of the living room. On the south west corner of the table, Cpl Pacholuk located a gray binder and a stack of papers. In that stack of papers, Cpl Pacholuk located a hand-written note that appeared to have been ripped out of a notebook. That hand-written note became Police Exhibit 31. Cpl. Thompson placed a yellow police marker labeled with an "11" where the Cpl. Pacholuk located Police Exhibit 31.
7. Attached as Appendix "B" are three photographs:
 - i. showing the table with the gray binder and the stack of papers;
 - ii. Showing the table with the yellow police marker 11 on top of the gray binder and the stack of papers, and;
 - iii. showing Police Exhibit 31 next to yellow police marker 11.
8. Neither the stack of papers in which Police Exhibit 31 was found nor the contents of the gray binder were inventoried.
9. On the east end of the same table, Cpl. Pacholuk located an Acer laptop and a payday loan agreement in the name of Rizig Bona. Other items were located on that table. However, Police Exhibit 31, the Acer laptop, and the payday loan agreement were the only items found on the table that were inventoried by Cpl. Pacholuk.

[7] The defence submits that the note is not admissible because it is hearsay, its authorship is unknown, and its probative value is outweighed by its prejudicial effect. The general rule regarding out-of-court statements is succinctly stated in *R. v. O'Brien*, [1978] 1 S.C.R. 591, at pp. 593-594:

It is settled law that evidence of a statement made to a witness by a person who is not himself called as a witness is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement; it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. This succinct formulation of the hearsay rule which one finds in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 956 (P.C.) at p. 970, was repeated with approval in *Ratten v. Reginam*, [1971] 3 All

E.R. 801 (P.C.) at p. 805. The reasons supporting the exclusion of hearsay evidence were stated by Lord Normand in *Teper v. The Queen*, [1952] A.C. 480 (P.C.) at p. 486:

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.

[8] The Crown submits that the handwritten note is admissible on the basis that it amounts to an admission of the accused.

[9] In the Crown submission, the handwritten note in this case is admissible on the same basis as a poem that the Supreme Court of Canada found to be admissible in *R. v. Terry*, [1996] 2 S.C.R. 207. Mr. Terry was charged with murder. At his trial, the Crown adduced evidence of an undated, unsigned poem in Mr. Terry's handwriting that the police had found on a pad of paper in his bedroom when they executed a search warrant. The poem read as follows:

Crazy thoughts pass through my head

Now I have killed a life, it's dead.

I drained his blood with my

knife, how stupid am I to

take his life. He had done

nothing wrong but I took his

life and now he's gone. Why?

Why did I do it? How? How

could I? Shit.

[10] On appeal from his conviction, Mr. Terry argued that the poem should not have been admitted, but the Supreme Court of Canada disagreed.

[11] McLachlin J. wrote at paras. 28-30:

28. The appellant contends that a poem seized from his bedroom referring to the taking of a life, entered without objection at trial, should not have been admitted. An admission against interest made by the accused is admissible as a recognized exception to the hearsay rule, provided that its probative value outweighs its prejudicial effect.

29. The probative value of the poem on the ultimate issue is not great. As a form of artistic expression, a poem is not necessarily probative of the "truth" expressed therein; an author may have any number of motivations for expressing him- or herself in a given fashion, only one of which is to recite what he or she did. Moreover, this poem's connection with known events is tenuous. No names were mentioned. The poem is undated. No details of the

"crime" described in the poem were provided other than a reference to the use of a "knife". At the same time, its prejudicial effect was considerable. The danger existed that the jury would accept the poem's oblique factual similarity with actual events to infer directly that the appellant was the author of both the poem and the events.

30. These concerns, however real, were alleviated by the careful instruction the jury received on the use of the poem. The trial judge charged the jury that it could conclude that the poem represented a "lament about the killing in question", but was not to use it in isolation as direct proof of the fact the appellant committed the act. It was admissible, he instructed, as a link in the chain of inferences tending to establish guilt; the strength of that link was for the jury to determine based on the cogency of the connecting inferences and the number and nature of alternative innocent inferences. Defence counsel specifically alerted the jury to the fact that the appellant was the author of numerous poems written prior to the killing, some of which conjured up scenes of violence. And there was nothing in the Crown's address that was capable of "inflaming the emotions of the jurors" to the point where they would overlook the fact that an inference equally consistent with innocence could be drawn from the poem. Accordingly, I conclude that admission of the poem was proper.

[12] The present case is unlike *R. v. Terry*, in that here, there is no evidence that the note is in Mr. Bona's handwriting.

[13] Generally, out-of-court statements of an accused are admissible if tendered by the Crown, but not if tendered by the defence. The rationale is the general rule that a party is entitled to tender in evidence admissions by the opposing party to the litigation. Sopinka J. explained this principle in *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 28:

The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in McCormick on Evidence, *supra*, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

[14] The issue in *Evans* was the admissibility of certain statements made to a married couple who had sold a car that was used as the getaway car in a robbery two days later. Mr. Evans was charged with that robbery. The couple could not positively identify Mr. Evans as the man to whom they sold the car, but the Crown submitted that the contents of the statements made to the couple by the man who bought the car could be used to establish his identity. Both the husband and his wife testified that the man who bought the car told them he

worked in chain-link fencing. As well, the wife testified that the man told her he had big dogs, and the husband testified that the man told him his dog was going to have pups. There was independent evidence that Mr. Evans had a large dog that was going to have pups and that he had been employed as a chain-link fencer.

- [15] Writing for the majority of the Court, Sopinka J. held that the trial judge had not erred in admitting the statements made to the couple by the man who bought their car. Before admitting the statements as admissions, the trial judge had to be satisfied on a balance of probabilities that the statements were made by the accused. In making that determination, the trial judge was entitled to consider the contents of the statements, not for their truth, but rather for the fact that they were made. The trial judge could consider the improbability of anyone other than the accused, making the specific assertions about having a pregnant dog and working with chain-link fences.
- [16] Once the statements were admitted in evidence, it would then be for the jury to determine whether they were satisfied that those statements were made by the accused. The jury would have to be instructed that they could not use the statements as evidence of their truth unless they were satisfied that they were made by the accused.

- [17] As explained by Sopinka J. at para. 37:

In this case there was evidence that it was the appellant who made the statements to the Boutets. The trial judge should have considered whether this evidence proved on a balance of probabilities that the statements were in fact made by the accused. In this determination he could have relied on the fact that the statements to the Boutets were made. It would be a most unusual coincidence that the purchaser and the accused would each have these two characteristics in combination. If he ruled out coincidence, the trial judge was entitled to consider that this narrowed the group of persons who were in a position to make this statement to the accused or someone who knew this about the accused and had some reason to make the representation as if he were the accused. Considered in light of the other evidence to which I will refer, the most likely person to make the statement was the accused.

- [18] In the present case, the Crown submits that there is sufficient evidence for me to find, on a balance of probabilities, that the handwritten note which is Police Exhibit 31, was written by the accused, Mr. Bona.
- [19] First, the Crown points out that the note was found in the locked basement suite that was generally accessed only by Mr. Bona and Ms. Magaya. That circumstance, on its own, is not particularly compelling, since there is no reason why the couple might not have in their residence certain papers that someone else had written. The location where the note was found might have been more significant if police had documented the other papers among which the note was found, but the police did not do that inventory as a part of their investigation.

- [20] The Crown's more substantial submission is that the contents of the note suggest that Mr. Bona was its author. The note refers to "my wife" and to the fact that he asked someone to remove a car that was in the driveway. The Crown submits that this is consistent with Mr. Bona being the author of the note and talking about the driveway at the residence.
- [21] Unlike the distinctive features in the case of Mr. Evans, however, there is nothing in the present case that is particularly distinctive about the author of the note having a wife and living at a residence that has a driveway. Moreover, there is evidence in this trial that Mr. Bona and Ms. Magaya did not park their vehicle in the driveway, so it is unclear why the note, if it had been written by Mr. Bona, would refer to being upset that someone else had parked in the driveway.
- [22] The handwritten note also refers to "sex tapes" confirming an affair that the wife denies. There is some evidence in this trial that there was a suspicion of infidelity. Moreover, the Crown submits the police also found in the residence a digital camera, which they say could be consistent with the reference to "sex tapes". When police examined the camera, however, they did not find any audio or video that one would describe as "sex tapes". The video was largely blank, and the voices so muffled that Cpl. Pacholuk was unable to make out what was being said.
- [23] Taking all the circumstances together, including the contents of the note itself, I am not satisfied on a balance of probabilities that the note was written by Mr. Bona.
- [24] Moreover, I am of the view that if this note were admitted in evidence, its probative value would be outweighed by its prejudicial effect. The probative value, according to the Crown, is that it is consistent with the theory that Mr. Bona suspected Ms. Magaya of being unfaithful. That inference, however, depends on when the note was written, who it was written by, and who was its intended audience. All of those things are obscure in this case. There is no evidence that the note is in Mr. Bona's handwriting. The note is undated. And it is entirely unclear who the author expected the note to be read by. The note would add very little to the other evidence in the case that there was a suspicion of infidelity. The prejudicial effect of its admission, however, would be great, because it would likely tempt the jury to engage in unfounded speculation about all these collateral issues, and would likely distract and divert the jury from their proper task.

III. Police Exhibit 51

- [25] Police Exhibit 51 is a folder containing papers that appear to relate to an application to the court in a family matter. The defence submits that this evidence should be admitted to support an inference that Mr. Bona was fearful of Ms. Magaya. They submit that it may be relevant to a defence of self-defence.
- [26] The circumstances under which this folder of papers was found is set out in paras. 10-17 of the Admissions:

10. On October 6, 2018, while searching the master bedroom, Cpl. Pacholuk observed a computer desk in the north west corner. There were two drawers on the left hand side of the desk. Cpl. Pacholuk discovered these drawers were both locked.
11. Cpl. Pacholuk was aware that a set of keys had been seized from Mr. Bona upon his arrest on October 5, 2018 (the "Keys"). Cpl. Pacholuk asked Sgt. Kanwar Bal to bring the Keys to the Scene.
12. At 7:05 p.m. on October 6, 2018, Sgt. Bal arrived on the Scene and gave the Keys to Cpl. Pacholuk.
13. At 7:08 p.m. on October 6, 2018, Cpl. Pacholuk returned to the master bedroom in the Scene and used the Keys to unlock both of the computer desk drawers. In the top drawer, Cpl. Pacholuk located a USB digital camcorder, the instruction manual for the USB digital camcorder, and a photocopy of Mr. Bona's Canadian passport. The USB digital camcorder became Police Exhibit 49.
14. Attached as Appendix "C" are 3 photographs of the top left hand drawer of the computer desk:
 - i. Showing the top drawer before the search of it began;
 - ii Showing the photocopy of Mr. Bona's Canadian passport; and
 - iii. Showing the USB digital camcorder and its instruction manual after it was removed from the top drawer of the computer desk.
15. In Appendix C, the photograph labeled as Appendix C (i) shows a red notebook on top of a black object. Neither the red notebook nor the black object were inventoried.
16. In Appendix C, the photograph labeled as Appendix C (ii) shows papers and other objects beneath the photocopy of Mr. Bona's Canadian passport. These papers and other objects were not inventoried.
17. In the bottom drawer of the computer desk, Cst. Jeremy Vetter found a folder labeled "Apartments". In that folder were various court related documents including an application for a protection order in the name of Rizig Bona. That folder of documents became Police Exhibit 51.
- [27] Police Exhibit 51 is a diverse collection of papers. The folder itself appears to be a marketing folder for some apartments. Inside the folder there are papers apparently relating to renting an apartment. There is an email dated October 4, 2018 which is apparently from the apartment rental company to Ms. Magaya's email address, along with a rental application form, and a sheet explaining the application procedure. None of those papers are filled out, and they do not appear to relate to Mr. Bona.

- [28] Also inside the folder is what appears to be a copy of the marriage certificate of Mr. Bona and Ms. Magaya, a document dated September 10, 2015 from Service Canada relating to Ms. Magaya's Social Insurance Number, and a photocopy of Ms. Magaya's driver's licence.
- [29] It is difficult to see how any of those papers would be admissible at the behest of Mr. Bona, as they seem to relate more to Ms. Magaya than to him.
- [30] The folder also contained, however, some papers apparently relating to a possible court application in relation to a family claim. There is a Form F17 requisition for a fee waiver, apparently signed by Mr. Bona, but the form is undated. There is a Form F3 Notice of Family Claim, apparently signed by Mr. Bona, which is partially filled out, requesting an order for divorce. However, it is unclear whose handwriting is on the form, and the date listed as the marriage date is not the actual date of the marriage between Mr. Bona and Ms. Magaya. The form itself is undated, and there is no evidence that this form was ever filed with a court registry. There is an Application for an Order Without Notice to the Respondent Checklist, but it is not filled out at all. There is a page of handwritten notes with the heading Google, but there is no indication of whose handwriting it is. There are some printed instructions about bringing a notice of motion and there is a Notice of Motion form which is partially filled out. However, the handwriting on this form appears to be that of more than one person, as the style of handwriting is not the same, and there are different colours of ink. There is an Application to Obtain an Order under the Family Law Act, which consists of an Application Form and printed instructions. It is partially filled out, with different colours of ink. There is a tick mark next to the printed words "protection order", but the form is not signed and it is not dated. Again, there is no evidence that this form was ever filed with a court registry.
- [31] There is a copy of a form entitled Confirmation of Permanent Residence, but it relates to Ms. Magaya, not to Mr. Bona.
- [32] There is a printed set of instructions about presenting affidavit evidence, which contains some handwriting, but there is no reason to believe that the handwriting is that of Mr. Bona.
- [33] There is an affidavit form which is partially filled out, apparently in two different styles of handwriting and in two different colours of ink. It states that the affidavit is in relation to an application by Rizig Bona for a protection order, but it does not set out any facts, and it is unsigned and undated.
- [34] Finally, there is a form entitled, Request for Service of Family Protection Order. It is filled out with details about Ms. Magaya, but it is filled out with at least three different colours of ink, and is undated.
- [35] The defence submits that the documents, and in particular, the documents relating to a protection order, should be admitted in evidence during the Crown's case, through cross-examination of the police officers.

- [36] The Crown submits that none of the documents should be admitted at the behest of the defence during the Crown's case, as they are all either irrelevant or inadmissible hearsay.
- [37] The defence relies on the documents in possession rule, as explained in *R. v. Turlon* (1989), 49 C.C.C. (3d) 186 (Ont. C.A), and *R. v. Bridgman*, 2017 ONCA 940. In the latter case, it was the Crown who sought admission of certain text messages under this rule as evidence against Mr. Bridgeman.
- [38] In *Bridgman*, the Court explained the two different circumstances in which the rule may be applicable, at paras. 68-70:
- [68] The rule is designed to permit the admission of documents in two different circumstances for two different purposes.
- [69] First, the rule allows for the admission of documents found in personal, constructive or joint possession of an accused as original circumstantial evidence of their contents to establish the accused's connection to or complicity in the matter to which the documents relate: *Ansari*, at para. 116. Second, where evidence exists that the accused has recognized, adopted or acted upon the documents found in possession, the documents may be admitted as an exception to the hearsay rule, allowing the trier of fact to consider them for the truth of their contents. As noted in *B.C. Securities Comm.*, at p. 33, "if the party in possession has recognized, adopted or acted on the document an admission of acceptance of its contents as true may be inferred."
- [70] This court addressed the dual nature of the admissibility doctrine in *Turlon*. The court adopted as correct the following passage from *Hodge M. Malek & Sidney L. Phipson, Phipson on Evidence*, 18th ed. (London: Sweet & Maxwell, 2013), at 37-10, pp. 1326-27, which remains substantively unchanged today:

Documents which are, or have been, in the possession of a party will generally be admissible against him as original (circumstantial) evidence to show his knowledge of their contents, his connection with or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as admissions (i.e. exceptions to the hearsay rule) to prove the truth of their contents if he has in any way recognised, adopted or acted upon them.

[Emphasis in original]

- [39] In the present case, counsel for Mr. Bona submits that the documents apparently relating to a protection order should be admitted under both aspects of the documents in possession rule. Counsel points out that the documents were found in a locked drawer in the basement suite that was opened by the police with a key obtained from Mr. Bona.
- [40] Under the first aspect of the documents in possession rule, the defence submits that the documents are original circumstantial evidence being tendered for a non-hearsay purpose, namely, to show Mr. Bona's state of mind and to connect him with a specific transaction,

namely, dealing with a court registry about a protection order. I do not accept that there is a connection with a specific transaction, as the documents provide no evidence that Mr. Bona ever actually contacted a court registry, so I shall focus on the rationale that the documents are evidence of Mr. Bona's state of mind.

- [41] In my view, the documents are not admissible at the behest of the defence under the first aspect of the rule, as original circumstantial evidence to establish the accused's state of mind, because the accused's state of mind can only be inferred by using the documents for a hearsay purpose. Even assuming that the handwriting on the forms is that of Mr. Bona, it only has significance if one treats the request for a protection order as amounting to an assertion by him that he has reason to fear Ms. Magaya. To admit this evidence would be to invite the jury to find that this assertion is true. That is, to infer anything about Mr. Bona's state of mind, the jury would have to consider the documents for the truth of their contents; they would have to consider the documents as evidence of the truth of an assertion that he has reason to fear Ms. Magaya. If the jury did not consider the documents for the truth of that assertion, then the documents would have no probative value.
- [42] Under the second aspect of the documents in possession rule, the defence submits that the documents are admissible even if it is for a hearsay purpose, because Mr. Bona acted on them by beginning to fill the documents out. In my view, that rationale does not provide a basis for the admissibility of these documents at the behest of the defence in this case.
- [43] The problem with admitting the unfilled protection order forms at the behest of the defence is that they are essentially self-serving hearsay, and subject to the general rule excluding such evidence. This was explained in *R. v. Rojas*, 2008 SCC 56 at para. 36:

Exculpatory out-of-court statements made by an accused are also subject to the general exclusionary rule against hearsay. Where the accused testifies, such statements are generally inadmissible because they are viewed as self-serving and lacking in probative value. Where the accused does not testify, there is an additional rationale for excluding such statements. McIntyre J. explained it in *R. v. Simpson*, [1988] 1 S.C.R. 3, as follows (at p. 22):

As a general rule, the statements of an accused person made outside court -- subject to a finding of voluntariness where the statement is made to one in authority -- are receivable in evidence against him but not for him. This rule is based on the sound proposition that an accused person should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subjected, as well, to cross-examination.

- [44] I am satisfied that the documents tendered by the defence are not admissible through the cross-examination of the police witnesses during the Crown case. The documents are not spontaneous utterances from which the accused's state of mind might be inferred. They are, assuming the handwriting is his, out-of-court statements made by him, amounting to an assertion that he has reason to fear Ms. Magaya, and to admit them at the behest of the defence would violate the rule against self-serving evidence.
- [45] This ruling does not deprive the defence of leading evidence to establish Mr. Bona's state of mind. It is open to him to take the witness stand and testify to that effect. In that case, the strength of the evidence can be tested through cross-examination.
- [46] I agree with the analysis of Griffin J., as she then was, in *R. v. Moir*, 2017 BCSC 1006 at paras. 38-40:
- [38] I will not review the exceptions to the accused calling evidence of his prior statements in detail because, other than the mixed-statement exception, they are premised on the accused testifying. Where it is determined that there is probative value to the evidence, the fact of the accused testifying minimizes the prejudicial effect of the evidence because the accused can be cross-examined and the inferences the defence seeks to be drawn from the evidence can thus be challenged.
- [39] For example, the exception that allows the accused to call evidence of his state of mind appears premised on the accused testifying. From the authorities I was provided by counsel, the closest example to the facts here is the case of *R. v. Pattison*, 2013 BCCA 246, where the accused had to testify first, but then was allowed to call evidence of a 9-1-1 call he made immediately after the incident which was the basis for the charges against him, to show his state of mind at the time of the call.
- [40] The defence could provide me with no examples in the authorities of any case that provided for an accused to call evidence of his prior statements to show state of mind without testifying where the accused was capable of testifying.

IV. Conclusion

- [47] Both the Crown's application to admit police Exhibit 31, and the defence application to admit police Exhibit 51 during the Crown's case are dismissed. Neither document is admissible during the Crown's case.

"Ehrcke, J."

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