R. v. Gauthier

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Subject: Criminal

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5 or 486.6 of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

> 486.5(1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2.1) The offences for the purposes of subsection (2) are
>
> > (a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

(3) An order made under this section does not apply in either of the following circumstances:

(a) the disclosure of information is made in the course of the administration of justice when the purpose of the disclosure is not one of making the information known in the community; or

(b) the disclosure of information is made by a person who is the subject of the order and is about that person and their particulars, in any forum and for any purpose, and they did not intentionally or recklessly reveal the identity of or reveal particulars likely to identify any other person whose identity is protected by an order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that other person.

(3.1) An order made under this section does not apply in respect of the disclosure of information by the victim, witness or justice system participant when it is not the purpose of the disclosure to make the information known to the public, including when the disclosure is made to a legal professional, a health care professional or a person in a relationship of trust with the victim, or witness or justice system participant.

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(5.1) If the prosecutor makes an application for an order under subsection (1) or (2), the judge or justice shall

(a) if the victim, witness or justice system participant is present, inquire of them if they wish to be the subject of the order;

(b) if the victim, witness or justice system participant is not present, inquire of the prosecutor if, before the application was made, they determined whether the victim, witness or justice system participant wishes to be the subject of the order; and

(c) in any event, advise the prosecutor of their duty under subsection (8.2).

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(8.1) If an order is made, the judge or justice shall, as soon as feasible, inform the victims, witnesses and justice system participants who are the subject of that order of its existence and of their right to apply to revoke or vary it.

(8.2) If the prosecutor makes the application, they shall, as soon as feasible after the judge or justice makes the order, inform the judge or justice that they have

(a) informed the victims, witnesses and justice system participants who are the subject of the order of its existence;

(b) determined whether they wish to be the subject of the order; and

(c) informed them of their right to apply to revoke or vary the order.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(1.1) A prosecutor shall not commence or continue a prosecution against a person who is the subject of the order unless, in the opinion of the prosecutor,

(a) the person knowingly failed to comply with the order;

(b) the privacy interests of another person who is the subject of any order prohibiting the publication in any document or the broadcasting or transmission in any way of information that could identify that person have been compromised; and

(c) a warning to the individual is not appropriate.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gauthier, 2024 ONCA 621
DATE: 20240820
DOCKET: C68998

Miller, Paciocco and Coroza JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Marc Gauthier

Appellant

Nader R. Hasan and Karen Bernofsky, for the appellant

Michael Fawcett, for the respondent

Heard: October 23, 2023

On appeal from the conviction entered on March 10, 2020 by Justice David J. Nadeau of the Superior Court of Justice, sitting with a jury.

Coroza J.A.:

I. OVERVIEW

[1] Marc Gauthier, the appellant, appeals his conviction for first degree murder.

[2] The appellant conceded that he killed his girlfriend, Tammy Avery. The Crown theory was that the killing was first degree murder because it was planned and deliberate or that the appellant forcibly confined Ms. Avery while killing her.

[3] Prior to her death, Ms. Avery complained to her sister that the appellant was being verbally abusive to her. She was afraid, upset about his drug use, and wanted to move away from him.

[4] On the night of November 14, 2017, the appellant's neighbours heard sounds of an argument and a fight emanating from his apartment. The police eventually arrived. They forced entry into the apartment and found the appellant inside, and Ms. Avery dead.

[5] The day before the killing, the appellant left a voicemail for Dr. Andree Morrison, his family physician, who was treating him for back and chest pain. The voicemail was left on Dr. Morrison's office phone. The message did not come to the attention of Dr. Morrison or her staff until the day after the killing. When they listened to it, they called the police, who attended at Dr. Morrison's office, listened to the message and seized an audio recording of the message, without a warrant.

[6] The Crown argued that the contents of this message were relevant to its theory that the killing of Ms. Avery was planned and deliberate. The voicemail was played for the jury.

[7] The appellant appeals his conviction and seeks a new trial. His appeal focuses on the trial judge's rulings relating to the admissibility of two pieces of evidence.

[8] The appellant's primary ground of appeal is that the trial judge erred by admitting the voicemail left for Dr. Morrison. The appellant argues that the police violated the appellant's s. 8 *Charter* rights when they made and seized a copy of the voicemail without a warrant. He argues that the evidence should have been excluded from the trial.

[9] I do not accept the appellant's submission. As I will explain below, the trial judge did not err in admitting the voicemail. There is no question that individuals have a reasonable expectation of privacy in private medical communications. But here, I agree with the trial judge that there was no reasonable expectation of privacy in a voicemail that the trial judge described as threatening and harassing. In this case, the appellant left a voicemail that was part of an overall pattern of harassment of Dr. Morrison and her staff. Indeed, the appellant was consequently charged with criminal harassment. Since the appellant had no reasonable expectation of privacy in the voicemail he left for the doctor, the *Charter* was not triggered and there was no violation of s. 8: *R. v. Lambert*, 2023 ONCA 689, (2023) 169 O.R. (3d) 81 (C.A.), at paras. 59 to 62.

[10] In any event, even if the appellant did have a reasonable expectation of privacy and the police unlawfully seized the voicemail message without a warrant, this evidence should not be excluded under s. 24(2) of the *Charter*, because the admission of the voicemail did not bring the administration of justice into disrepute. Consequently, I would dismiss this ground of appeal.

[11] Second, the appellant argues that the trial judge erred by admitting into evidence statements made by the appellant to two police officers and a correctional officer after his arrest, in which he spontaneously confessed to killing Ms. Avery. These statements were not audio or video recorded. The police officers who heard one of them made late entries of this

statement in their notes on the next day, and the correctional officer who heard the other statement acknowledged that his notes could have been written later than he estimated, and that he inserted an additional detail later. The appellant argues the trial judge erred by concluding that the Crown met the very high burden of proving beyond a reasonable doubt that the statements were made voluntarily. The appellant submits that the trial judge shifted the burden of proof to him to provide evidence that the statements were not voluntary; did not grapple with the failure of the Crown to provide a proper evidentiary record which would permit the court to fairly adjudicate the voluntariness question; and failed to consider whether the inculpatory statements were the product of an "operating mind".

[12] I agree that the trial judge failed to grapple with the poor evidentiary record relied on by the Crown, and that there were significant gaps in the evidence surrounding the circumstances and voluntariness of the appellant's statements. While deference is ordinarily given to a trial judge's voluntariness ruling, appellate intervention is required if the relevant circumstances are not considered: *R. v. Tessier*, 2022 SCC 35, 419 C.C.C.(3d) 1, at para. 43. In my view, this is such a case. Given the evidentiary record tendered by the Crown, it could not discharge its burden. Accordingly, the trial judge erred in admitting these statements.

[13] However, I conclude that this error was of no consequence. The appellant's statements only provided evidence that he killed Ms. Avery, and he knew he had done so. Neither of these points were in dispute at trial. Thus, while the trial judge erred in admitting the statements, this error could not possibly have impacted the jury's verdict. I would therefore apply the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[14] Accordingly, I would dismiss the appeal.

II. FACTS

(1) The Killing

[15] The appellant and Ms. Avery lived together. Ms. Avery's sister testified that Ms. Avery was not happy with the appellant. She was upset with his heavy drug use and she wanted to

leave him and move out. He was also being verbally abusive to her. The verbal abuse was becoming more frequent. Ms. Avery was afraid.[1]

[16] On the night of November 14, the neighbours heard loud noises coming out of the appellant's apartment. The noises sounded like a fight. One of the neighbours who lived downstairs with Ms. Avery's sister testified that he recognized the appellant's voice.

[17] After more loud banging, the appellant stuck his head out his apartment window, yelling for someone to call 911 because "she's dead."

[18] The downstairs neighbour tried to kick open the door into the appellant's apartment, but failed initially. The neighbour yelled at the appellant "you better not have hurt her." The appellant responded that Ms. Avery was hurt.

[19] The police arrived and also tried to force entry through the apartment door without success, until the neighbour's assistance ultimately broke open the door. They saw the appellant running out of a room and into the bathroom. They found a wooden board with a screw in it on the kitchen floor, which may have been previously attached to the apartment door as a barricade. Emergency medical personnel found Ms. Avery without vital signs – she had been beaten, strangled, and stabbed.

[20] The police placed the appellant under arrest.

(2) The Trial

[21] The Crown argued that the appellant planned to kill Ms. Avery. It relied on several pieces of evidence including a voicemail he left for his doctor, Dr. Andree Morrison at 9:40 p.m. on the day before the murder, where the appellant narrated how he could kill his girlfriend and how he could keep the police out by boarding up his apartment. At trial, Dr. Morrison testified that the appellant would call her at her office and personal phone repeatedly, including in the middle of the night, despite having been instructed not to. In one four-day period, the appellant made fourteen calls to Dr. Morrison's home.

[22] The Crown submitted to the jury that the voicemail was evidence both of planning and deliberation, and that it supported the theory that the appellant barricaded his apartment door with the wooden board to forcibly confine the victim while killing her. Accordingly, the Crown argued that the appellant was guilty of first degree murder either under the pathway of planning and deliberation under s. 231(2), and/or murder while committing forcible confinement under s. 231(5)(e).

[23] The appellant called no witnesses. In his closing address, the appellant's counsel conceded that the appellant murdered Ms. Avery. Defence counsel argued that the case was "literally a matter of degrees, first degree or second degree [murder]." He argued that there was reasonable doubt on both Crown theories of first degree murder, and so the jury should convict on only second degree murder.

[24] After approximately nine hours of deliberations, the jury returned a verdict of guilty of first-degree murder.

III. ISSUES ON APPEAL

[25] As noted, the appellant raises two issues on appeal:[2]

1. Did the trial judge err by admitting the voicemail?
2. Did the trial judge err by admitting the statements to the police officers and correctional officer because the Crown had not proven they were voluntarily given?

[26] Additionally, the Crown raises the applicability of the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*, should this court agree with the appellant's second ground of appeal.

IV. ANALYSIS

(1) The Appellant's Voicemail Was Admissible

(a) The Appellant's Voicemail to Doctor Morrison

[27] The appellant's voicemail to Dr. Morrison can fairly be characterized as rambling, verging on incoherent. In the early part of the message, the appellant asked the doctor not to cut his prescription, and then spoke about having had a "big fight" with his girlfriend four days ago. The message then verged into unrelated topics such as the state of his health, and the price of the lights he bought.

[28] At the end of the voicemail, the appellant returned to the topic of a fight with a woman, and explained if he was going to kill her, how he could do it. For ease of reference, I set out the entirety of the voicemail[3]:

> Uh, I'm sorry to disturb you. It's Joseph Pierre Marc Gauthier. Um, I decided to uh, I'm, uh, I'm gonna uhm, I'm gonna stay home an', I'll stop my carbon filter, an', uh I'm (unintelligible) my room. An, I stayed there for 12 hours, and I slept. An' I didn't have an attack, I don't have anything. So, uh, I'd like you to not cut my prescription, I'll follow it. An' uhm, other than that, that's all I have to say. I'm not going anywhere. I'll stay home an' I know I won't die, I was dying. (Unintelligible) was so violent, I was shaking. I lost my voice, I lost my voice because I yelled. An' my girlfriend We had a big fight, four days ago, an' it rose, an' the, an' the same night, I didn't think. I'm losing my memory. I had a big attack, a really big attack. The first time, it was more violent, (unintelligible) I get violent, but they're becoming more violent. So, I slept for 12 hours, in my special room, and, uh, I don't have any more pain, I don't have any more, um, attacks. I still have some muscle spasms, I still have a small headache, not like some (unintelligible) that I had. I know I was dying. I (unintelligible) all weekend, an' then, I was going to the general hospital in Hamilton and I was stopping in Toronto to, uh, see, uh, the medical lawyer there. So, uh, I don't know. I stopped all that. I don't want to go through that. I have enough money in my account and my insurances, I don't need any more. Uh, so, uh, so, if you want to talk to me, uh, like, uh, like a reasonable (unintelligible), you can talk to me. I had some, some attacks. I told you that. You thought I'd taken too many pills, well, that's, that's your idea. Uh, besides that, I think I get, uhm, I bought some lights, 5,000 bucks each. Before, I had cheap lights. I bought some lights, 5,000 bucks

> each, so, an' they'll be in on Thursday. So, I think, Thursday, uh, it'll be, just the smell. Wow! It's, I'll put a/an, I opened a door. I put my chair in it an', well, because it's, it's not, it's not (unintelligible), but, it's not a small room. It's just uh, I went small, an' now, I'll go ten times bigger now. So that's it, okay. Uh, an' she changed her mind. She apologizes an' I told her: "Well, it's your fault" eh. She punched me! An' I, I, if I was gonna kill her, just in the neck, an' just (unintelligible), there's two, there's three spots, four spots that I grab. I just need four spots, an' I'd just have her, the spots in the neck. She would've fallen, she would've (unintelligible) an' she would've been dead. An' then the police would've tried to get in. I would've boarded up all my place, you'd have to have a bomb to get in because it's all made of concrete. An' they can't get in through the windows; I have holes to spray them with, uhm, chemicals. So, they'll have to use a bomb. So, an' even, they'll never be able to…". [Emphasis added.]

[29] The voicemail message had been left on the evening of the day before the murder. The day after the killing, one of Dr. Morrison's nurses listened to the office's voice messages. After listening to the appellant's voicemail, she brought it immediately to Dr. Morrison's attention. Dr. Morrison, who was aware of the murder, was upset after listening to the voicemail that she had not heard it before the killing. She reported it to the police. The police arrived at her office, listened to the voicemail, and made a copy of it. The police did not obtain a warrant before doing so. The appellant was charged with criminal harassment of Dr. Morrison.

(b) The Trial Judge's Ruling

[30] Prior to trial, the appellant brought a pre-trial motion to exclude the voicemail from being entered as evidence, on the basis that the police's warrantless seizure violated s. 8 of the Charter. The *voir dire* was conducted based on the statement of facts set out in the appellant's notice of application (which was mostly accepted by the Crown), and the transcript of Dr. Morrison's evidence at the preliminary inquiry. At the preliminary inquiry, Dr. Morrison testified that for at least a month prior to the killing, the appellant had been calling Dr. Morrison "non-stop", at her house, cell phone, and office.[4]

[31] The trial judge ruled that the police did not violate s. 8 by copying the voicemail without a warrant. He based his ruling on the threshold question of whether the appellant held a

reasonable expectation of privacy in the voicemail. He concluded that even if the appellant may have had a subjective expectation of privacy in the voicemail, that expectation was not objectively reasonable in the totality of the circumstances.

[32] The trial judge gave weight to several factors in deciding that any expectation of privacy was not objectively reasonable:

- Dr. Morrison contacted the police and volunteered the voicemail, in part because of its "harassing and threatening nature;"

- Dr. Morrison did not act as an agent of the state, did not compel the voicemail, and did not make an agreement with the appellant that he could leave a voicemail or that any "threatening words" would be kept confidential;

- Section 40 of the *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, Sch A., authorizes physicians to disclose health information when reasonable grounds exist to believe that disclosure is necessary to eliminate or reduce a risk of serious bodily harm to a person;

- The appellant had absolutely no control over the message once it was left on Dr. Morrison's answering machine. Access would be available not only to Dr. Morrison but to the other office staff, and accordingly it was much less private than a text message to another individual person.

[33] Given his conclusion that the appellant did not hold a reasonable expectation of privacy over the voicemail, the trial judge noted that in *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 46, the Supreme Court left "for another day" the question of whether s. 8 is engaged when a citizen voluntarily brings an item to the police.

[34] In the alternative, the trial judge held that if the appellant had a reasonable expectation of privacy in the voicemail, then even despite the absence of exigent circumstances or prior judicial authorization, he still would have found no violation of s. 8. In the further alternative, he

would have declined to exclude the evidence under s. 24(2) of the *Charter*, given the "harassing and threatening" nature of the voicemail, the "weak" impact on the appellant's interests, and the "reliable and critical" nature of the voicemail evidence to the Crown's case of first degree murder.

(c) The Parties' Positions

[35] The appellant acknowledges that for the purposes of the *Charter* s. 8 analysis, there was nothing wrong with Dr. Morrison informing the police about the voicemail, nor with the police receiving that information, which could be received without any judicial authorization. When, however, the police attended the doctor's office, listened to the voicemail and seized a copy of it, they breached the appellant's s. 8 rights.

[36] The Crown concedes that the seizure of the voicemail was state action within the meaning of s. 8 and was not the "passive acquisition" of evidence as explained by this court in *Lambert*.[5] However, the Crown argues that the trial judge's conclusion that the appellant had no reasonable expectation of privacy in the voicemail was correct. It submits that the threatening and harassing voicemail was not private because it constituted the *actus reus* of an offence against the recipient. Relying on this court's decision in *R. v. Campbell*, 2022 ONCA 666, 163 O.R. (3d) 355, at paras. 62 and 73, leave to appeal granted, appeal heard and reserved [2022] S.C.C.A. No. 436 and *Lambert*, at para. 60, the Crown submits that there is no reasonable expectation of privacy in a voicemail message sent by a *Charter* claimant to a recipient where the message is used to commit the offence.[6] Second, the Crown argues that even if the appellant had established a reasonable expectation of privacy in the voicemail, the police lawfully seized it under the common law "ancillary powers" doctrine or under s. 489(2) of the *Code*, which creates something akin to the plain view authority to seize information that the police are lawfully in a position to obtain, and have reasonable grounds to believe will afford evidence of the offence. Finally, the Crown argues that even if there was a breach of the appellant's s. 8 rights, the evidence should not be excluded under s. 24(2) of the *Charter*.

(d) The Appellant Did Not have a Reasonable Expectation of Privacy

[37] The applicable s. 8 principles are not controversial. Section 8 protects a claimant's reasonable expectation of privacy against unreasonable state intrusion. State action will amount to a search and seizure under s. 8 if that conduct infringes on the complainant's reasonable expectation of privacy in the subject matter of the search or seizure: see *Lambert*, at para. 70; and *R. v. Singh*, 2024 ONCA 66, 432 C.C.C. (3d) 527, at para. 43.

[38] I agree with the trial judge's conclusion that the appellant did not have a reasonable expectation of privacy in the voicemail message he left for Dr. Morrison.

[39] The determination of whether a claimant has a reasonable expectation of privacy involves a factual and a normative inquiry. In *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 28, Karakatsanis J. put it this way:

> In assessing whether a claimant has a reasonable expectation of privacy in an item that is taken, courts must consider "the totality of the circumstances". In particular, they must determine (1) the subject matter of the alleged seizure; (2) whether the claimant had a direct interest in the subject matter; (3) whether the claimant had a subjective expectation of privacy in the subject matter; and (4) whether this subjective expectation of privacy was objectively reasonable. The reasonable expectation of privacy standard is normative, rather than descriptive. The question is whether the privacy claim must "be recognized as beyond state intrusion absent constitutional justification if Canadian society is to remain a free, democratic and open society". Further, the inquiry must be framed in neutral terms — "[t]he analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought". [Citations omitted.]

[40] In a recent decision in *Singh*, at para. 63, Doherty J.A. observed that broader societal concerns, particularly public safety and security, must be factored into the reasonable expectation of privacy calculus.

[41] I accept the appellant's argument that the jurisprudence supports a broad grant of protection to two-way electronic communications, and that the nature of the relationship between Dr. Morrison and the appellant (i.e., doctor and patient) was an important normative

factor in assessing the reasonable expectation of privacy: *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608. For example, in *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, four justices held that there should not be a reasonable expectation of privacy in communications between adults and children who are strangers to them. This decision was summarized by Trotter J.A. in *Campbell*, at para. 63, where he acknowledged that an analysis of the relationship between the parties to a communication, in determining whether normative factors negate a reasonable expectation of privacy, is generally an important consideration.

[42] However, there is another competing normative consideration in this case, namely that the evidence before the trial judge established that the appellant was committing the act of criminal harassment in the communication he now claims to have been private. In *Campbell*, the police arrested an individual. An officer looked at the arrestee's cell phone, and saw notifications for incoming text messages that were indicative of a drug transaction in progress. The police took the arrestee's phone, and texted in-character to arrange to meet, surprise, and arrest the person texting with them, who turned out to be Mr. Campbell. At trial, Mr. Campbell asserted a reasonable expectation of privacy in his text exchange with the arrestee's phone. The Crown argued that under *Mills*, there was no reasonable expectation of privacy. Trotter J.A. disagreed. He found that the facts were very similar to the Supreme Court of Canada's decision in *Marakah*, and so presumptively there was a reasonable expectation of privacy. Ultimately, Trotter J.A. concluded that *Marakah* sets out a broad presumption of reasonable expectation of privacy over text messages, but that "*Mills* carved out an exception in circumstances where the electronic communications themselves constitute a crime against the recipient – in that case, the victimization of children": *Campbell*, at para. 62.

[43] In *Lambert*, Paciocco J.A. also recognized that a *Charter* claimant may have no reasonable expectation of privacy "where electronic messages sent by the *Charter* claimant to the victim are used as the means of committing the offence charged, such as the offence of threatening to cause death or bodily harm, or criminal harassment": *Lambert*, at para. 60.

[44] In my view, the voicemail here falls squarely within the exception identified by my colleagues. Put another way, the appellant's voicemail was the means of committing the offence of criminal harassment (*Criminal Code* s. 264) and harassing communications (s. 372(3)). The trial judge found that Dr. Morrison "contacted police and volunteered the audio recording in part because of its harassing and threatening nature." There was support in the record for the trial judge's finding that the communication was an act of harassment. The message was not an isolated one. There was evidence that the appellant had repeatedly called the doctor outside of the office, in spite of being told not to do so. She testified at the preliminary hearing:

> Q. Okay. If you could just briefly explain to us why you contacted the police about the message.
>
> A. It was a message that was left on the answering machine at my office and it was a message from Marc left on the phone that had some information on it that just seemed to be relevant to what the - that the police should know about. And it had also unnerved us all at the - at the office so we contacted the police.
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> […]
>
> Q. Meaning you didn't believe him.
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> A. No, it's not that I didn't believe him. It's just that I don't know if I'm allowed to say why but basically for at least a month prior to that he'd been calling us non-stop at my house, on my cell phone, at the office, constantly. He'd been told several times that if he was having an attack and was unwell that he should go to the emergency department but in the end most of the times - most of the interactions were just to try to get pain medication or anxiety medication.
>
> […]
>
> Q. The name of the nurse who first received the message, please.
>
> A. Tasha Belanger.
>
> Q. Does she still work for you?
>
> A. Yes.

Q. She RPN or RN?

A. RPN.

Q. RPN. And how would you describe her demeanour when she says, you know, hey doc, there's this message on the machine. How would you describe her demeanour when she comes to you?

A. Very distraught and actually quite afraid.

Q. Afraid.

A. Yeah.

[…]

Q. Doctor, thanks for being here. Yes, thank you. What caused you some concern about that? I mean, I think I know but I'd like to hear from you.

A. Basically we already had known when we listened to - well, first of all my secretary - my nurse, sorry, is the one who listens to the messages first at my office and then transmits the messages to me that need to be listened to. For some reason there was a delay in listening to that message and so we already had heard about the incident prior to listening to the message and so when the nurse listened to the message she right away had me listen to it and - and everyone at the time was just very upset about the fact that we had not heard the message prior.

Q. So if I ....

A. For the simple fact that maybe we could have intervened in some fashion to have potentially helped the situation.

[45] Accordingly, I do not accept the appellant's argument that the voicemail was a quintessential doctor-patient call and that the content of the message was not harassing towards Dr. Morrison or her staff: *Singh*, at paras. 51-55. The content of the message should not be read in isolation of the evidence introduced at the *voir dire*. When Dr. Morrison's preliminary hearing evidence is read fairly, and in its entirety, it can be inferred that one of the

reasons she called the police and turned over the voicemail was in part because she felt harassed. I say this for the following reasons.

[46] First, Dr. Morrison testified that for “at least a month” beforehand, “he’d been calling us non-stop” and that these calls were not only to the doctor’s office, but to her cell phone, and her residence.

[47] Second, Dr. Morrison testified that the appellant had “been told several times” to go to the emergency department if he was unwell. In other words, the appellant had been made aware that his repeated calls were not welcome.

[48] Third, upon receiving the message, Dr. Morrison described that it “unnerved us all”. She described the demeanour of the nurse who heard the voicemail first as “very distraught” and “quite afraid”.

[49] The voicemail was part of a series of repeated, unwanted messages from the appellant to his doctor. The message had unnerved Dr. Morrison and her staff. To be sure, one of the reasons that the doctor and her staff were upset was because they did not retrieve the message earlier. However, the doctor, learning about the killing, in context, concluded that this whole environment was threatening not just to the deceased victim, but to her and her staff.

[50] I conclude that s. 8 of the *Charter* was not triggered because the appellant had no reasonable expectation of privacy in the voicemail. My conclusion is fortified by the British Columbia Court of Appeal’s decision in *R. v. Pelucco*, 2015 BCCA 370, 327 C.C.C. (3d) 151. There the court considered whether a person who sends a threatening text message has a reasonable expectation of privacy in that message. The court held that they do not. The court noted that the reasonable expectation of privacy is a normative standard and the court reasoned that on a normative perspective, “a person who threatens another has no right to expect that the person who has been threatened will keep the threat private”: *Pelucco*, at para. 61. The same holds true with harassing messages.

[51] In sum, the appellant had no reasonable expectation of privacy in the knowledge that Dr. Morrison had regarding the details disclosed in the message, and he had no reasonable expectation of privacy in a voicemail sent to Dr. Morrison that was the means of committing an offence with which he was charged in this case: criminal harassment: *Lambert*, at para. 60.[7] The reason why boils down to this: a reasonable person in Canada ought not to expect privacy in leaving a voicemail for a recipient that itself constitutes a crime.

(e) The Crown's Alternative Argument – the Seizure of the Voicemails was Lawful

[52] In light of my conclusion that the appellant had no reasonable expectation of privacy, it is therefore unnecessary to consider the Crown's alternative argument that the searches were nevertheless lawful under the warrantless seizure power set out in s. 489(2) of the *Code* and the ancillary powers doctrine.

[53] I note that the trial judge did not explicitly refer to either of the proposed bases of authority in his ruling. In my view, the record does not permit the Crown to rely on either power because there is simply no evidence on this sparse record that the officer who conducted the seizure believed that he had the lawful authority that the Crown is relying upon. The police officer who attended Dr. Morrison's office who listened to and seized the voicemail did not testify on the *voir dire* and was not asked any questions about these powers. We have no way of knowing whether the officer turned his mind to whether he had such authority and concluded that he did: *Lambert*, at para. 82. In my view, the Crown is thus presumptively barred from making this argument on appeal.

(f) Section 24(2)

[54] However, even assuming that there was a reasonable expectation of privacy in the voicemail and that the police acted unlawfully by not obtaining a warrant before seizing it, the appellant can only succeed on the appeal if he can satisfy this court that the evidence should be excluded under s. 24(2) of the *Charter*.

[55] While I agree that the trial judge's s. 24(2) decision is owed no deference, because he found no breach of s. 8 in the first place, I do agree with his conclusion that the admission of the voicemail would not bring the administration of justice into disrepute.

[56] Under the well known *Grant* test, the appellant must persuade us, that on balance: (1) the seriousness of the breaches; (2) the impact of the breaches; and (3) society's interest in the adjudication of the case on its merits, requires exclusion because the admission of the evidence would bring the administration of justice into disrepute: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 71.

[57] I reject the appellant's position that the voicemail should be excluded.

(i) Seriousness of the Breach

[58] I recognize that this is a private communication and the police could have easily obtained a warrant for the voicemail if they had turned their minds to it (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 71), but it is important to recall that this event happened in 2017. The issue of whether the receipt, taking, and recording of electronic messages provided to the police by third parties was state action that could trigger s. 8 was not necessarily settled. In *Lambert*, a decision released six years after the police conduct in this case, Paciocco J.A. observed that there was debate on this issue, and the law, at least in 2017, was far from settled. And so, I would not characterize the police actions in this case as negligent or demonstrating a fundamental misunderstanding the law, back in 2017. I note that the leading authority on communicative privacy at the time the seizure took place was this court's decision in *R. v. Marakah*, 2016 ONCA 542, 131 O.R.(3d) 561 ("*Marakah* (ONCA)"), rev'd 2017 SCC 59, [2017] 2 S.C.R. 608 ("*Marakah* (SCC)"), which found no reasonable expectation of privacy in text messages, due to the sender's lack of control. The applicable law was thus arguably in flux, and the police may have reasonably relied on authority that supported their actions. Simply put, I see no evidence of bad faith or recklessness here, or any evidence that suggests that the police were looking for a *Charter* shortcut by seizing the voice mail that the doctor had given them.

(ii) Impact on *Charter* Rights

[59] The appellant argues that the *Charter*-infringing actions of the police in this case totally obliterated the appellant's privacy in the voicemail (*Marakah* (SCC), at para. 67). I accept that a patient's communications with their doctor, which touch on medical issues, arguably have an especially high privacy and dignity interest.

[60] But I do observe that the voicemail was largely an incoherent ramble. It therefore may not have revealed the appellant's core biographical information, and given the unique circumstances, this call was part of a broader campaign of harassment, was unwanted, and the appellant had been told to stop. And as I have noted, the police could easily have secured a search warrant because they clearly would have reasonable grounds to seize the voicemail in the murder investigation. The fact that the police could have obtained a warrant lessens the impact on the accused's privacy and dignity interests in this particular case (*Côté*, at para. 72).

(iii) Society's Interest in Adjudication

[61] The appellant argues that the Supreme Court of Canada has cautioned that statements taken in violation of the *Charter* may lack reliability. I do not see this voicemail as tantamount to an unreliable statement because the voice mail was left voluntarily by the appellant and there is no suggestion that the statement was made in connection with any *Charter* breach.

[62] In the end, it is not disputed that this evidence was critical to the issue of planning and deliberation. It goes without saying that first degree murder is amongst the most serious offences in the *Criminal Code*.

[63] In my view, the first *Grant* factor is neutral, the second factor leans moderately towards exclusion, and the third factor leans towards inclusion. Cumulatively, on balance, the appellant has not persuaded me that the voicemail should be excluded.

(g) Conclusion

[64] The voicemail was properly admitted, and I would dismiss this ground of appeal.

(2) The Appellant's Alleged Statements to the Officers Were Not Admissible

[65] The appellant allegedly made statements that confessed to killing Ms. Avery, to the police and to a correctional officer, on the day after the murder. Both statements occurred spontaneously, without any formal caution. The Crown sought a ruling pre-trial that the statements were voluntary and thus admissible. The trial judge ruled that they were admissible, and the statements were heard by the jury. The trial judge also ruled admissible another statement that was not ultimately heard by the jury. The Crown only sought to have that statement admitted for the purposes of cross-examination in the event the appellant testified.

(a) The Statements

[66] The first alleged statement took place while two police officers, Officer Paquette and Officer Mantha, were transporting the appellant to court. In the police vehicle, the appellant allegedly told the officers that he was not sorry for killing Ms. Avery.

[67] One of the officers testified that he first recorded the appellant's statement in his notes approximately 15 hours later. The second officer, who also noted the appellant's statement, did not testify exactly when he made his notes, but acknowledged they were a late entry on the next day. There were some differences between how the two sets of notes described the statement.

[68] The second statement occurred when the appellant was in his cell at the jail to which he had been taken after the court appearance. While a correctional officer, Sergeant Keefe, checked the welfare of the appellant as part of his duties, the appellant allegedly spontaneously told the officer that he had killed a girl the previous night.

[69] The correctional officer who heard this second statement testified that he recorded it in his notes probably an hour afterwards, but it could have been later, or it could have been earlier, and he could not be sure. The officer insisted under cross-examination that he recorded the confession accurately.

[70] The appellant was not under surveillance in the leadup to his statements. However, the evidence suggested that the appellant was in difficult conditions. While in a holding cell at the police station before the first alleged confession, the appellant was observed “making a curtain with his Tyvek suit.” Later, he wrote on the cell walls with feces. When the appellant made his first alleged confession, he still had feces on his hands.

[71] When the appellant was taken to the jail after his court appearance, he flooded his cell there. He told the correctional officer who noticed the flooding and heard the second alleged confession that he also thought he was being poisoned. The correctional officer who heard the appellant's second alleged confession agreed that he had "no idea" what his state of mind was.

(b) The Trial Judge’s Ruling

[72] After holding a *voir dire*, the trial judge concluded that both statements were admissible. He outlined the test before him as asking whether the Crown had proven that the statements were made, and if so, whether they were made voluntarily. The standard of proof on the first issue was minimal, and the second was beyond a reasonable doubt.

[73] The trial judge cited to *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, to outline the relevant factors in a voluntariness analysis. He then outlined the defence arguments against finding voluntariness: the gaps in the evidentiary record, the evidence of oppressive circumstances affecting the appellant, and the lack of any formal caution.

[74] The trial judge rejected the appellant's arguments. He ruled that the alleged confessions were made voluntarily. The trial judge stated:

> Having regard to the evidence called as a whole on this Application, I have been satisfied that the Crown has proven beyond a reasonable doubt that each one of the statements to these three persons in authority were made voluntarily by the accused. In the absence of any direct evidence from the accused, I have been satisfied beyond a reasonable doubt that the Respondent made the statements and utterances as an exercise of his free will, and that his will was not overborne by the combination of any of the factors raised in his defence. Furthermore, the evidence clearly indicates that the

> Respondent had been told by his lawyers not to say anything to the authorities. These unprompted utterances made by the accused, without interrogation or questioning, do not arise in circumstances that would shock the public consciousness. The conduct of these persons in authority is not such that it shocks the conscience of the community, nor brings the administration of justice into disrepute. [Emphasis added.]

[75] The trial judge went on to reject an argument by the defence that the trial judge should exclude the statements because they were more prejudicial than probative. This ruling is not challenged on appeal.

(c) Analysis

[76] The approach to be taken by an appellate court in its assessment of a trial judge's finding of voluntariness was recently restated by the Supreme Court of Canada in *R. v. Tessier,* 2022 SCC 35, 419 C.C.C. (3d) 1, at para. 43:

> A finding of voluntariness calls for deference unless it can be shown that it represents a palpable and overriding error. An appellate court may only intervene where the error is "overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue". The standard of review associated with the finding of voluntariness is tied to the idea that the analysis under the confessions rule must be a contextual one in which bright-line rules are few. Where the law is properly understood and the relevant circumstances considered, the trial judge is best placed to measure that context and make the relevant findings. [Citations omitted.] [Emphasis added.]

[77] Here, the appellant argues that the voluntariness ruling is not entitled to deference because the trial judge misapplied the law and failed to grapple with and consider the gaps in the evidentiary record tendered by the Crown on the *voir dire*. The appellant makes three submissions:

- The trial judge shifted the burden of proof to the accused.
- The trial judge did not address whether the Crown had discharged its burden of production of an evidentiary record which will permit the court to fairly adjudicate the

voluntariness question.

- The trial judge also failed to consider whether the inculpatory statements were provided by an accused who was of “sound mind” when he made them.

[78] I do not agree with the appellant that the trial judge shifted the burden of proof. Read fairly, the trial judge clearly identified that the Crown bore the burden of proof and while the statement “in the absence of any direct evidence from the accused” appears problematic, when read fairly, and in the context of the entire ruling, I am satisfied that the trial judge was stating that on the record before him, the Crown had established voluntariness beyond a reasonable doubt, and the accused did not raise anything that caused him to doubt the voluntariness of the accused’s statements.

[79] I am, however, satisfied that the trial judge erred in his assessment of all the relevant circumstances. In my view, he failed to grapple with the inadequate evidentiary record tendered by the Crown on the *voir dire*. Regarding the alleged confession to Officer Paquette and Officer Mantha on the way to court, the trial judge acknowledged the defence argument that “there are obvious ‘gaps’ resulting from the testimony of [both police officers], who were apparently together at the relevant times the statements and utterances were made”, but other than pointing out that the two police officers did not record in their notes the same statements, he did not deal with the submission that the evidentiary record was insufficient to prove that the statements and utterances were voluntary.

[80] The trial judge correctly observed that the requirement of proof beyond a reasonable doubt does not apply as to whether the statement was actually made. He stated that to satisfy the onus of showing that the appellant made a statement, the Crown need only introduce some evidence that the accused made the statement attributed to him. The standard of proof required is minimal, and not often the subject of dispute, except in cases such as here where it is not a formal police interview and not video recorded. The trial judge was on solid ground because the accuracy and completeness of the record of a voluntary statement is an issue of

weight that is usually left for the trier of fact, in this case, the jury: *R. v. Lapointe and Sicotte* (1983), 9 C.C.C. (3d) 366 (Ont. C.A.), aff'd [1987] 1 S.C.R. 1253.

[81] However, the trial judge did not grapple with the defence submission in this case, that the accuracy and completeness of the record of the circumstances surrounding the making of the statement were deficient and those gaps were fatal to the Crown in proving that the statements were voluntary: *R. v. Moore-McFarlane* (2001), 56 O.R. (3d) 737, at para. 67 (Ont. C.A.). In fairness to the trial judge, this distinction is often difficult to apply, especially in a case like the one at bar where no evidence is called by the defence on the *voir dire.*[8] It may be unclear in some cases whether the defence is raising issues of voluntariness or issues of accuracy. However, I am satisfied, in this case, the defence did raise the inadequacy of the evidentiary record specifically as a challenge to establishing voluntariness. And the trial judge acknowledged this when he summarized the position of the defence. However, in my view he did not address the deficient record introduced by the Crown in this case. This court stated in *Moore-McFarlane*, at para. 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. [Emphasis added.]

[82] In this case, the relevant circumstances included the following:

1. None of the confessions was video or audio-recorded. Each is a memo book statement and required the trial judge to examine very closely the completeness of the note entries.

2. The recordings in the notebooks were not verbatim accounts. The two police officers specifically acknowledged that their notes of the statement allegedly uttered by the appellant on the way to court were not verbatim accounts. Officer Mantha agreed with the suggestion that his independent recollection was vague, and his evidence was based entirely on his notes, and he generally had very little independent memory without his notebook.

3. The statement allegedly made by the appellant on the way to court was a "late entry" memo book recording in the police officers' notebooks. As noted above, Officer Paquette acknowledged that he did not make a note until more than 15 hours after the words were allegedly uttered. He agreed ultimately that he had opportunities to make his notes earlier. Constable Mantha conceded that his notes of the appellant's admissions were a late entry, and he acknowledged failing in his duty to make timely entry. And he had no explanation for why he made contemporary notes of some of the appellant's utterances on the way to court, but failed to make contemporaneous notes of the confession to killing his girlfriend. Officer Mantha testified he had no memory of whether he talked with Officer Paquette about it the following day and made his late entry thereafter. Regarding the confession allegedly uttered in the jail cell, Sergeant Keefe believed he probably made his notebook entry an hour after the statement was made, but acknowledged on cross-examination it may have been later or earlier, and he could not be sure. He also acknowledged inserting an additional detail of the statement into the margin of his notes later.

4. The statements were devoid of context, and most of the time that the officers spent with the appellant is unaccounted for. In this case, there are several gaps

from when the appellant was arrested to when he made these statements. The police arrested the appellant shortly before midnight on November 14, 2017. But there is sparse information as to what happened from the arrest until 6:00 a.m. in the morning. At that time, Officer Mantha and another police officer who did not testify then took the appellant to the hospital, where he made the statement that was not led in front of the jury. At 3:15 p.m. on November 15, 2017, more than 15 hours after the arrest, Officer Mantha and Officer Paquette transported the appellant to court in North Bay, about 30 minutes away, during which car trip he allegedly uttered the first confession that was heard by the jury. After the court appearance, at 4:56 p.m. he was brought to the jail in North Bay where he was placed in segregation, and there is a longer gap from 4:56 p.m. to 8:00 p.m., when Sergeant Keefe heard the inculpatory statement allegedly uttered by the appellant in his jail cell. There was no evidence led by the Crown as to the appellant's interactions with others during that time. To the contrary, the Crown led a sparse record, only from those officers who interacted with the appellant who say he made these inculpatory statements, despite the fact that these officers were not with the appellant the entire time.

5. The Crown's witnesses had little independent recollection of the statements.

6. There was very little evidence led as to the conditions of custody. There was very little evidence led about relevant information central to the voluntariness inquiry such as whether the appellant slept and when he slept, what he ate, or when he ate. There were large gaps in the record with the appellant's interactions with jail staff besides the three officers who testified, and on what he was doing other than the culminating points discussed by the three officers who testified.

[83] I agree with the appellant that the deficient evidentiary record alone was a sufficient basis for the trial judge to find that the Crown had not discharged its evidentiary burden. The Crown bore the onus to produce a record capable of demonstrating that the appellant's statements were not the product of undue influence or coercion.

[84] In sum, the trial judge did not deal with the gaps in the evidentiary record. The trial judge's ruling does not attract deference and I would conclude that, when the relevant considerations are properly considered, the Crown has not discharged its onus to show that the statements were voluntary.

[85] In light of my conclusion that there was an error in principle in how the trial judge dealt with the statements, and that the statements should not have been admitted, it is unnecessary to address the appellant's argument that the trial judge failed to deal with the argument that the appellant was not of sound mind when he provided the statements.

(d) The Proviso

[86] The Crown argues that even if the trial judge erred in admitting the statements, then this court should invoke s. 686(1)(b)(iii) of the *Criminal Code* and dismiss the appeal. That section allows an appellate court to dismiss an appeal notwithstanding a legal error in the decision below if the court "is of the opinion that no substantial wrong or miscarriage of justice has occurred". The Crown argues that even if the statements were improperly admitted there is no "reasonable possibility that the verdict would have been different had the error in issue not been made": *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28.

[87] If the Crown seeks to rely on the curative proviso, it "bears the burden to establish one of the requirements of the proviso: that (1) the error of law is 'harmless', or (2) despite a potentially prejudicial error of law, there is an 'overwhelming' case against the accused", such that the jury would inevitably have convicted the accused: *R. v. Abdullahi*, 2023 SCC 19, 428 C.C.C.(3d) 1, at para. 33, citing *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 25; see also *Khan*, at para. 31; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 36.

[88] I am satisfied that the Crown has met its burden. The statements led by the Crown dealt with the appellant's *involvement* in the murder and there was no real live issue as to his involvement because he was found inside a barricaded apartment, alone with the victim. The real issue was whether the appellant had the *mens rea* for first or second degree murder.

Unlike the physical evidence discovered at the scene and the voice mail message, in my view the statements say nothing about planning or premeditation, or forcible confinement and their introduction could not have impacted the verdict of first degree murder.

[89] Consequently, I would dismiss this ground of appeal.

V. DISPOSITION

[90] For these reasons, I would dismiss the appeal.

Released: August 20, 2024 “B.W.M.”

“S. Coroza J.A.”
“I agree. B.W. Miller J.A.”
“I agree. David M. Paciocco J.A.”

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[1] The trial judge admitted these statements under the principled approach to the hearsay rule.
[2] In his factum, the appellant also challenged the trial judge’s decision to admit certain hearsay statements by Ms. Avery. The appellant abandoned this ground of appeal.
[3] The voicemail was left in French. A translated English transcript was introduced into evidence without objection.
[4] The parties acknowledge that the trial judge decided the admissibility of the voicemail on a sparse evidentiary record. However, the parties referred to and cite liberally in their factums to the evidence of Dr. Morrison at trial. In my view, they have improperly widened the record for review. This court is restricted to only examining the evidence that was led at the admissibility hearing and not the doctor’s testimony at trial, because it did not form part of the trial judge’s ruling. The record that was tendered for the pre-trial *voir dire* was the preliminary hearing testimony of Dr. Morrison and the appellant’s Notice of Application which served as an “agreed statement of fact”: see *R. v. T.W.W.*, 2024 SCC 19, at para. 43.

[5] The Crown also argues that listening to the voicemail was not a search within the meaning of s. 8. It is not necessary to decide this argument because I accept the Crown’s primary argument that the appellant did not have a reasonable expectation of privacy in the voicemail such that it would have triggered any s. 8 *Charter* right.
[6] See also *R. v. Knelsen*, 2024 ONCA 501, at para. 64.
[7] Such behaviour also arguably made out the *actus reus* of harassing communications, which is an offence under s. 372(3) of the *Criminal Code*. The *actus reus* of this offence is simple – repeatedly communicating with a person by means of telecommunication without lawful excuse: *R. v. Berhe*, 2022 ONCA 853, 421 C.C.C. (3d) 491, at para. 32; *Manrique c. R.*, 2020 QCCA 1170, 394 C.C.C. (3d) 1, at paras. 36-37, leave to appeal denied [2021] S.C.C.A. No. 151.

[8] See *R. v. Learning*, 2010 ONSC 3816, 258 C.C.C. (3d) 68, at para. 62 *per* Code J.