

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 539(1) of the *Criminal Code*. This subsection and subsection 539(3) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection (1), read as follows:

539. ORDER RESTRICTING PUBLICATION OF EVIDENCE TAKEN AT PRELIMINARY INQUIRY —(1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

- (a) may, if Application therefor is made by the prosecutor, and
- (b) shall, if Application therefor is made by any of the accused, make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,
- (c) he or she is discharged, or
- (d) if he or she is ordered to stand trial, the trial is ended.

. . .

(3) **FAILURE TO COMPLY WITH ORDER** — Every one who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

DATE: 2021 09 24
COURT FILE No.: Toronto 21-55001290

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

MOHAMED ALI WEHELIE

**Before Justice Weinper
Heard on August 23, 24, 25, 26 and 27, 2021
RULING ON APPLICATIONS TO ADMIT EVIDENCE PURSUANT TO S.540(7)
AND CROSS-EXAMINATION PURSUANT TO S.540(9) AND
REASONS FOR COMMITTAL
Reasons for Judgment released on September 24, 2021**

**Michael Coristine.....counsel for the Crown
Stephen Whitecounsel for the accused Mohamed Ali Wehelie**

WEINPER J.:

**RULING ON THE APPLICATIONS UNDER SUBSECTIONS 540(7) AND 540(9) OF THE
CRIMINAL CODE**

Introduction

[1] This is my ruling on a Crown Application to introduce statements pursuant to s.540(7) of the *Criminal Code* and an Application by the Respondent for an order requiring the four complainants to attend for cross-examination pursuant to s.540(9) of the *Code*.

[2] The Respondent stands charged with 19 counts of various domestic offences against Zabrina Overland and her three children. They are not the Respondent's biological children. The first set of charges arises out of an alleged incident on August 16,

2020. The second set of charges arises out of a series of incidents alleged to have occurred between December 26, 2020 and January 14, 2021.

[3] The Crown elected to proceed by indictment. The Respondent elected to be tried in the Superior Court by Judge and Jury with a preliminary inquiry in the Ontario Court of Justice.

[4] On August 23, 2021, the matter commenced before me as a preliminary inquiry. Five days were set aside for the hearing. The Respondent is in custody on these charges.

[5] Bill C-75 came into effect on September 19, 2019. The resulting amendments to the *Criminal Code* eliminated the availability of preliminary inquiries for indictable offences punishable by less than 14 years imprisonment. As a result, the Respondent is only entitled to a preliminary inquiry on the two charges of aggravated assault (counts 1 and 18) and extortion (count 15).

[6] Zabrina Overland is the complainant in relation to the charges which are the subject of this preliminary inquiry. She and her three children are the complainants on the other charges.

[7] On May 27 and June 29, 2021, an officer attended the complainants' residence to serve subpoenas on the four complainants. Zabrina Overland indicated to the subpoena server on both occasions that she and her children would not attend the proceedings. She refused to accept the subpoenas. On or about June 29, 2021, a subpoena for each witness was emailed to Zabrina Overland. It is unknown if she received and opened the email.

[8] Detective Constable Knowles, the officer-in-charge in relation to the August 16, 2020 incident, testified on this Application that he spoke to Zabrina Overland twice by phone since he became aware that she refused to accept the subpoenas. She advised Officer Knowles during these conversations that she and her children would not attend court. She said she was angry with the system. She was angry that she could not get her teeth fixed. I note parenthetically that one of the allegations is that the Respondent punched Ms. Overland in the mouth, knocking out one of her front teeth. Further, Officer Knowles testified that the police had put Ms. Overland in touch with an organization that provides assistance to families in the complainant's situation. He described it as a "focus group". Ms. Overland told Officer Knowles that she blamed the focus group for the C.A.S. getting involved with the family. She blamed the police, the focus group and the criminal justice system for her situation. She did not say that she had been threatened or intimidated by the Respondent.

[9] Officer Knowles further testified that he called the complainant's home on August 19, 2021, just a few days before the commencement of the preliminary inquiry. He spoke to Ms. Overland's daughter, Samarra Overland. He understood that Ms. Overland was in the room with Samarra, but she refused to come to the telephone. Samarra repeated what her mother had said in the earlier conversation with Officer Knowles: that her mother was angry at the focus group and blamed it for C.A.S. involvement, and that she was angry about the situation with her teeth. Samarra also said that her mother was embarrassed about appearing in court with no teeth.

Position of the Parties

[10] As a result of the non-attendance of Zabrina Overland and her children, the Crown has brought an Application to admit the video statements of Zabrina Overland and each of her three children at the preliminary inquiry pursuant to s.540(7) of the *Criminal Code*. The Crown also seeks to tender other evidence in support of the s.540(7) Application.

[11] Specifically, the Crown is seeking to tender the following exhibits which have been filed on the Application:

- Exhibit 1: Video Statement of Zabrina Overland, October 21, 2020
- Exhibit 2: Video Statement of Mozee Overland, October 21, 2020
- Exhibit 3: 911 call placed on January 14, 2021
- Exhibit 4: TPS body camera footage from January 14, 2021 taken in the area of 1803 Martingrove Road and in Unit 2 at that address
- Exhibit 5: TPS body camera footage from January 14, 2021 taken of Zabrina Overland in the hospital intake area
- Exhibit 6: TPS body camera footage of Zabrina Overland's statement at the hospital on January 14, 2021
- Exhibit 7: TPS body camera footage of Mozee Overland's statement at the hospital on January 14, 2021
- Exhibit 8: TPS body camera footage of Samarra Overland's statement at the hospital on January 14, 2021
- Exhibit 9: TPS body camera footage of Zion Overland's statement at the hospital on January 14, 2021
- Exhibit 10: SOCO (police) photos of Zabrina, Samarra and Zion Overland's injuries
- Exhibit 11: Medical Report dated August 16, 2020

[12] The Crown submitted that the requirements of s.540(7) have been met. The Crown contended that the statements are credible or trustworthy in the circumstances of the case and the witnesses should not be required to attend for cross-examination pursuant to s.540(9).

[13] The Respondent opposed the Crown's Application to tender the proposed evidence on the basis that all of the statements, the 911 call and all of the body camera footage do not meet the "credible or trustworthy" test in s.540(7). Alternatively, the Respondent submitted that the court should order cross-examination in order to

determine whether the evidence should be admitted under s.540(7). The Respondent highlighted many areas which he submitted were unclear or called for elaboration and which should lead the court to conclude that an order for cross-examination of Ms. Overland and her children would be appropriate.

The Law

[14] The rules and procedures governing a preliminary inquiry are set out in Part XVII of the *Criminal Code*. The purpose of a preliminary inquiry, as articulated in s.548(1), is to determine if there is sufficient evidence to put the accused on trial for the offences charged. It is one way to screen out meritless allegations: see *R. v. R.S.* [2019] O.J. No. 5773 (C.A.).

[15] Section 540 of the *Code* establishes the procedure by which a justice shall conduct a preliminary inquiry. In order to satisfy a court that there is sufficient evidence to commit the Respondent to stand trial, the court generally hears witnesses called by the prosecution, subject to cross-examination by counsel. The court then determines whether the *Sheppard* test has been met; that is, whether there is any admissible evidence, whether direct or circumstantial, upon which a reasonable jury properly instructed could convict the accused: *United States v. Sheppard*, [1977] 2 S.C.R. 1067; *R. v. Arcuri*, [2001] 2 S.C.R. 828. (In some circumstances that need not be addressed here, the defence may call witnesses at the preliminary inquiry.)

[16] Parliament amended the *Criminal Code* in 2002 by adding subsections 7, 8 and 9 to section 540. These were proclaimed in force on June 1, 2004.

[17] These subsections read as follows:

540(7) A justice acting under this Part may receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances, including a statement that is made by a witness in writing or otherwise recorded.

540(8) Unless the justice orders otherwise, no information may be received as evidence under subsection (7) unless the party has given to each of the other parties reasonable notice of his or her intention to tender it, together with a copy of the statement, if any, referred to in that subsection.

540(9) The justice shall, on the Application of a party, require any person whom the justice considers appropriate to appear for examination or cross-examination with respect to information intended to be tendered as evidence under s.(7).

[18] Whether witnesses are required at the preliminary inquiry turns, in this case, on two important determinations: (1) whether the evidence sought to be introduced instead of *viva voce* evidence is “credible or trustworthy”; and (2) whether, in the discretion of the court, it is “appropriate” in the circumstances to order witnesses to attend for purposes of examination or cross-examination.

Credible or Trustworthy: s.540(7)

[19] Subsection 540(7) allows the Crown to place evidence before the court without the necessity of calling *viva voce* evidence subject to the court's decision to require the attendance of a witness pursuant to s.540(9). Evidence that is written or recorded *may* be introduced where the court is satisfied that the evidence being tendered is credible or trustworthy. The Crown bears the onus of proving that the evidence meets the test.

[20] Many of the cases provided to me summarize the purpose and scope of evidence that may be admitted pursuant to s.540(7). The amendments reproduced above came about because Parliament intended to streamline the preliminary inquiry process and to cause it to be more focused and efficient; to spare witnesses and complainants the ordeal of having to testify twice; and to protect vulnerable witnesses. Further, the sections recognize that the need for discovery has become less important since an accused is entitled to full disclosure pursuant to *R. v. Stinchcombe* [1991] 3 S.C.R. 326; *R. v. S.J.L.* [2009] 1 S.C.R. 426 at paragraph 22.

[21] The credible or trustworthy test has a lower evidentiary threshold than would be the case for admission at trial. The wording of s.540(7) imports that lower threshold of admissibility by allowing the introduction of "information that would not otherwise be admissible." In *R. v. Ali*, [2015] O.J. No.4201 (C.J.), Paciocco J. (as he then was) adopted the phrase "*prima facie* air of reliability" as the applicable threshold. His Honour stated at paragraph 8:

The section should be read as requiring the judge to determine that a "threshold reliability" standard has been met, not an "ultimate reliability" standard. Put less opaquely, the inquiry is into whether there is a basis for finding information credible or trustworthy and not whether the preliminary inquiry judge is persuaded about its reliability.

[22] The evidence must be considered on a case by case basis. The "credible or trustworthy" threshold is disjunctive; that is, the evidence can be admitted under s.540(7) either because it is "credible" or because it is "trustworthy".

[23] Credibility in the context of s.540(7) does not have the same meaning as it would at trial; nor does it have the same meaning it would have in a *Khan* or *Khelawon* application to introduce hearsay evidence under the principled exception to the hearsay rule. Subsection 540(7) does not require the preliminary inquiry judge to make any assessment of credibility; the court need not determine whether it believes or rejects the evidence. The weighing of that evidence must be left to the trier of fact at trial: see *R. v. Inglis*, [2006] O.J. No.1739 (O.C.J.) at paragraph 25; *R. v. Francis*, [2005] O.J. No. 2864 (S.C.J.) at paragraph 26; *R. v. Scott and Mohamed*, unreported, April 6, 2018 (O.C.J.) per Pirraglia J. at paragraph 13-14.

[24] Paciocco J. in *R. v. Ali*, *supra*, at paragraph 20, distinguished the term "credible" as set out in s.518(1)(e) from the use of the term in s.540(7):

By the same token, it is obvious that the term “credible” cannot carry the meaning it is ascribed under section 518(1)(e), as relating to the apparent truth of original in-court testimony, as opposed to hearsay evidence, which is captured in section 518(1)(e) by the term “trustworthy”: see *R. v. Hajdu* (1984) 14 C.C.C. (3d) 563 (Ont. H.C.). Interpreting one of the terms as referring to original evidence and the other to hearsay evidence makes no sense in section 540(7), since section 540(7) presupposes that the subject information need not be presented by witness testimony. It therefore does not need to reference original evidence in the form of in-court testimony.

[25] At paragraph 21, Paciocco J. summarized the interpretation to be given to “credible” for the purposes of s.540(7):

In my view, the term “credible” necessarily has its normal meaning that it is “believable”, based on its realistic potential for accuracy. This term therefore calls for the kind of criteria found in the first branch of *Khelawon*, namely, *indicia* showing that, on its face, the evidence is capable of being believed or credited.

[26] There may be circumstances where credibility is overwhelmingly suspect so as to preclude the admission of a statement: see for example, *R. v. Pinnock* 2004 ONCJ 193 (O.C.J.) where the complainant admitted to perjury; or the examples provided by Ratushny J. in *R. v. Francis, supra*, at paragraph 29: credibility or trustworthiness could not be established where a witness who had never seen the accused made a frivolous identification; or the Crown tendered a photograph purporting to identify the accused where there was no information as to who took the photograph or when, and it cannot be said that the photograph relates to any person involved in the case. These are extreme and obvious examples. The facts of most cases will be more nuanced.

[27] Paciocco J. in *R. v. Ali, supra*, at paragraph 22, also articulated the meaning of “trustworthy” in s.540(7):

Since the term “trustworthy,” must be given its own independent meaning, it can be given its ordinary meaning as capturing information that can be trusted. Given the context and purpose of section 540(7), including that the term “credibility” already accounts for evidence that is capable on its face of being believed, the term “trustworthy” refers to information that the presiding judge could trust a trier of fact with, given the potential for that information to be evaluated rationally.

[28] There may be issues surrounding the taking of the statement that would preclude its admission as credible or trustworthy. For example, in *R. v. Inglis*, 2006 ONCJ 154, Vaillancourt J. held that the complainant’s videotaped statement was not credible or trustworthy and should not be admitted in the absence of the witness at a preliminary inquiry involving charges of sexual assault and indecent assault. The statement was made in the absence of an oath or affirmation or any caution to tell the truth and the consequences of failing to do so. The videotapes were of poor quality. Significant areas crucial to the reliability of the complainant’s statement were not explored, such as the impact of alcohol consumption on the complainant’s memory of the events or the lapse of time between the allegations and reporting them. In addition, the reason offered for the complainant’s non-attendance was wholly unrelated to his vulnerability as a witness:

the witness resided overseas and lacked the financial means to attend court. These accumulated factors led to the exclusion of the statement. As will be evident below, I find this decision distinguishable on the facts, at least insofar as it might be applied to key pieces of evidence I am prepared to admit.

[29] Over the years the courts have distilled a number of factors in determining whether a statement or evidence meets the threshold test of credible or trustworthy. I will refer to a number of these factors when analyzing the various exhibits the Crown seeks to introduce. In addition, each case will have its unique issues that will inform whether the Crown has met its onus.

[30] In summary, I have adopted the approach to admissibility articulated by Paciocco J in *R. v. Ali, supra*, at paragraph 28, namely, “by examining whether there is a sufficient basis to enable a reasonable trier of fact to credit the information as true and accurate, or for a judge to trust it as capable of evaluation because of the process by which it was obtained, always bearing in mind that the evidence need not be demonstrably reliable enough to satisfy the principled hearsay exception.”

Cross-examination pursuant to s.540(9)

[31] Subsection 540(9) mandates that the justice shall make any person available for examination or cross-examination as the justice considers appropriate. Cross-examination will not be required in every case to determine whether the proposed evidence meets the credible or trustworthy standard. As Paciocco J. stated in *R. v. Ali, supra*, at paragraph 25:

The point, therefore, is not that the opportunity to cross-examine is immaterial. It is simply that the opportunity to cross-examine need not be, and should not be, as central an admissibility factor under section 540(7) as it is under the principled hearsay exception. The operative assumption underlying section 540(7) is that even if the opportunity to cross-examine is lost at the preliminary inquiry, that opportunity will be accorded where it matters most, at trial, unless the Crown satisfies a hearsay exception...

[32] The court may find that, in the particular circumstances of a case, the s.540(7) determination can be made in the absence of *viva voce* evidence. The court could also find that the statement is credible or trustworthy within s.540(7) and nevertheless order cross-examination of the witness. Similarly, the court could find the evidence credible or trustworthy but order that the statement will only be admitted after cross-examination of the witness has taken place. I remind myself that the determination by a preliminary inquiry judge as to whether cross-examination is appropriate is different than a determination by a trial judge as to whether the availability of cross-examination is a precondition to trial admissibility of a declarant’s statements.

Preliminary Considerations

The Notice Requirement in s.540(8)

[33] On or about the date set for the preliminary inquiry, the Respondent became aware that the complainants would not attend court and that the Crown would bring an Application under s.540(7). The Respondent argued that he has been prejudiced by not being advised earlier that there was an indication the complainants would not attend court. He submitted that if he knew about the refusal in advance he may have re-elected trial in the Ontario Court.

[34] I am satisfied that the failure to inform the Respondent in a more timely way was not a tactical decision on the Crown's part. The Crown also scrambled to assemble its argument on admissibility and prepared a Factum on or about the first day of the preliminary inquiry that was subsequently amended. After the Crown made submissions on admissibility, the matter was briefly adjourned to allow the Respondent to prepare a response. The response by the Respondent's counsel was thorough, articulate and well-researched. The Respondent was not prejudiced, in my view, by the short notice given. In the particular circumstances, I am satisfied that the notice requirement in s. 540(8) has been satisfied. As for the Respondent's submission that he might have elected differently had he known that the witnesses would not be attending court, this is merely speculation. Moreover, although not essential to my decision, I observe that the Respondent did not seek leave during the preliminary inquiry to be permitted to re-elect trial in the Provincial Court based on the existing circumstances.

Application of the law to the exhibits the Crown seeks to tender

August 16, 2020 Allegations

[35] On October 21, 2020, Zabrina Overland attended, along with her son, Mozee Overland, at 12 District of the Toronto Police Service to report a domestic assault that had allegedly occurred on August 16, 2020. They each provided a videotaped statement.

The October 21, 2021 Statement of Zabrina Overland

Summary of the Statement

[36] Zabrina Overland stated that on August 16, 2020, she was with the Respondent at his apartment as well as with her then 10-year-old son, Mozee, and Ms. Overland's two-year-old nephew. When Ms. Overland awoke, the Respondent wanted to engage in sexual activity with her, but she declined because her nephew was in the bedroom, She also did not want to leave her two-year-old nephew in Mozee's supervision, given Mozee's age.

[37] Ms. Overland described how the Respondent became angry when she refused his sexual advances. She went into the living room to pack up the children and leave the apartment. As she turned around, the Respondent punched her in the face, causing a laceration to her lip. Ms. Overland fell backwards onto the floor. She was bleeding profusely as the Respondent stood over her and began beating her about the head and other parts of her body, with clenched fists. The Respondent then dragged Ms. Overland into a corner of the room and continued beating her, kicking her and spitting on her. The Respondent told her to "shut up" and put his hand around her throat and began to squeeze. Ms. Overland could not breathe. Both children witnessed the incident.

[38] The Respondent then turned to Mozee and told him not to be a "snitch." Once the violent actions of the Respondent ended, Ms. Overland begged the Respondent to let her go to a clinic to get stitches to her lip. The Respondent acquiesced, but told Ms. Overland that if she tried anything, he would kill her. The Respondent, Ms. Overland, her son, and her nephew took a taxi to the Walk-in Clinic at 877 Jane Street. Ms. Overland received stitches to her lip. After the visit to the clinic, all parties walked to Ms. Overland's apartment. The Respondent stayed with Ms. Overland and her family for several days after the incident.

[39] Later on the evening of August 16, 2020, Ms. Overland took photographs of her injuries on her phone. During the October 20, 2021 statement, Officer Knowles looked at the photographs on Ms. Overland's phone depicting her injuries.

[40] The Respondent was ultimately arrested on November 2, 2020 and charged with offences arising from the incident on August 16, 2020. He was granted bail with a surety on the same day.

Discussion

[41] The Respondent raised several issues with Zabrina Overland's statement which, it was submitted, should cause the court to conclude that her statement does not meet the threshold requirement for admission pursuant to s.540(7). I note that the Respondent also relies on these same areas for the submission that if the court may be inclined to admit the statement, he should be afforded an opportunity to cross-examine the complainant pursuant to s.540(9).

[42] I will refer to several of the issues raised by the Respondent. In doing so, I remind myself that the Crown bears the burden of demonstrating that the evidence tendered is admissible, not the Respondent.

[43] The Respondent correctly observed that the statement of October 21, 2021 was not taken under oath. Notwithstanding the absence of an oath, Officer Knowles asked Ms. Overland, at the commencement of the interview, a series of questions that, in my view, were sufficient to bring home to the complainant the importance of telling the truth. She indicated that she consented to being recorded and that she was giving the statement voluntarily. She understood that she could stop the interview at any time. She said that she understood that it was a criminal offence to mislead a police officer in the course of a criminal investigation and that she could be charged as a result. The caution provided by the officer brought home the necessity of telling the truth.

[44] The Respondent pointed out a contradiction in Ms. Overland's statement as to whether she was beaten for 15-20 minutes or for one hour. The Respondent submitted that the contradiction raises the issue of whether the complainant was beaten at all and that it is essential to cross-examine the complainant to obtain her position on this contradiction.

[45] The Respondent also pointed out that the officer asked a leading question when he reviewed with the complainant that she had been punched. He added, "and it bled a lot". The Respondent submitted that the officer should have left this for the complainant

to adduce. The Respondent further argued that the reason why the officer stated, “and it bled a lot” must relate to an earlier meeting with the complainant where she provided information. Thus, the statement “and it bled a lot” reflects a prior exchange of information between the complainant and the officer that we know nothing about. Therefore, the statement is not a complete and exhaustive statement and does not meet the credible or trustworthy test. The evidence of Officer Knowles on this issue is that he would have had an initial conversation with the complainant at the division’s counter prior to bringing her in for her videotaped statement.

[46] In my view, admissibility for the purposes of s.540(7) is unaffected by a brief introduction at the counter or the failure of the officer to make notes in that regard. The complainant required stitches; the corollary to that requirement is that the complainant’s lip would likely have “bled a lot”. This leading question does not impact on the credible or trustworthy analysis and it is not appropriate to order cross-examination to flesh this out.

[47] The Respondent also submitted that there were areas in Ms. Overland’s statement where the officer should have requested clarification or elaboration, such as, when she alleged that the Respondent called her son a snitch and threatened him; or, as to who stitched up her lip; or when she described what the Respondent was “probably” wearing during the incident; or when she said that after the incident the Respondent stayed at her place.

[48] The Respondent argued that the fact the complainant allowed the Respondent to stay with her in her home after the assault undermines the credibility of the video statement and similarly, does not support its trustworthiness. The Respondent also submitted that this area was ripe for cross-examination. In her statement, Ms. Overland said that the Respondent looked after her during this time, bringing her ice for her injuries and polysporin for her stitches. In my respectful view, I do not see the purported failure of a domestic complainant, in these circumstances, to extricate herself from a violent domestic situation as figuring prominently, or at all, in undermining Ms. Overland’s credibility or trustworthiness and thus, whether there is a sufficient basis to enable a reasonable trier of fact to credit the information provided in her statement as true and accurate. This is an area which the Respondent may wish to explore in cross-examination at a trial, subject of course to the trial judge’s rulings on admissibility.

[49] During the interview the complainant showed Officer Knowles photographs that she took of her injuries on the evening of the incident. The officer is seen on the video looking at the complainant’s phone and describing what he sees in the photos:

Photo 1: redness to throat area, with some abrasions to upper chest area

Photo 2: lip pulled up showing stitches to lip area

Photo 3: top of her head, with some swelling and redness to top of head

Photo 4: contusions to underside of left arm

Photo 5: contusions to back of shoulder

Photo 6: contusions to left side of chest again

Photo 7: contusions to upper front part of right shin

Photo 8: contusions to thigh

Photo 9: abrasion/contusions to right leg, upper thigh towards the buttock area.

[50] There was no forensic identification officer at 12 Division on October 21, 2020 when the complainant attended. Officer Knowles asked the complainant to send the photos to him and she agreed. She has never sent the photos to the Toronto Police. While it might well have been preferable for the officer to have insisted that Ms. Overland forward the photographs to him before she left the interview room, that did not happen. Nevertheless, the photos described by Officer Knowles afford significant evidence that there were injuries, as he described, and that they provide some corroboration for her statement. This includes the fact that he saw the stitches to the complainant's lip which she, according to her phone, took at 10:31 p.m. on the evening of the day the complainant said she was beaten by the Respondent.

[51] The Respondent also submitted that the medical report (Exhibit 11) can provide no corroboration because the report is poorly worded and unclear. Certainly the report could have been prepared with more care. There is a reference to "upper lips" instead of "upper lip". However, the report was prepared on August 16, 2020 and it refers to a visit to the clinic by Zabrina Anne Overland on August 16, 2020. She required two stitches. The report corroborates Ms. Overland's statement that she attended the clinic on the same day as the alleged assault and received stitches at the clinic. She said in her statement that she did not want to attend the hospital to have the stitches done there because she was afraid of contracting COVID at the hospital. This appears to be logical and accords with common sense.

[52] In my view, the medical report is sufficiently clear regarding the medical services provided to the complainant for it to be admitted on the Application. Further, the injury described provides some corroboration for Zabrina Overland's statement. The fact that the complainant did not disclose bruises, abrasions and contusions to other parts of her body to a medical professional in circumstances where the Respondent accompanied her to the clinic and allegedly threatened her, to say nothing about how she actually obtained the injury to her lip, does not undermine the credibility or trustworthiness of the statement.

[53] The Respondent further submitted that s.540(7) is only to be used in the case of vulnerable witnesses and that, having regard to what Ms. Overland said to the subpoena server and Officer Knowles, she is not a vulnerable witness. I disagree with both points. An affirmative finding of vulnerability is not a precondition to a determination that a statement meets the threshold of credible or trustworthy evidence to justify its admission, although a finding in relation to vulnerability or lack thereof obviously can inform whether such a determination is made. Secondly, in my view, there is circumstantial evidence that supports some vulnerability without resort to the content of the statement itself; in particular, the fact that the Respondent entered a guilty plea to assaulting Ms. Overland within a relatively short time period before the August, 2020 matter permits a reasonable inference of some vulnerability.

Conclusion regarding October 21, 2020 Statement of Zabrina Overland

[54] I have evaluated all the factors surrounding the taking of the statement and the statement itself. I have also considered the totality of the Respondent's submissions as to why he should be afforded the opportunity to cross-examine the witness. I have cautioned myself that it is not my role to determine the ultimate reliability of the statement.

[55] In my view, the October 21, 2020 statement of Zabrina Overland provides a sufficient basis to enable a reasonable trier of fact to credit the content of the statement as true and accurate. As stated earlier, it need not be demonstrably reliable enough to satisfy the principled hearsay exception. The statement was videotaped. The video and audio are of good quality. The statement provides an excellent record of what was said. It enables me to consider the manner in which the statement was given, recognizing that undue weight should never be placed on demeanour. The statement was voluntarily made. There is nothing that suggests otherwise. With one exception that I find to be insignificant, her statement was not elicited through improper leading questions. Although the statement was unsworn, the officer cautioned Ms. Overland at the beginning of the interview about her obligation to tell the truth and the consequences of not doing so. It is clear from the videotape that she fully understood what she was told in this regard. Her statement is detailed and internally consistent in important respects. She was crystal clear that it was Mohamed Ali Wehelie who assaulted her and on which day he assaulted her. She was equally clear on the details of the beating and that she needed stitches where she was punched. She appeared in the statement in a sober condition. The photographs viewed by Officer Knowles provide some corroboration that the complainant had stitches to her lip on August 16, 2021 and bruises, abrasions and contusions to various parts of her body. The medical report corroborates the injury to her lip. Mozee Overland's statement to the police, which I will analyze below, is also consistent with the beating and injury described by Ms. Overland which required stitches. The Crown has satisfied its onus of establishing that the statement is sufficiently credible or trustworthy to justify its admission at the preliminary inquiry.

Cross-examination under s.540(9)

[56] I have considered the Respondent's submissions regarding why he should be afforded the opportunity to cross-examine the complainant at the preliminary inquiry pursuant to s.540(9). I find that it would not be appropriate to order that Ms. Overland appear for cross-examination based on the totality of the circumstances earlier outlined. The appropriate forum to cross-examine this complainant on this statement, again subject to a trial judge's rulings on admissibility, is at a trial where the issues raised by the defence may be explored.

The October 21, 2020 Statement of Mozee Overland

[57] On August 16, 2020 Mozee Overland was 10 years old; he was 11 years on October 21, 2020 when he attended at the police station with his mother and provided a videotaped statement regarding events that occurred on August 16, 2020.

[58] Mozee Overland described an assault on his mother by the Respondent that took place at the Respondent's residence at 5 Bellevue, Apartment 805. He said that the Respondent hit his mother and then he kept punching her "over and over and over again"; "he hit her a lot" and that "he called her names". He also said that his mother was "in the corner" and his dad kept punching her. He went to the clinic with his mother and the Respondent where his mother received stitches to the side of her lip. After that they returned to the complainants' home.

[59] The Respondent pointed out that no oath was administered to Mozee nor was he given any kind of warning about the consequences of not telling the truth. The Respondent submitted that the absence of a formal procedural safeguard goes directly to the issue of credibility and trustworthiness, unlike the situation in which a statement pursuant to *R. v. K.G.B.*, [1993] 1 SCR 740 is taken.

[60] In my view, it is significant that Officer Knowles effectively fulfilled the same requirements that would have to be met if Mozee had been testifying in court. Subsection 16.1 of the *Canada Evidence Act* provides:

16.1(1) A person under fourteen years of age is presumed to have the capacity to testify.

16.1(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

16.1(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

...

16.1(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

16.1(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

16.1(8) For greater certainty if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

[61] Having regard to the requirements under the *Canada Evidence Act* for taking evidence from a child witness, it would have been inappropriate for Officer Knowles to have administered an oath to Mozee. In fact, a combination of s.16.1(2) and 16.1(3) provides that a proposed witness less than 14 "shall not take an oath or make a solemn affirmation" but that once the evidence is received, "it has the same effect as if it were taken under oath".

[62] Officer Knowles did more than fulfill the requirements for the admission of a child's evidence in a court proceeding. At the commencement of the statement, Officer Knowles established that Mozee was able to understand and respond to questions. In addition, Officer Knowles satisfied himself that Mozee understood the difference between telling the truth and telling a lie. Officer Knowles asked Mozee twice if he promised to tell the truth and Mozee responded affirmatively each time. After the second time Mozee promised to tell the truth, Officer Knowles said that telling the truth was "very important". In all the circumstances, I am satisfied that there were important procedural safeguards put in place in relation to Mozee's statement.

[63] The Respondent further submitted that it was difficult to hear Mozee's statement, especially at the beginning. I listened to the statement with headphones and I was able to make out what was being said. Mozee was soft-spoken, particularly at the commencement of the interview, but I had no difficulty hearing him.

[64] I have also considered the leading questions Officer Knowles asked. Officer Knowles suggested to Mozee that he went to the clinic and his mother received stitches. According to the time stamps on the video statements, Officer Knowles interviewed Zabrina Overland before he interviewed Mozee. The officer had already viewed the photographs depicting stitches to Ms. Overland's lip before he interviewed Mozee. I do not view this line of questioning as impacting on the credible or trustworthy nature of Mozee's statement. It did not affect the core of Mozee's statement.

[65] Mozee said that the Respondent hit his mother a lot and that he did not count how many times. He said that the Respondent was "punching her over and over and over again" and "called her names". The Respondent submitted that the officer should have asked for a greater description of what transpired during the assault. In my view, this is an area for cross-examination at trial and not one that undermines the credibility or trustworthiness of the statement for the purposes of s.540(7).

[66] Further, the Respondent pointed out that the presence of the two-year-old nephew was central to Zabrina Overland's account and yet Mozee did not recall that his cousin was present during the incident. However, there is no indication that Mozee would have known that the argument between the Respondent and Zabrina Overland was about the Respondent's request for sex in circumstances where the two-year-old was in the same room. It was the content of this argument that gave prominence to the presence of the two-year-old. It is understandable that as a child of ten (at the time of the incident), Mozee would focus on the extremely violent nature of the attack on his mother and forget the presence of his cousin. This point viewed singly or cumulatively falls well short of undermining admissibility of the statement or as a basis for compelling cross-examination at the preliminary inquiry.

[67] The Respondent further argued that the officer did not ask questions to establish whether Mozee's statement was the same as his mother's. For example, the officer did not ask questions such as, "what was your mother doing when she got hit?"; "was there a stroller in the room?" The Respondent submitted that in the absence of these questions one cannot rule out that Mozee was coached as to what to say and that Ms. Overland was not beaten by the Respondent that day. In my view, these are questions that go to ultimate credibility and should properly be raised before the trier of fact. There is little or

nothing in Mozee's statement, viewed in the context of the events of October 21, 2020 that raise such concerns about Mozee being coached or lying about his observations to undermine admissibility.

[68] Mozee's statement is just over nine minutes long. It corroborates Zabrina Overland's statement; namely, that she was hit and punched by the Respondent at the Respondent's residence on the same day they visited the water park; that his mother required stitches to her lip which she received at a clinic; and that after attending the clinic he and his mother returned to their home on Humberview Boulevard with the Respondent. Having regard to the entire statement, I am satisfied that the Crown has met its onus in establishing that Mozee Overland's statement is credible or trustworthy. Further, it would not be appropriate to compel Mozee Overland to attend for cross-examination, again having regard to the totality of circumstances already outlined in my reasons.

The Issue of Identity

[69] A pre-trial was conducted in this case with the Respondent's previous counsel and the Crown. Previous counsel conceded that, for purposes of the preliminary inquiry, identity was admitted. Mr. White, present counsel, took the position that he was not bound by that admission. His position was that there is no evidence of identity since none of the complainants have attended to identify the Respondent as the person who is alleged to have committed any of the 19 offences in the information.

[70] I have been referred to the decision of *R. v. St. Pierre* 2016 ONCA 173. It stands for the proposition that the court may consider documents otherwise placed before the court on the issue of identity. *St. Pierre* involved an appeal from a finding of guilt on a charge of failure to attend court. The accused argued that the Crown failed to call sufficient evidence of identity since it did not call the officer who issued the promise to appear. The Court of Appeal held that there was evidence upon which a reasonable jury could convict the accused since the accused was named in a promise to appear, he turned himself in and the promise to appear was confirmed. As the court stated in *St. Pierre*, at paragraph 10:

At the very least, the similarity between the name and date of birth of the person named in the promise to appear and the name and date of birth of the person named in the information is some evidence to establish that the accused person before the court was the person named in the documents.

[71] In the case before me, the information alleges offences committed by "Wehelie, Mohamed Ali DOB: 01 Jan. 1986 DL: W22405601860101 805- 5 Bellevue Cr, York, On". There is also a release order before the court with a condition that the Respondent was not to have contact with Zabrina Overland. That original release order refers to the same accused with the same birthdate. Also, before the court is a non-communication order against "Wehelie Mohamed Ali" with a birthdate of "Jan.01, 1986". Pursuant to the non-communication order, "Wehelie Mohamed Ali" with a birthdate of "Jan. 01, 1986" is to have no contact with Zabrina Overland, Zion Overland, Samarra Overland and Mozee Overland. The date of the non-communication order is "January 15, 2020". I can take note that there is an error in the year and the year should have been noted as "2021" and not "2020". There was no process against the Respondent in 2020 in relation to the

matters presently before the court and the information number cited on the non-communication order is one from 2021. Further, I note the Warrant of Committal dated February 4, 2021 where “Mohamed Wehelie” with a birthdate of “1986/01/01” is ordered to have no communication with Zabrina Overland and her three children (whose names are listed) and a further individual named Joel Ramirez-Umana. These documents, taken together, establish some evidence that the Respondent is the person named in the information and the person who is alleged to have committed the offences set out therein.

The 911 call (Exhibit 3)

[72] A 911 call was played in court and filed as Exhibit 3 on the Application. The Crown submits that the 911 call should be admitted as part of the *res gestae*. The Respondent submits that the 911 call contains no reliable evidence; the audio is very poor and we do not have a clear understanding of what is going on during the call; and that the portion of what the speaker relates regarding forcible confinement is incredible. The Respondent submits, therefore, that the 911 call is not credible or trustworthy. Further, the Respondent submitted that if the 911 call is unclear, then there is no reliable evidence that could support a committal.

Summary of the call

[73] The 911 call was placed on January 14, 2021 by a neighbour. The neighbour told the dispatcher that a woman currently in her home had been beaten up badly and was bleeding. The neighbour provided her address. Crying could be heard in the background. A different female then took over the call.

[74] The 911 call was played in court. At times the audio cannot be made out, perhaps because the speaker was crying, and it was difficult to make out what she was saying or perhaps she was speaking too closely into the mouthpiece or for some other reason. In any event, it was difficult to make out a few portions of the call. There are, however, many things that can be made out:

- (1) The speaker identifies herself as Zabrina Overland, 38 years old.
- (2) She states she was assaulted by Mohamed Wehelie and that his birthdate is January 1, 1986.
- (3) She has three children, aged 11, 13 and 15 years old.
- (4) The Respondent had not let Ms. Overland or her children leave the house for five days; she subsequently said that he would not let them leave since December 26, 2020.
- (5) The Respondent had a flat head screwdriver that he had been using to threaten them. He tried to stab her son in the back, but he was unsuccessful.
- (6) The Respondent said that he was going to kill them.

- (7) Ms. Overland and two of her children ran out of their home to escape the Respondent. The Respondent ran after Ms. Overland. He punched her in the face and knocked out her teeth. She ran from him screaming for help. A neighbour let her in.
- (8) The Respondent had assaulted Samarra, her daughter, and she now had a black eye. Ms. Overland said that the Respondent was still in the area or had gone back to the house. She was afraid of what the Respondent might do to her daughter.

Whether the 911 call is admissible as part of the *res gestae*

[75] As a general principle, *res gestae* statements are admissible as an exception to the hearsay rule: *R. v. Khan*, [1990] 2 S.C.R. 531. The particular exception raised by this 911 call relates to “excited utterances”. As explained by Paciocco and Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin Law, 2011) (Paciocco and Stuesser) at p.177:

A statement relating to a startling event or condition may be admitted to prove the truth of its contents if it is made while the declarant is under the stress of excitement caused by the event or condition.

[76] The rationale for admitting a statement in this category for the truth of its contents is that the stress or pressure under which the statement was made can be said to safely discount the possibility of concoction. To avoid the prospect of fabrication, the statement should be reasonably contemporaneous with the alleged occurrence: see *R. v. Clark* (1983), 7 C.C.C. (3d) (Ont. C.A.).

[77] I have assessed all the relevant evidence relating to the 911 call, including the content, timing and circumstances of the call as well as the fact that some portions are inaudible. Ms. Overland ran from the Respondent screaming for help and a neighbour let her in. As reflected in the 911 call, she believed that the Respondent was still in the area and she thought that her daughter was in danger. She thought that the Respondent may have returned to the house and was in the process of harming her daughter. She said that her daughter had a black eye at the hand of the Respondent and that he had threatened to kill Ms. Overland and her children. Her fear is palpable. Her conversation with the 911 operator was, in large measure, a cry for help. As the Alberta Court of Appeal stated in *R. v. Sylvain* [2014] ABCA 153 at para. 34:

A 911 call in the middle of a crime is akin to a cry for help heard by someone nearby. In these circumstances, the someone nearby happens to be the 911 operator.

[78] Further, the 911 call must be viewed in its larger context. Evidence existing independently of the statements made during the 911 call can assist in establishing the existence of the shocking event and therefore the spontaneity of the statement: *Khan*, *supra* at paragraph 31. Ms. Overland’s injuries are visible in the body camera statement she provided at the hospital a short time later (Exhibit 7, discussed below) and the police photos taken of her injuries (Exhibit 10, discussed below). These corroborated her injuries

and her extreme concern, expressed to the 911 operator multiple times, for her daughter's safety.

[79] The 911 call was evidence of the sequence and timing of events; Ms. Overland's injuries; her emotional and physical state at the time of the call; and the whereabouts of the Respondent. The temporal proximity to the event and the effect that the injuries would have had on Ms. Overland's mind, and her fear for her daughter's safety, make it doubtful that she fabricated her statements in the 911 call, although yet again, I emphasize that I am not the arbiter of ultimate credibility and reliability. I am satisfied that the utterances made by Zabrina Overland that were recorded during the 911 call constitute *res gestae* statements. It follows that the 911 call can be admitted for the truth of its contents. It can also be used to inform the s.540(7) application regarding the body camera footage statements of Zabrina Overland and her three children.

Body Camera Footage

[80] Exhibits 4-10 consist of Toronto Police Service body camera footage. The Crown seeks to have these videos admitted on the s.540(7) Application.

[81] The first body camera video (Exhibit 4) runs from when the police arrived at a housing complex on Martingrove Road in response to the 911 call, to when they left the Overland residence at 1803 Martingrove Road, Unit 2. The next five exhibits are the TPS body camera footage taken at the hospital. Exhibit 5 is a hospital intake video and the next four videos are statements separately given by Zabrina Overland and her three children at the hospital. The Respondent submitted that none of these videos should be admitted under s.540(7) since they are not credible or trustworthy. The Respondent further contended that s.540(9) plays a role in the court determining whether the videos are credible or trustworthy and that it would be appropriate for the court to order cross-examination of the declarants.

Admissibility of Police Body Camera Footage at Scene and Conversation with Samarra Overland and Mozee Overland in the House (Exhibit 4)

Summary of the Video

[82] The police arrived at 1803 Martingrove Road in response to the 911 call. The police encountered Mozee on the walkway. He was wearing a t-shirt and he was not wearing shoes. He told the police that his sister was in the house and the police followed him. On their way to the house, Zabrina Overland appeared. She had obvious injuries to her face: two black eyes were clearly visible. She expressed concern for her daughter's safety. The police told her to go with the paramedics. The police continued to follow Mozee to Unit 2 at 1803 Martingrove Road. What Mozee said to the police on the way to the house is, in large measure, inaudible.

[83] Samarra Overland answered the door at Unit 2. She had a black eye. She explained that the Respondent gave her the black eye a few days ago, on Saturday. She also said the Respondent kept the family captive in her mother's room for a few hours with a screwdriver and that he kept their phones "the whole time".

[84] Samarra also said the Respondent had been acting violently; he had been threatening her mother for hours. She made a reference to “all this court stuff on the 27th”. She said that her mother hatched a plan to leave the house. Her mother ran out of the house with her brothers. The Respondent caught her mother as she ran. Samarra stayed behind. Mozee provided further information to the police about the Respondent.

Discussion

[85] This TPS body camera footage is a snapshot of what the police saw and did when they arrived on scene. It provides evidence of the heightened state of emotions experienced by Zabrina Overland and her three children that night. It also depicts injuries to Zabrina and Samarra. However, it cannot be said that the statements of Mozee and Samarra are full and complete. Almost everything Mozee said outside is not caught on the body camera audio. It was unclear whether Mozee was describing what he saw or what he heard had happened. Samarra and Mozee provided summaries of what happened or what the witnesses heard had happened. There are statements of wrongdoing without context. In these circumstances, I am not satisfied that this evidence, given the accumulation of deficiencies, meets the credible or trustworthiness threshold for admissibility. Even if the Crown had been able to satisfy the court that the applicable admissibility threshold had been met, s.540(7) does not mandate admissibility. Based on the same deficiencies, I would decline to exercise my discretion to admit the evidence under s.540(7).

Admissibility of Police Body Camera Statement of Mozee Overland at the hospital (Exhibit 7)

Summary of the Statement

[86] Mozee Overland provided a brief statement at the hospital captured on a police officer’s body camera. He explained that on December 1, 2020, the family had an “at risk” move to 1803 Martingrove Road. Everything was fine until the Respondent arrived on December 26 or 27. He said the Respondent kept them hostage. His mother was hit in the eye. Her eye was bruised and bleeding. Everyone was dragged into his mother’s room. The Respondent slapped his brother in the head and neck, and he punched his sister in the eye. He said they devised a plan to leave today because they knew they would be killed if they waited.

Discussion

[87] Mozee’s statement demonstrates his heightened emotional state. There is no promise to tell the truth and there is no context to his statement that the Respondent took them hostage. It is unclear at times if Mozee is describing what he saw or what he was told. He said, for example, “I think he tried to stab my brother”. Further, it is unclear if Mozee heard the death threats or if he was told by his mother or siblings about the death threats. It is unclear if Mozee saw the Respondent follow his mother around the house or if this was something he was told. Mozee was not asked to explain what he meant by an “at risk” move to the new address. There were parts of his statement, particularly at the beginning, where Mozee’s voice is completely inaudible. In my view, the statement does not meet the credible or trustworthy test. Moreover, Mozee’s statement does not assist

the court in determining whether the Respondent should be committed to stand trial on extortion or aggravated assault, the ultimate subject of the preliminary inquiry. The Application to admit Mozee Overland's statement pursuant to s.540(7) is dismissed.

The Admissibility of the Body Camera Footage at the Hospital Intake (Exhibit 5) (Zabrina Overland's first statement at the hospital)

Summary of the video

[88] Exhibit 5 is a video taken on a police body camera at intake at the hospital. The video is about 14 minutes long. Zabrina Overland appeared on a gurney for the first seven minutes of the video. She spoke about the history of her relationship with the Respondent; that he broke her jaw and chin in the past; that he currently had a key to her apartment; and that he showed up on December 26, 2020 and would not leave. She called it a "hostage situation" and described how he monitored her use of the phone. She explained that she waited for him to fall asleep that night and then made her move to leave. She screamed for help and a neighbour whom she did not know let her in.

Discussion

[89] The sound is missing for the first minute of the video. During this time, Ms. Overland is gestured toward her face; she was clearly speaking but what she said was not been recorded. There was conversation between Ms. Overland and Mozee that was inaudible. Mozee spoke again later in the video and what he said at this point is also inaudible. The voice of the officer was heard speaking to one of the children off camera but what the child or children said is inaudible. Also, Zabrina was later seen sitting on a chair. She was speaking to someone. She was seen nodding her head repeatedly, but the conversation was inaudible.

[90] While there were many things Zabrina Overland said on this video that were audible, there were too many gaps in what was being said to her and in what she said for me to conclude that the intake video is credible or trustworthy within the meaning of s.540(7). The Crown's application to admit the hospital intake video pursuant to s.540(7) is dismissed.

The Admissibility of the SOCO Photographs and the Body Camera Statements at the Hospital

[91] I am going to deal with the SOCO photos and the statements of Zabrina, Samarra and Zion at the hospital (other than the evidence at intake and Mozee's statement) as a unit.

The Statement of Samarra Overland at the Hospital (Exhibit 8)

Summary of the Statement

[92] Samarra Overland was 15 years old at the time she gave her statement. She described an incident which she said took place on "Saturday". I understood her to mean the incident occurred the previous Saturday. She overheard her mother and the

Respondent arguing. Samarra saw the Respondent grab her mother and push her on the bed. Samarra grabbed the Respondent and pulled him off her mother. In response, the Respondent struck Samarra in the face; he “backhanded” her. He then hit her mother. He dragged her brothers into the bedroom. They were in the room for an hour and a half. He had his screwdriver which he had taken out of his side bag. The Respondent struck her brother with the screwdriver causing a scratch. He spat on her and her mother. Samarra sustained a black eye from being struck by the Respondent. Her mother had a black eye from being struck by the Respondent and her eye started bleeding where the skin split. The Respondent would not let her brothers go out to get bandages and her mother had to use tape to keep the skin together until she was able to bandage her eye.

[93] Samarra also described a subsequent incident which she said had taken place on “Tuesday”. I took her to mean that this incident took place the prior Tuesday. They were in the living room and the Respondent took their phones away from them and he brought his screwdriver out again. He yelled into her mother’s face and called her names. The Respondent said that if “the court matter” does not go his way he was going to kill her and her children. Further, “he was saying stuff about him getting guns off of someone to kill us”.

[94] Samarra also stated that the day before, in the morning, she heard her mother and the Respondent talking. Her mother was crying because the Respondent was speaking to her mother in a rude and degrading manner. She heard the Respondent threaten her mother. He said that if any of the children came downstairs because they heard her crying, he was going to hit her again. Samarra also heard the Respondent tell her mother that she liked to be hit by him.

[95] The night before the incident that brought the family to the attention of the police, her mother told her and her brothers that they were going to leave the residence because of the Respondent’s threats. Later she saw her mother and her brothers leave the residence. She stayed behind and pretended to the Respondent she was sleepy. She innocently asked the Respondent: “where’s mommy?” The Respondent was angry, and he ran out of the house in an undershirt and shorts. He returned a short time later, got dressed and left. Samarra remained in the house. She did not see what transpired outside of the home.

The Statement of Zion Overland at the Hospital (Exhibit 9)

Summary of the Statement

[96] Zion Overland was 13 years old on January 14, 2021 when he provided a statement to the police. Zion described how he, his siblings and his mother were forcibly confined in his mother’s bedroom for many hours. During this time, the Respondent yelled at the family for things they did not do. They were eventually allowed to leave the room. Zion stated that the Respondent hit his sister and his mother. The Respondent also hit Zion in the back of the head. He said that his neck still hurt. He also described that the Respondent tried to stab him in the back with a screwdriver. Zion moved out of the way and the Respondent just scratched him with the screwdriver. Zion also stated that shortly before the current incident, the Respondent threatened his mother and said he had a gun and he was going to shoot all of them. With respect to the incident of January 14, 2021,

he saw the Respondent dragging his mother. A man walked nearby and then the Respondent ran to the Overland house.

The Statements of Zabrina Overland at the Hospital (Exhibit 6)

[97] In her statement, Zabrina Overland described how, because of the earlier incident of assault in August 2020, she and her family were moved to 1803 Martin Grove Road, Unit 2 for safety reasons. They moved into the new home on December 1, 2020. On December 26, 2020, the Respondent showed up at her door. She only answered the door because she assumed it was the neighbour who had complained the day before about the noise her children were making.

[98] The Respondent entered the home. He told her that she should not have charged him and that she needed to write a letter to the Crown Attorney so that he “could beat everything at trial”. He drove her to the courthouse at Jane and Finch to drop off the letter but she was unable to get into the courthouse because she did not have an appointment. The Respondent also forced her to write to a lawyer named Charles Lamy saying that she had not been assaulted by the Respondent but, rather, she had been assaulted by other people; that she made the complaint against him because she was jealous that he had been unfaithful to her. He told her that he was going to stay at her house until his next court date to ensure the charges went away. He also said that he could be deported because of her complaint to the police. He said that if the lawyer did not call back with good news, he would make sure that they all die and pay for him being deported back home.

[99] Ms. Overland described an incident which had taken place on “Saturday”. I took this to mean the Saturday prior to January 14, 2021. They were in bed in the morning having an argument. She got out of bed and the Respondent grabbed her by her throat and dragged her back to her bed. She panicked and screamed for her daughter. Her daughter came into the bedroom to help her. The Respondent backhanded her daughter. He repeatedly punched Ms. Overland in the head. The skin around her eye split open. He continued to hit her. She sustained two black eyes. He made her children sit down in the bedroom; he got a screwdriver out of his side bag; he attempted to stab her son Zion in the back with the screwdriver but he was unsuccessful.

[100] The Respondent also threatened that he would kill whoever was next to him if one of the children, whom he might send to the store, came back with the police. He also threatened to kill all of them.

[101] Ms. Overland stated that the threats to kill all of them if his court case did not work out in his favour had been going on since Saturday. She told her children that they were going to leave the residence that evening after she got the Respondent to sleep. She told them to be ready with warm clothes; that she was going to wake them up to leave. She made it out of the house with her two sons. She ran from the house; she felt arms on her. She turned around because she thought it was her daughter. Instead it was the Respondent. He grabbed her; he tried to pull her mouth open. He said he was going to break her jaw again. He held her mouth open; his fist came down on her mouth and he knocked out one of her teeth. He tried to drag her back into the house. She was screaming

for help. A man appeared in the parking lot who offered no assistance. She ran into a neighbour's house. He tried to get into the neighbour's home but was unsuccessful.

SOCO Photos (Exhibit 10)

[102] The Crown filed a series of 59 photographs depicting the injuries to Ms. Overland, Samarra and Zion. The photographs of Ms. Overland show two black eyes; bruising and abrasions to her face and chin; a very red and swollen left eye; swollen forehead; a cut below her eyebrow; an abrasion or cut to her left cheek; black, blue, yellow and red discolouring under her left eye; a contusion to the right side of her lower face near her mouth; bruising and contusions to her right arm; marks on her left arm; a bloody and swollen lip. She is missing a front tooth in a photograph which shows dark red colouring and an obviously fresh injury. There is a separate photograph of the preserved tooth.

[103] The photographs of Samarra show a black left eye; there is blood in the white layer of her left eye; there is redness and bruising to her forehead; bruising to her left cheek and lower left jaw; and a scratch to her lower neck/chest region.

[104] The photographs of Zion show a scratch and redness to the back of his neck, and a long horizontal scratch to his upper back shoulder area.

Discussion

[105] The Respondent submitted that the police photographs should not be admitted. He argued that, although there may be a time stamp on the photographs reflecting when they were purportedly taken, there is no evidence as to when or where they were taken or who took the photographs; as well, there is nothing to establish that they have been unadulterated or altered. The Respondent submitted, moreover, that there is no evidence from the witnesses saying that the photos accurately reflect their injuries nor that the injuries depicted are what the Respondent did to them.

[106] In my view, the arguments raised by the Respondent regarding the photographs are issues to be raised at a trial. The photographs are clear, as are the injuries depicted in the photographs. There is nothing on the face of any of the photographs that suggest they have been altered or are adulterated in any way. On the contrary, they appear to be compelling evidence of injuries that correspond to the statements describing how the complainants received their injuries. As outlined below, they are capable of providing corroboration of key components of the statements provided by Ms. Overland and her children.

Admissibility of the statements

[107] I have already admitted the October 21, 2020 statements of Ms. Overland and Mozee regarding the August 16, 2020 incident. There was a process followed at the commencement of these statements that provided some support for finding they were credible or trustworthy and therefore admissible pursuant to s.540(7). There was no similar process adopted at the hospital in January 2021 of having the declarants swear, affirm or promise to tell the truth or cautioning them about the consequences of failing to tell the truth. These statements can therefore only be admissible on the basis that there

are sufficient *indicia* of credibility or trustworthiness to meet the s.540(7) admissibility threshold apart from the process.

[108] I am entitled to view the statements other than in isolation. The statements can provide some circumstantial support for each other. Further, these statements must be seen in the context of the 911 call which I already admitted and in the context of the availability of credible or trustworthy evidence documenting a history of assaultive behaviour on the part of the accused, including the statements of Ms. Overland and Mozee given to the police on October 21, 2020.

[109] There are many *indicia* of credibility and trustworthiness present in the statements of Zion, Samarra and Zabrina provided in January 2021. I will highlight several features.

The Statement of Zion Overland at the Hospital

[110] The following *indicia* provide support for a finding that Zion Overland's statement is credible or trustworthy:

- (1) Zion's statement is recorded on the officer's body camera. It is of good quality and captures everything he said to the police during his interview. The transcript appears to accurately reflect what he said to the police during his interview.
- (2) Zion gave his statement before his mother provided her statement.
- (3) Zion's mother was not present when he gave his statement.
- (4) All statements were provided shortly after the alleged events.
- (5) There is no evidence that Zion colluded with his sister or with his mother prior to providing his statement. Nor is there any indication that he was coached. Indeed, the circumstances suggest the contrary.
- (6) Although lacking in particularity at times, Zion's statement describes what happened to him at the hands of the Respondent.
- (7) Although one could pick out the odd question of a leading nature, the core of his evidence was given without the benefit of being led.
- (8) Zion described a sore neck and scratch he suffered at the Respondent's hands and the SOCO photos are consistent with the injuries he described. The lengthy scratch along his back accords with his description of the Respondent attempting to stab him with a screwdriver and Zion moving to avoid being stabbed.
- (9) Zion's statement regarding his injuries is also consistent with the statements provided by Samarra and Zabrina. They also mention the screwdriver the Respondent used to threaten and intimidate them. They both describe the Respondent's attempt to stab Zion and Zion sustaining the scratch to his back.

- (10) Ms. Overland described the attack on Zion by the Respondent with the screwdriver in the 911 call.
- (11) There is consistency between what Samarra, Zion and Ms. Overland said regarding the plan to leave the house because of their fear that the Respondent had access to a gun or guns and would follow through on his repeated threats to kill them.

The Statement of Samarra Overland at the Hospital

[111] The following *indicia* provide support for a finding that the statement of Samarra Overland at the hospital is credible or trustworthy:

- (1) Samarra's statement is recorded on the officer's body camera. It is of good quality and captures everything she said to the police during the interview. The transcript of the interview appears accurate.
- (2) Samarra gave her statement before her mother provided a statement.
- (3) Samarra's mother was not present when she gave her statement.
- (4) The statement at the hospital was provided very shortly after the alleged events.
- (5) There is no evidence that Samarra colluded with Zion or her mother before providing her statement. Nor is there any indication she was coached. Indeed, the circumstances suggest the contrary.
- (6) Samarra's statement describes what happened to her at the hands of the Respondent and the actions of the Respondent towards her mother that she witnessed as well as threats the Respondent made to her, her siblings and her mother.
- (7) Samarra's injuries are clearly visible on the video.
- (8) The infrequent leading questions did not impact the core of her statement which was given without being led.
- (9) Samarra described being backhanded by the Respondent when she pulled the Respondent off her mother. The SOCO photos of Samarra's injuries are consistent with the injuries she described as well as the description of the incident provided by Ms. Overland.
- (10) There is consistency between what Samarra, Zion and Ms. Overland said regarding the plan to leave the house because of fear that the Respondent might kill them as a result of his repeated threats and references to a gun.
- (11) Ms. Overland referred to her daughter's black eye at the hands of the Respondent on the 911 call.

The Formal Statement of Zabrina Overland at the Hospital

[112] The following *indicia* provide support for a finding that the statement of Ms. Overland is credible or trustworthy:

- (1) Ms. Overland's statement is recorded on the officer's body camera. It is of good quality and captures everything she said during the interview. The transcript appears accurate.
- (2) The statement was taken relatively contemporaneous with the incident. The video was taken on the heels of the incident. Ms. Overland alleged she was struck by the Respondent; she ran to a neighbour's home for help; she spoke to the 911 operator; the police attended; she was transported to the hospital. All of this took place within a relatively short time frame.
- (3) The injuries are visible on the video.
- (4) The statement is detailed; it provides the history of the relationship; how the Respondent came to be at the family's new home on December 26, 2020.
- (5) A review of the transcript does not suggest that the officer engaged in leading questions vis-à-vis the core of her statement.
- (6) The injuries Ms. Overland sustained the previous Saturday and her statement that it was the Respondent who struck her are consistent with Samarra's statement.
- (7) There is support for how the injuries were sustained in the 911 call where Ms. Overland described being struck on several occasions by the Respondent.
- (8) The plan to leave the house because of the threats to kill the family is corroborated by Zion and Samarra.
- (9) There is no evidence that Ms. Overland colluded with her children before she gave her statement at the hospital. Nor is there any indication she coached the children. As already noted, the circumstances suggest the contrary.

[113] In summary, the video statements were made shortly after the events described; the injuries graphically depicted in the photographs and in the videotaped statements of Ms. Overland and Samarra are compelling. There is no evidence of concoction or collusion. There are features of the video evidence viewed singly and in combination that provide some circumstantial support for the conclusion that there is a *prima facie* air of reality to the statements. There is no doubt that 13-year-old Zion and 15-year-old Samarra are vulnerable witnesses. My comments above regarding the vulnerability of Ms. Overland apply here as well notwithstanding her refusal to accept service of the subpoenas.

[114] In all the circumstances, I find that these statements are credible or trustworthy for the purpose of s.540(7) and the statements of Zion Overland, Samarra Overland (at the hospital) and Ms. Overland will be admitted on this basis.

[115] There are obvious, legitimate areas of cross-examination that might be explored in relation to the video statements that could be useful to the defence. Counsel for the Respondent went through an exhaustive list of potential areas which would be suited for cross-examination at trial. For example, one area that might be explored is the alleged discrepancy in the dates the family was allegedly confined, although that too, could be explained: at times things were fine; at other times the Respondent became threatening and ultimately violent. It is not my role to determine the ultimate reliability or credibility of the statements at this stage. In any event, in my view, cross-examination is not necessary or appropriate for purposes of determining admissibility under s.540(7); nor should I exercise my discretion to compel cross-examination, in the circumstances already outlined, despite my finding that the s.540(7) threshold has been met.

RULING ON THE APPLICATIONS

[116] The Crown's Application is granted, in part. The following exhibits are admitted on the preliminary inquiry pursuant to s.540(7): the statement of Ms. Overland dated October 21, 2020 (Exhibit 1); the statement of Mozee Overland dated October 21, 2020 (Exhibit 2); the Medical Report dated August 16, 2020 (Exhibit 11); Samarra Overland's body camera recorded statement of January 14, 2021 (Exhibit 8); Zion Overland's body camera recorded statement of January 14, 2021 (Exhibit 9); Ms. Overland's body camera recorded statement of January 14, 2021 (Exhibit 6); SOCO (police) photographs of the injuries to Ms. Overland, Samarra and Zion Overland (Exhibit 10). The 911 call (Exhibit 3) is admitted as part of the *res gestae*. The Respondent's Application to cross-examine Ms. Overland and her children is dismissed.

COMMITTAL

Aggravated Assault

[117] The Respondent is charged with two counts of aggravated assault. The theory of the Crown is that the injuries to Ms. Overland's lip on August 16, 2020 and the injuries to her teeth and lip on January 14, 2021 constitute wounding. Justice David Watt, in his Manual of Criminal Jury Instructions, at p.529, defines a "wounding" as follows:

To wound someone means to injure someone in a way that breaks or cuts or pierces or tears the skin or some part of the person's body. It must be more than something trifling, fleeting or minor, such as a scratch.

[118] This definition was adopted in *R. v. Cummings*, [2015] O.J. No. 3209 (S.C.J.) per Corrick, J. at paragraph 58 and *R. v. Khalili-Arabi*, 2013] O.J. 4237 per Code, J. at paragraph 144. The British Columbia Court of Appeal, in defining aggravated assault, adopted a "serious bodily harm standard" in *R. v. Pootlas*, [2019] B.C.J. 403 (C.A.). The court stated:

109. It is a definition that can potentially encompass relatively transient harm as long as it is sufficiently serious to be a substantial interference, as well as relatively trifling harm that lasts long enough to be substantial. In short, it is an appropriate elevation of the bodily harm standard.

...

111. In my view, the serious bodily harm standard is workable and comprehensible. It provides a principled way to distinguish between an assault causing bodily harm and the more serious offence of aggravated assault by wounding...

...

113. To briefly conclude, a wound, as the word is used in s. 268(1) of the *Code*, is a break in the continuity of the whole skin that constitutes serious bodily harm. Serious bodily harm is any hurt or injury that interferes in a substantial way with the integrity, health or well-being of the complainant. This is a finding of fact, upon the application of the proper legal test.

[119] There is some evidence that on August 16, 2020, the Respondent punched and slapped Ms. Overland in the face causing her lip to split. She required stitches. Further, there is also some evidence that on January 14, 2021 the Respondent beat Ms. Overland causing multiple bruises, scrapes and contusions; there is evidence the Respondent punched Ms. Overland in the face, causing a cut lip and her front tooth to be knocked out of her mouth. There is evidence that these injuries constituted a break to Ms. Overland's skin that constituted substantial interference with her integrity, health and well-being. In my view, there is, therefore, some evidence upon which a jury, properly instructed, could return a verdict of guilty on both aggravated assaults. The Respondent will therefore be committed to stand trial on these two counts.

Extortion

[120] Section 346(1) of the *Criminal Code* provides:

Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

[121] In *R. v. Davis* [1999] 3 S.C.R. 759, Lamer C.J. explained the offence of extortion in these terms at paragraph 45:

Extortion criminalizes intimidation and interference with freedom of choice. It punishes those who, through threats, accusations, manaces, or violence induce or attempt to induce their victims into doing anything or causing anything to be done...When threats are coupled with demands, there is an inducement to accede to the demands. This interferes with the victim's freedom of choice, as the victim may be coerced into doing something he or she would otherwise have chosen not to do.

[122] Applying this test to the evidence admitted on the preliminary inquiry, there is some evidence upon which a reasonable jury properly instructed could render a finding

of guilt that the Respondent induced Ms. Overland, through threats, into writing a letter to the Crown and into contacting a lawyer to claim that the August 16, 2020 charges were false. There is evidence that he threatened to kill her and her children if she did not succumb to his threats. In my view, there is sufficient evidence on each element of extortion to support committal. The Respondent will therefore also be committed to stand trial on the charge of extortion.

Disposition

Released: September 24, 2021

Signed: Justice Weinper