



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *R. v. Jennings*, 2020 NLCA 40

**Date:** December 3, 2020

**Docket Number:** 201901H0097

**BETWEEN:**

JUSTIN JENNINGS

APPELLANT

**AND:**

HER MAJESTY THE QUEEN

RESPONDENT

**Coram:** Welsh, Hoegg and Butler JJ.A.

**Court Appealed From:** Provincial Court of Newfoundland and Labrador,  
St. John's

**Appeal Heard:** September 17, 2020

**Judgment Rendered:** December 3, 2020

**Reasons for Judgment by:** Welsh J.A.

**Concurred in by:** Butler J.A.

**Concurring reasons by:** Hoegg J.A.

**Counsel for the Appellant:** Stephen P. Orr

**Counsel for the Respondent:** Dana E. Sullivan

**Welsh J.A.:**

[1] Justin Jennings was convicted of extortion contrary to section 346 of the *Criminal Code*. In appealing his conviction he relies on two grounds: that the trial judge erred by considering audio-visual recordings obtained from a doorbell recording system; and that the elements of the offence were not proven.

**BACKGROUND**

[2] On May 27, 2019, Mr. Jennings met with the complainant, Mr. O'Halloran, on the doorstep of the complainant's residence. He told the complainant that he had been sent by one or more other persons to collect a \$37,000 debt, and that it must be paid immediately. In his oral decision, the judge summarized:

[The complainant] tried to resist payment by explaining that he owed no money and later Jennings gave him 60 or 90 minutes to come up with one third of the money or something bad would happen and things would get worse. Jennings intimated that there would be other people coming here and that "it's not something you want in the least." Jennings goes on to say that "if it got to get worse it will get worse", and that [he] wouldn't want to cause scenes in front of the complainant's house, and mentioned the complainant's children at the same time. Jennings emphasized that he's not joking and that if the complainant doesn't pay the debt he is "going to have to pay something else." Jennings says that it could get very bad for the complainant and that if he doesn't get the money it's not going to be good. It was clear from the full conversation that Jennings had others to assist him in carrying out these veiled threats. Two other males were waiting in the vehicle in which Jennings had arrived. [The complainant] referred to this fact explicitly in his testimony as an additional reason why he felt intimidated.

[3] Audio-visual recordings made by means of a motion-activated doorbell recorder were admitted into evidence at the conclusion of a *voir dire*. The trial judge convicted Mr. Jennings, having determined that the elements of the offence under section 346 of the *Criminal Code* had been proven beyond a reasonable doubt. Consequent upon that verdict, the judge found Mr. Jennings guilty of breaches of an undertaking and a probation order, contrary to sections 145 and 733.1 of the *Code*.

**ISSUES**

[4] At issue is whether the trial judge erred: (1) in concluding that the audio-visual recordings of the conversation between Mr. Jennings and the complainant were admissible; and (2) in assessing the elements of the offence.

## ANALYSIS

[5] Section 346 of the *Criminal Code* provides for the indictable offence of extortion:

(1) 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.

(1.1) Every person who commits extortion is guilty of an indictable offence and liable

...

(b) in any other case, to imprisonment for life.

### Admissibility of the Recorded Conversation

[6] In his oral decision on the *voir dire*, the trial judge made the following determinations from the evidence:

1. The recordings were made by the use of a system called ring.com and a doorbell camera.
2. The recording equipment was activated by motion, which caused it to operate for a set period of time.
3. Each recording was stored remotely, and could be accessed by the complainant for download or transmission to others.
4. The complainant testified that he downloaded and forwarded to the police all the recordings made during the relevant period of time.
5. The complainant testified that the recordings forwarded to the police were not altered by him, and that they covered the complete event on which the charge is based.
6. Breaks occurred in the recording because the automatic recording system was activated by motion, after which it recorded for a set period of time, and then stopped until reactivated. The complainant testified that the breaks in the recordings did not affect the depiction of what took place.

7. The trial judge accepted the complainant's evidence having found that he was present during the entire event, and that his evidence was reliable and uncontradicted.

[7] In the result, the trial judge admitted the recordings into evidence, and the transcript of the recordings as an exhibit:

... As regards the transcript of the recording, it's clear to me that there are some discrepancies between the recording and the transcript as is so often the case in these situations. The best course of action here is to receive the transcript as an exhibit, I'll mark it as number two, to be used to assist me as trier of fact in interpreting the recording itself, which is the evidence.

[8] Mr. Jennings submits that the trial judge erred in law in admitting the recordings into evidence for two reasons: (1) the Crown could not prove that the recordings were not altered; and (2) the Crown could not prove the accuracy of the recordings, given the breaks that resulted from the automatic operation of the recording system.

*Proof the recordings were not altered*

[9] In submitting that the Crown must prove that the recordings were not altered, Mr. Jennings relies on the decision in *R. v. Penney*, 2002 NFCA 15, 210 Nfld. & P.E.I.R. 209. In particular he points to the following sentence:

[17] Evidence establishing that the video has not been altered or changed is a precondition to its admission as evidence (*R. v. Nikolovski, supra*, at paragraph 28). ...

[10] As is always the case when relying on an earlier decision as a precedent, it is necessary to consider the context. The common law develops through the refinement and the application of precedents to different factual circumstances. For example, in *Penney*, following the above statement, paragraph 17 continues:

... Current technology is such that it is not difficult for a competent person to alter visual evidence. In this case, the video was, for a lengthy period, in the possession of a company that, in fact, edits videos. In Provincial Court, the trial judge concluded that both Crown witnesses lacked credibility when they testified that the video had not been altered ... .

In those circumstances, whether the video had been altered was important in assessing the probative value of the evidence.

[11] As a general principle, in considering whether evidence is admissible, the essential question is whether the evidence is relevant and probative (*Penney*, at

paragraph 10). Regarding videotape evidence in particular, the majority in *Penney* explained:

[13] Within the context of videotape evidence in *R. v. Nikolovski, supra*, Cory, J., after referring to the general principle of inclusion of evidence, recognized the need for limitations. Discussing the admissibility of a videotape obtained from a surveillance camera which operated continuously and automatically during a robbery, he said, at paragraph 28:

“Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. ...”

[14] When applying the decision in *Nikolovski* to other situations, it must be considered in context. In *Nikolovski*, the videotape was obtained by means of an automatic security camera located in a convenience store. The uncontradicted evidence of the clerk was that the video showed the entire robbery. The video clearly constituted relevant and probative evidence.

[15] By contrast, where the camera is operated by a person who selectively chooses to film only portions of the events, the question of whether the video depicts the scene of the crime, whether it is a silent, trustworthy, unemotional, unbiased and accurate witness, in short, whether it is probative evidence, must be carefully reviewed.

[12] Mr. Jennings’ reliance on the broad proposition that the Crown must prove that audio-visual recordings were not altered as a precondition to their admissibility is based on a misapprehension of the decision in *Penney*. Comments in that decision, which in hindsight may not have been sufficiently clearly stated, should not be relied upon when taken out of context. As stated in *Penney*, the central consideration in determining admissibility of evidence is its relevance and probative value. Whether a recording has been altered or whether it is complete, and the effect such factors may have on the probative value and admissibility of recordings will depend on the particular circumstances. For example, in *Penney*, the recording was made by an individual using a hand-held video camera. The operator chose what to film and admitted that the recording covered only “the gory stuff”. That situation stands in contrast to the circumstances here and in *Nikolovski* where the recording was made through the automatic operation of a recording system.

[13] Considering each case on its facts is consistent with sections 31.1, 31.2 and 31.3 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which address the dual requirements of authentication of electronic documents and the integrity of the electronic document system:

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

31.2(1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored;

...

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

[14] In addition to addressing the authenticity and integrity of the electronic documents system, section 31.7 of the *Canada Evidence Act* provides:

Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.

In accordance with this provision, the judge is required to exercise a further gatekeeper function. That is, to be admissible, evidence must be relevant and probative.

[15] In this case, Mr. Jennings did not challenge the authenticity of the recordings. The Crown adduced evidence regarding how the doorbell recording and storage systems operate. The trial judge accepted the complainant's evidence that he had accessed the recordings from the electronic storage and had forwarded them to the police.

[16] There was no evidence that the recording system was not operating properly. Rather, the complainant's evidence, which was uncontradicted and was accepted by the judge, was that, despite the gaps, the recordings accurately portrayed the whole event. Integrity of the system was satisfied.

[17] However, that is not the end of the analysis. Having established the authenticity and integrity of the system, it is necessary to consider whether the electronic document satisfies the requirement that the evidence be relevant and probative. That requirement is referenced in *Penney*:

[9] Factors which have been considered in assessing the admissibility of photographs were set out in *R. v. Creemer and Cormier*, [1968] 1 C.C.C. 14; 2 N.S.R. (1965-69) 546 (C.A.), at page 22 [C.C.C.]:

“All of the cases dealing with the admissibility of photographs go to show that such admissibility depends on (1) their accuracy in truly representing the facts; (2) their fairness and absence of any intention to mislead; (3) their verification on oath by a person capable to do so.”

[10] These factors must be considered in light of the trend in the past decade toward a less stringent test for the admissibility of evidence generally. The threshold set by the Supreme Court of Canada, stripped to its core, is whether the evidence is relevant and probative.

...

[18] In this case, there is no basis on which to conclude that the judge erred in determining that, insofar as the recordings depicted the event, they were relevant and probative. Nonetheless, Mr. Jennings submits that the gaps between recordings, which resulted from the automatic operation of the recording system, affected their probative value because the entire event is not depicted. In the result, he submits, the recordings are inadmissible.

### *Gaps between the recordings*

[19] In addressing the issue of the gaps between recordings, the trial judge quoted the following two paragraphs from *Penney*:

[28] The failure to depict an entire event, without gaps, may not be critical depending on the use to be made of the video at trial. For example, in *Nikolovski* [[1996] 3 S.C.R. 1197] the video was used to identify the accused as the robber. In that situation, a continuous video was available so the issue of gaps did not arise. However, where the video is being used for the purpose of identification, a continuous video may not be necessary.

[29] The same cannot be said when the video is being used to depict the event itself. In this case, the offence is attempting to kill a seal other than in a manner that is designed to kill it quickly. In the absence of a continuous video of the killing of one seal, it is impossible to determine whether the manner used was designed to kill it quickly. A video consisting of short clips, interrupted by gaps in filming, particularly where it is impossible to determine the length of the gaps, and filming only portions of what occurred, cannot be relied upon as an accurate depiction of the event. Such a video is, in fact, not different from a series of still photographs. The photographs may show a seal at various times, but they could not be relied upon to demonstrate the event which constitutes the offence. The video in this case is not comparable to the trustworthy, unbiased and accurate witness referenced by Cory, J., in assessing the videotape in *Nikolovski*.

(Emphasis added.)

[20] These comments from *Penney* must be read in context and in conjunction with paragraph 27:

In the circumstances, the Crown has also failed to establish that the video accurately represents the facts or depicts the scene of the offence. The failure results primarily from the manner in which the video was filmed and the fact that the original video did not include time codes. It is clear from the evidence that the camera operator filmed selected short sequences of what he described as the “gory stuff”. It is impossible to ascertain the time lapse between sequences, or the chronology of events.

(Emphasis added.)

[21] The video in *Penney* was ruled inadmissible because it lacked probative value, and

[30] ... It is trite to observe that editing a visual presentation, either during filming or production, may well result in a distortion of reality. The Crown has failed to establish that the video provides an accurate representation of the facts. It follows that the video lacks the necessary probative value to be admitted as evidence portraying a violation of section 8 of the Regulations.

[22] Finally, in *Penney*, the Crown did not provide evidence by way of credible witnesses to explain the gaps in the recording or to attest to the accuracy of the recording as depicting the event:

[31] Alternatively, the Crown may have intended to rely on the video as if it was a series of still photographs. The difficulty with this approach is that the trial judge has already concluded that the only witnesses who could give the necessary testimony to provide a basis on which to admit the video, and to use it solely as illustrative of a particular moment, are totally lacking in credibility. ...

[23] By contrast, in this appeal, the trial judge was satisfied from the evidence that the recording system was working and that the recordings accurately depicted the entire event forming the basis of the charge. The judge accepted the complainant's evidence that he had forwarded to the police all the recordings for the relevant period of time, that they had not been altered, that the recordings covered the complete event, and that they accurately depicted what had taken place. The judge summarized in his oral decision:

... The recording is of value because it accurately and faithfully depicts the actions, words and expressions of both parties at the time in question when the extortion is alleged to have taken place. ...

[24] In the result, there is no basis on which to conclude that, in admitting the recordings, the judge erred in the application of the law to the findings of fact. Based on all the evidence, the gaps between recordings did not reduce their value in providing an accurate depiction of the event. There is no basis on which to conclude that use of the recordings would be unfair or that there was any intention to mislead (*Penney*, at paragraph 39).

[25] Accordingly, I am satisfied that the recordings were relevant and probative, and that the judge did not err in admitting them into evidence.

### Elements of the Offence

[26] The elements of the offence of extortion are discussed by Binnie J., for the majority, in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368:

[53] Extortion requires the Crown to establish beyond a reasonable doubt (i) that the accused has induced or attempted to induce someone to do something or to cause something to be done; (ii) that the accused has used threats, accusations, menaces or violence; (iii) that he or she has done so with the intention of obtaining something by the use of threats; and (iv) that either the use of the threats or the making of the demand for the thing sought to be obtained was without reasonable justification or excuse [citations omitted].

[54] Of particular pertinence in *Natarelli* [[1967] S.C.R. 539] is the instruction by Cartwright J. (later Chief Justice), speaking for the Court, that "one item in the accused's course of conduct" is not to be isolated, but taken in the context of the "course of conduct considered in its entirety" (p. 546). Although Cartwright J. was speaking in relation to whether the conduct was "justifiable or excusable", his observation applies with equal force to all of the elements of the charge of extortion.

[27] Applying the above four elements, the trial judge concluded:

... The prosecution is required to prove beyond a reasonable doubt the absence of any reasonable justification or excuse. Here, the prosecution has established that there was no reasonable excuse or justification for the demands made by Jennings in all the circumstances. [The complainant] testified that there was no debt owed, and I accept his testimony in this regard. Even if a lawful debt had been owed, it is my determination that the threats in these circumstances go beyond what is reasonable and what a reasonable person would view as legitimate or warranted means of attempting to collect the debt. Under all the circumstances, I find Justin Jennings guilty as charged of extortion and this necessarily means that he's also guilty of breaching the terms of the court orders under s. 145 and s. 733.1.

[28] Mr. Jennings submits that the trial judge erred when he failed to consider Mr. Jennings' conduct "in the context of his entire course of behaviour" (*Barros*, at paragraph 58). He submits that the recordings demonstrate that he was attempting to collect a debt, which is not illegal, and that the judge misconstrued what was depicted in the recordings.

[29] However, it was for the trial judge to assess all the evidence, the recordings being only a portion. He accepted the evidence of the complainant that he felt threatened or menaced, and that there was a potential for violence related to collection of the alleged debt. The judge concluded that, in the circumstances, there was no reasonable justification or excuse for Mr. Jennings' threatening conduct. In the result, the elements of the offence of extortion had been proven.

## **SUMMARY AND DISPOSITION**

[30] In summary, the trial judge did not err in concluding that the audio-visual recordings of the conversation between Mr. Jennings and the complainant were relevant and probative evidence, and were admissible. Further, the judge did not err in assessing the elements of the offence and in concluding that the offence of extortion had been proven beyond a reasonable doubt.

[31] Accordingly, I would dismiss the appeal.

---

B. G. Welsh J.A.

---

G. D. Butler J.A.

**Concurring Reasons By Hoegg J.A.:**

[32] I agree with my colleague that this appeal be dismissed. I also agree that there is no basis to exclude the doorbell video recording from the evidence, and that the offence of extortion was established. Nevertheless, I must say something different respecting the admissibility of the doorbell video recording.

[33] Mr. Jennings argues that the trial Judge erred in admitting into evidence the video recording taken by the doorbell camera at the complainant's residence. Mr. Jennings maintains that the recording was not an accurate recording of the incident in that it did not continuously cover the whole incident and that the duration of the gaps in the recording could not be ascertained.

[34] Mr. Jennings had challenged the admissibility of the doorbell video recording at trial. After a *voir dire*, the Judge admitted the recording.

[35] The *voir dire* evidence established that the doorbell video camera was activated by motion, so it only recorded when motion triggered it to record. As a consequence, the tendered recording was composed of 13 separate clips, each of which depicted a part of the incident between the complainant and Mr. Jennings. There were gaps between each of the clips, but the length of time of each of the gaps could not be determined with any degree of certainty because the time stamps on the clips were established to be unreliable.

[36] The Judge accepted the complainant's *voir dire* evidence that "he downloaded and forwarded to police all recordings for the relevant time period covering the complete event which forms the basis of the charges and that they were unaltered" [and] "that despite some breaks in the recordings, they depict what took place to a substantial degree." The Judge found that the necessary preconditions for admissibility required by law had been met, and admitted the recording into evidence. He stated that "the weight to be placed on their contents is a matter for argument at trial." The Judge went on to note that although there were discrepancies between the doorbell video recording and the transcript, he would admit the transcript into evidence for his use in interpreting the recording. In short, despite the doorbell video recording being neither a complete nor a completely accurate depiction of the incident between Mr. Jennings and the complainant, it was nevertheless admissible.

[37] Mr. Jennings appeals the Judge's decision to admit the doorbell video recording into evidence, arguing that the test for admissibility as stated in *Penney* was not met. In particular, he maintains that the Crown had not

discharged its burden of establishing that the video recording was not altered as a precondition to its admissibility, and that it was not continuous. Mr. Jennings maintains that the recording, like in *Penney*, had gaps and therefore was not an accurate depiction of the incident between him and the complainant. He maintains that all of the conversation between him and the complainant bears directly on the offence of extortion, and argues that the piecemeal and incomplete recording of what transpired between him and the complainant leaves an inaccurate impression of whether what transpired was actually extortion. Because of the gaps and the unreliable time stamps on the recording, Mr. Jennings maintains that admitting it into evidence jeopardized his ability to defend himself of the charge.

[38] All members of the Court agree that the Judge did not err in admitting the doorbell video recording. However, I find it necessary to explain how and why I agree that the doorbell video recording was correctly admitted into evidence. In so doing, I seek to clarify some of the statements in *Penney* which could lead to the opposite conclusion.

[39] Under the common law, the party seeking to admit a video recording into evidence has the burden of authenticating it, so that it can be considered by the trier of fact as a piece of evidence, along with all of the other evidence adduced in a trial, when the trier of fact is determining whether the offence charged has been established. The tendering party does not have to prove that the recording is continuous, or that it captures the entire event, or that it has never been altered. A video recording that depicts only part of an event, or that has been altered by editing, or that has gaps in it, may be admissible for what it is — no more, no less. What matters is whether the integrity of the content of the recording has been compromised by alteration. In other words, what matters is whether the evidence sought to be admitted is a fair representation of what it purports to be. As long as there is some evidence authenticating that the recording depicts what it purports to depict — no more, no less, it may be admitted, subject to relevance (the primary rule of admissibility of evidence), any exclusionary rule, and a prejudice versus probative value analysis. Once admitted, the recording, like all other trial evidence, can be considered by the trier of fact when the trier of fact assesses and weighs all of the evidence in finally deciding the case.

[40] In this case, the parties relied on common law principles respecting the admissibility of evidence and the Judge decided the *voir dire* on that basis. The Judge recognized that although the recording was an imperfect and incomplete depiction of the incident involving the complainant and Mr. Jennings, it was

authenticated by the complainant, it was relevant and not subject to any exclusionary rule, and its probative value was not outweighed by prejudice. He admitted the doorbell video recording, and said that he would consider its reliability and weight after hearing argument at trial. In so doing, he relied on *R. v. Bulldog*, 2015 ABCA 251.

[41] In *Bulldog*, the issue was the admissibility of a video recording of an incident which led to an assault charge. The video did not depict the entire incident. The appellate court ruled that the trial judge correctly admitted it into evidence, saying that there was nothing in the evidence giving rise to a concern that the video recording was altered in a material way and that the video was authentic in the sense that it was a substantially accurate and fair depiction of what happened.

[42] The *Canada Evidence Act (CEA)* addresses the admissibility of electronic documents into evidence. The doorbell video recording in this case would qualify as an electronic document (section 31.8) under that legislation. Section 31.1 of the *CEA* provides that a party that wishes to have an electronic document admitted into evidence must put forward some authenticating evidence that could support a finding that the electronic document, in this case the doorbell video recording, is what it purports to be. The bar for admissibility under section 31.1 of the *CEA* is very low: It requires only some evidence which could support a finding that the electronic document is what it purports to be. It does not require a finding that the tendered electronic document is exact, complete, or unaltered (*R. v. C.B.*, 2019 ONCA 380 at paras. 67-68, *R. v. Durocher*, 2019 SKCA 97 at para. 82, *R. v. Richardson*, 2020 NBCA 35 at para. 27).

[43] The authenticating evidence in this case was the complainant's evidence that the recording was substantially accurate although incomplete depiction of what transpired between him and Mr. Jennings. By any measure, this evidence more than supported a finding that the doorbell video recording was what it purported to be — that being a depiction of much, although not all, of what transpired between the complainant and Mr. Jennings. Accordingly, the doorbell video recording, although not a continuous, complete, or unaltered depiction of the alleged crime, would meet the test for admissibility under section 31.1, and its ultimate reliability as a piece of trial evidence would be a matter for consideration in the Judge's determination of the case upon considering and weighing the totality of the evidence.

[44] The *CEA* also addresses system integrity (section 31.2). In this case, the gaps in the recording were explained by the fact that the doorbell video only recorded when it was triggered by motion. Why the time stamps on the 13 clips of the recording were determined to be unreliable was not satisfactorily explained. However, the gaps in the recording did not undermine the integrity of what was recorded, and there was no suggestion, let alone evidence, of tampering so as to leave a false or unfair impression of the content of the recording. In the result, the Judge effectively found that the gaps and the unreliable time stamps did not affect the integrity of the recording and would not preclude its admissibility.

[45] At trial and on appeal Mr. Jennings relied on statements made in *Penney* which say that the party tendering an electronic document must prove that it has not been altered or changed as a pre-condition to admissibility, and that the document must be a continuous and complete depiction of the crime alleged (see *Penney* at paras. 17, 20, 27-30 and 32). As my colleague explains, selective editing resulting in gaps in the video recording in *Penney*, combined with the lack of credibility of the witnesses for the prosecution respecting the editing process, were not only important to the offence charged in that case, but germane to it.

[46] In our judicial system we rely on precedents established in other cases to guide and direct our understanding and application of the law to future cases. Mr. Jennings relied on the statements in *Penney* as having precedential value. While statements made in an appellate court's decision are always to be taken seriously, the statements referred to above, while applicable to the facts in *Penney*, are too broad to constitute general principles and do not reflect accepted law respecting the admissibility of electronic documents.

[47] In *Downer v. Pitcher*, 2017 NLCA 13, Green C.J.N.L. cautioned against placing too much emphasis on the specific language used in reasons for judgment and parsing the words in a court's reasons as though they were words enacted in a statutory provision. He explained that statutory interpretation is unlike "the process of interpreting and giving life to general common law, let alone principles stated by a judge in the course of his or her reasons" (at para. 12). The Chief Justice quoted with approval the statements of Arthur L. Goodhart in "Determining the Ratio Decendi of a Case" (1930), 40 Yale L.J. 161 at 164, who said that the ratio of a case "is to be sought in a reconstructed principle that best explains the result by reference to the facts of the case that are deemed material by the judge" and "it is not the rule of law set forth by the court...which necessarily constitutes the principle of the case. There may be no

rule of law set forth... or the rule when stated may be too wide or too narrow...” (at para. 12).

[48] To my mind this is the situation that *Penney* presents. The statements in the body of the *Penney* judgment, while appropriate in the context of the *Penney* facts, are stated too broadly to be of general application. The real ratio of *Penney* is, as was stated at paragraph 30 of the decision, that the prejudice caused by the selective editing of the video by the complainant, whose interests were adverse to those of the defendant and whose witnesses were found to be devoid of credibility, outweighed the probative value of the video as tendered. This was why this Court upheld the trial judge’s refusal to enter the video into evidence.

[49] Accordingly, in my view the precedential value of *Penney* is that selective editing of an electronic document by an adverse party whose credibility is suspect is a prejudice to be considered in the prejudice versus probative value analysis. As with any such analysis, the balancing can result in a determination that the evidence is admissible or that it is inadmissible. In *Penney*, the prejudice versus probative value analysis favoured exclusion.

[50] In the result, the statements in *Penney* respecting the burden on a tendering party to prove that a video has not been altered and that the video is continuous in that it depicts the entire crime are not precedents. Those statements are properly confined to the particulars of that case and do not govern the admissibility of electronic evidence in other cases. This approach is consistent with the application of common law principles respecting the admissibility of evidence (see *Bulldog*, at paras. 29-33) as well as interpretations of the *CEA* provisions by other appellate courts (see *C.B., Durocher, and Richardson*, as discussed above in para. 42, as well as *R. v. Hirsch*, 2017 SKCA 14 at paras. 18-19).

[51] After admitting the doorbell video recordings, the Judge went on to use the doorbell video recording evidence in the same way any trier of fact uses any piece of evidence. He considered the recording and relied on it, explaining essentially that he found it to be reliable evidence, supported by the complainant’s uncontradicted evidence, and not undermined in any way by Mr.

Jennings's contentions that the gaps in the recording could have shown other conversation between him and the complainant that could have exculpated him.

---

L.R. Hoegg J.A.