



THE UPDATE

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ACCUSED'S TESTIMONY - W.(D.) - MOTIVE TO LIE

R. v. Laboucan - 2009 ABCA 7
per Berger, Slatter, Rowbotham,
JA - T. Judge: Burrows, J:

Conviction appeal on first degree murder charge. Teenage girl brutally sexually assaulted and beaten to death. Accused testified and denied being the killer. In reviewing *W.(D.)*, and in rejecting the accused's evidence, trial judge stated (in part) that the accused had "a very great motive to be untruthful given the consequences of being convicted."

Held: Appeal allowed, new trial.

"The impugned language in the trial reasons implies a lack of trust in the oath taken by the accused, who, in that regard, is singled out from any other witness ... the analysis begins with scepticism that distorts the assessment of the accused's credibility, commands caution and requires in advance that trust be restored. Such a posture cuts to the core of a fair trial, eroding, as it does, the presumption of innocence." Authorities reviewed. Rowbotham, JA dissenting.

L. Stevens - Defence Counsel

CHARTER - 8 - PERSONAL SEARCH - JETWAY PROGRAM

R. v. Wilkening - 2009 ABCA 9 per
Ritter, Martin, Mahoney, JA - T.
Judge: Cummings, PCJ:

Conviction appeal from firearms offences. Accused stopped at Calgary bus depot as part of Jetway Program. After speaking with accused, a warrant under the *Traffic Safety Act* was discovered. Accused arrested on the warrant and placed in a police van. A flat-screen TV box that was part of the accused's luggage was searched, and handguns found. Police testified that the search was necessary to ensure safety, as they did not want to possess or transport a large box not knowing what was inside of it. Trial judge found a breach of s. 8, but did not exclude the evidence under 24(2).

Held: Appeal dismissed.

Trial judge's 24(2) analysis "survives a reasonableness review ... Police cannot be expected to take steps to secure property carried by arrested persons, other than to place that property in police-controlled locked compounds. Nor can they be expected to simply abandon such property on the street."

M. Bates - Defence Counsel

CHARTER - 8 - VEHICLE SEARCH - NO BREACH

R. v. Chubak - 2009 ABCA 8 per
Berger, Ritter, Martin, JA - T.
Judge: Cioni, PCJ:

Crown appeal from acquittal on weapons and drug charges. Police dispatched to a report of a man having been stabbed. Police saw a vehicle drive up and accused seen attempting to retrieve bear spray from the vehicle. Accused arrested, and upon a cursory search a folding knife and \$1090 were found on accused's person. Vehicle search then commenced, and upon finding a number of ringing cell phones the scope of the search expanded, and ultimately drugs were found.

Held: Appeal allowed, new trial.

"The case law says that searching officers can subjectively have more than one reason for the search, so long as one of the reasons is objectively justified as incidental to arrest, and the entirety of the search can be connected to that reason ... *R. v. Caprara* (2006), 144 CRR (2d) 287 ... Therefore, the entire fruit of the constables' dual purpose search in this case is admissible." Authorities reviewed.

M. Bates - Defence Counsel

IMPAIRED DRIVING - 8 - REASONABLE GROUNDS

R. v. White - 2008 ABPC 381 per Allen, PCJ:

Impaired driving trial. Issue regarding reasonable grounds to arrest and make breath demand. Police responded to a complaint of erratic driving. Upon police arrival in the area, accused located approximately 30 feet from his vehicle. Indicia of impairment noted, and accused arrested.

Held: s. 8 breach, breath samples excluded.

Police officer did not articulate any reasonable belief that the accused had operated the motor vehicle in the preceding 3 hours. No evidence of the time of the dispatch call, nor regarding the content of the call. “In the absence of such evidence there is no basis upon which could be drawn that the officer that the officer concerned himself with the time of driving.”

P. Northcott - Defence Counsel

IMPAIRED DRIVING - 258 CC - EVIDENCE TO THE CONTRARY

R. v. Hughes - 2009 ABCA 11 per Paperny, JA:

Defence application for leave to appeal. Evidence to the contrary. Straddle case. Defence expert put accused’s blood-alcohol at a range of 53 - 109 mg%. Summary conviction appeal court found that on the basis of **Gibson** [2008] 1 SCR 397, evidence to the contrary straddling the legal limit was inadmissible.

Held: Leave to appeal denied.

No reasonable prospect of success. “The straddle evidence before the Supreme Court ranged from 40 mg to 105 mg in **Gibson** and from 64 mg to 109 mg in **MacDonald**. The majority of the Supreme court dismissed the appeals with Charron J. effectively holding that all straddle evidence was inadmissible and LeBel J. holding that this wide range of straddle evidence could not be considered evidence capable of rebutting the presumption. While Hughes submits that Charron J. did not expressly state that straddle evidence is inadmissible, that is the only logical conclusion that can follow from her comments to the effect that such evidence will always be irrelevant to rebut the presumption at issue.”

T. Foster - Defence Counsel

SENTENCE - SEXUAL ASSAULT - INCEST

R. v. W.D.C. - 2008 ABPC 380 per Matchett, PCJ:

Accused pled guilty to multiple acts of incest with his biological daughter who was 8 - 11 years old at the time. Acts included the rubbing of the accused’s penis and one incident of vaginal intercourse. Joint submission for 4 years jail. 43 year old accused with no record.

Held: 5.5 years jail.

Joint submission rejected. Aggravating factors included: multiple acts over a three year period, “highest” position of trust, and the age of the child. 4 year starting point for one act of sexual assault upon a child. Deterrence and denunciation paramount. Guilty plea constituted the only mitigating factor.

L. Stevens - Defence Counsel

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