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The Hill/Wein Criminal Evidence NetLetter is a semi-monthly current awareness service providing case summaries and commentary in the area of criminal evidence.

HIGHLIGHTS

* "Age" defence to sex with a minor - Resort to accused's date of birth in court file (R. v. J.N., [2019] N.J. No. 319, 2019 NLCA 65)
* Critical analysis of circumstantial evidence in prosecution case - Relevance of police failure to hold identification lineup relating to a physical exhibit (Fennell v The Queen, 2019 HCA 37)
* Review of procedure and appropriate considerations concerning the "rule" in Browne v. Dunn (R. v. Neilson, [2019] A.J. No. 1407, 2019 ABCA 403)
* Circumstantial evidence - Applying burden of proof to alternate inferences inconsistent with guilt (R. v. Rai, [2019] B.C.J. No. 2055, 2019 BCCA 377)

NEW CASE LAW

R. v. J.N.

HWCE/2019-070

Newfoundland and Labrador Court of Appeal

D.E. Fry C.J.N.L., F.P. O'Brien and W.H. Goodridge JJ. A.

October 9, 2019

[2019] N.J. No. 319

Full Text: 2019 NLCA 65

"Age" defence to sex with a minor — Lay opinion re age — Propriety of court accessing court file for information as to accused's date of birth .

JN was charged with sexual interference of her boyfriend, A, contrary to s. 151 of the *Criminal Code.* That section criminally proscribes sexual contact with a person under the age of 14 years. JN and A, as boyfriend and girlfriend, commenced a sexual relationship two or three months prior to A's 16th birthday.

When JN was charged, she was pregnant with A's child and the couple planned to marry with the consent of A's parents.

Section 150.1 (2.1) of the *Code* provides:

> Exception - complainant aged 14 or 15
>
> (2.1) If an accused is charged with an offence under section 151 or 152, subsection 173 (2) or section 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused
>
> (a) is less than five years older than the complainant; and
>
> (b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

The prosecution is obliged to disprove the potential age "defence" beyond a reasonable doubt.

In this judge-alone trial, the only evidence respecting the accused's age came from a Crown witness - A's mother, B - who testified that JN was four or five years older than her son:

> Q. Were you aware of her age?
>
> A. Yes.
>
> Q. ... [M]y next question was going to be if that caused you any concern?
>
> A. No, her age wasn't a concern, no.
>
> Q. You were aware, were you aware, if she was the same age or older than [your son, A]?
>
> A. I knew she was older.
>
> Q. Okay, how much older?
>
> A. I guess like four or five years.

The trial judge relied on the witness' evidence respecting JN's age and, applying s. 151.1 (2.1), found a reasonable doubt that JN was five years or greater in age than A at the relevant time.

The Crown appealed JN's acquittal submitting that the trial court erred:

> (1) in admitting and relying upon A's mother's opinion or "guess" regarding the age of the accused
>
> (2) in failing to access the Form 2 information in the court file said to have recorded JN's actual date of birth.

The Crown's first argument was rejected on the basis that a witness is entitled to express an opinion as to a person's age:

> [12] B's opinion evidence as to the apparent age of J.N. was admissible evidence. There was a factual foundation to the evidence. B had a seven-year connection with J.N., as a neighbor, and as the mother of A who was J.N.'s boyfriend. Based on this, B stated that she was aware of J.N.'s age.
>
> ...
>
> [14] In accepting and relying on B's evidence of J.N.'s age, and the age gap, the trial judge found that B was a credible and trustworthy witness and was very familiar with J.N., having known her for seven years. There was no error by the trial judge accepting and relying on this evidence.
>
> ...
>
> [20] In this matter the defence identified Crown evidence which, if true, would allow an acquittal under section 150.1 (2.1), based on consent. There was no contrary evidence, in fact no other evidence, addressing J.N.'s age. It was only necessary that the age evidence identified by the defence created a reasonable doubt. The trial judge found that testimony of B regarding J.N.'s age created this reasonable

doubt, and dismissed the charge:

> [O]n the basis of the testimony of [B], as elicited by the Crown, her testimony that [J.N.] is four years, maybe five years older than [A], I am left in reasonable doubt that [J.N.] is at least five years older than [A], and therefore, on the basis of that reasonable doubt, the charge against [J.N.] is dismissed.

[21] There was no error by the trial judge in relying on B's evidence regarding J.N.'s age, to satisfy J.N.'s evidentiary burden, and establish a reasonable doubt.

As to the second submission relating to the failure of the trial court to place reliance on a date of birth for JN, as recorded on the charging information in the court file, the appeal court concluded:

> [34] In the context of this matter, there was no error by the trial judge in not viewing and relying on the court file that included, on the Information, J.N.'s date of birth. The context is especially important. The consent defence was in play because of evidence indicating an age gap of only four or five years. The Crown had an onus to counter that evidence and prove that the age gap was five years or more. It failed to do so. An indirect and vague reference to an Information that might be in the file - made after the close of the Crown's case and after the defence chose to call no evidence - without production of that Information, and without a direct request for the trial judge to inspect the Information, does not discharge the Crown's onus.
>
> [35] I add that it would be inappropriate for the Crown to rely on anything in the Information as evidence to prove its case, except with consent of the accused. The Information contains the allegations against an accused, and does not serve as evidence to prove the Crown's case.
>
> **CONCLUSION**
>
> [36] The trial judge did not err in admitting and relying on the evidence of B regarding J.N.'s age and the age gap between J.N. and A.

Commentary

The NLCA's holding that a witness may express an opinion as to another person's age follows well established authority: *R. v. Graat,* [1982] S.C.J. No. 102, [1982] 2 S.C.R. 819 (lay opinion admissible as to another's "apparent age"); *R. v. Spera*, [1915] O.J No. 119 (C. A.), at paras. 7-12; *R. v. Cox*, [1989] 1 Q.B. 179, at p. 180.

Apart from the jurisprudence reviewed by the appeal court respecting a trial court accessing the court file for additional evidence, other cases too support permissive authority to do so for limited purposes only: i.e., *R. v. Tysowski*, [2008] S.J. No. 408, 2008 SKCA 88, at paras. 3, 16 - 19; *Wong v Giannacopuolos*, [2011] A.J. No. 1115, 2011 ABCA 277, at para. 6; *R. v. Hunt,* [1986] O.J. No.1210 (C.A.), at para. 10.

In the *JN* case, the court rightly concluded that information in a court file, in the absence of consent of the parties, does not constitute admissible evidence respecting prosecutorial discharge of proof. What is the provenance of the date of birth recorded on the Form 2 information? Is there a hearsay issue? Where the information originated from the accused was the statement voluntary or impermissibly conscripted?

In a case earlier this year, *R. v. K.S.*, [2019] O.J. No. 3050, 2019 ONCA 474, at paras. 7- 11, the appeal court agreed that the trial judge was entitled to form an opinion as to the complainant's age at the date of the alleged offence (sexual interference with under-age-14 female) from observation of photos of the youth admitted into evidence.

In neither the *JN* nor the *KS* decisions was reference made to ss. 658 (3) to (5) of the *Criminal Code,* providing fact-finding assistance respecting age determination*:*

> Proof of age
>
> (3) In any proceedings to which this Act applies,
>
> (a) a birth or baptismal certificate or a copy of such a certificate purporting to be certified under the hand of the person in whose custody the certificate is held is evidence of the age of that person; and

(b) an entry or record of an incorporated society or its officers who have had the control or care of a child or young person at or about the time the child or young person was brought to Canada is evidence of the age of the child or young person if the entry or record was made before the time when the offence is alleged to have been committed.

Other evidence

(4) In the absence of any certificate, copy, entry or record mentioned in subsection (3), or in corroboration of any such certificate, copy, entry or record, **a jury, judge**, justice or provincial court judge, as the case may be, **may receive and act on any other information relating to age that they consider reliable**.

Inference from appearance

(5) **In the absence of other evidence**, or by way of corroboration of other evidence, **a jury, judge,** justice or provincial court judge, as the case may be, **may infer the age of a child or young person from his or her appearance.**

(emphasis added)

Fennell v The Queen

2019 HCA 37HWCE/2019-071

High Court of Australia

Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ

November 6, 2019

Circumstantial evidence — Strands of evidence in prosecution case — Appropriate evaluation of strength of individual pieces of circumstantial evidence said to support inference of guilt Identification — Alleged murder weapon — Police failure to conduct chattel lineup as identification procedure .

After a jury trial, Steven Fennell was found guilty of murdering 85-year-old Liselotte Watson in her residence in the small community of Moreton Bay, population 2500. The prosecution theory was that Fennell robbed the victim and murdered her to avoid detection.

The victim lived alone. For one to two years prior to the victim's death, Fennell assisted her almost every day with shopping, banking, and yard maintenance. The victim was generally known to keep large sums of money in her home.

When Watson did not answer a phone call or her door when he knocked, Fennell contacted the police. The residence had apparently been ransacked. The victim had been killed violently with a blunt weapon with injuries suggestive of her assailant using a hammer. Only $290 was discovered in the house.

Within days, the police located a shaving bag in the mud of nearby mangroves. The bag contained recent banking documents relating to the deceased. About 15 metres away in the mangrove waters, police divers discovered additional property of the victim, as well as an extremely rusty claw hammer which had no fingerprints or DNA.

When a picture of the hammer flashed up on their TV screen in a news story, two residents of Moreton Bay, Mr. and Mrs. Matheson, purported to identify the discovered hammer as the one Mr. Matheson loaned to Fennell a year or two earlier.

DNA investigation did not reveal Fennell's DNA on the shaving kit. The Crown case against the accused relied upon opportunity, motive, and a miscellany of other matters said to be inculpatory.

Following an unsuccessful intermediate appeal to the Queensland Court of Appeal, Fennell's appeal to Australia's highest court was allowed on the basis that the guilty verdict was unreasonable. An acquittal was entered.

In an introductory paragraph, the HCA observed:

> The Crown case concerning opportunity and motive was extremely weak. Mr Fennell's opportunity was, at best, a very small window of time which required an assumption about the time of the murder that was contradicted by other evidence. Even with that opportunity, the evidence of opportunity and motive did not put Mr Fennell in a relevantly different position from any of the numerous other people who shared the common knowledge that Mrs Watson kept large sums of money in her house. As the Crown properly accepted in this appeal, once that conclusion is reached the evidence from Mr and Mrs Matheson linking Mr Fennell to the hammer became essential evidence that a reasonable jury would have been required to accept before convicting Mr Fennell. To use Wigmore's metaphor, the evidence from Mr and Mrs Matheson became by far the most significant of the "strands in a cable" supporting the conviction. But the evidence of Mr and Mrs Matheson should have had so little weight that, at best, it was barely admissible.
>
> (at para. 5)

The court then proceeded, under the title "The Crown case and its weaknesses" to evaluate the circumstantial evidence strands of the prosecution case.

Following evaluation of the opportunity evidence, the court concluded:

> At best, the evidence of opportunity showed only that Mr Fennell had briefly visited Mrs Watson's house on Monday 12 November 2012. For two reasons, that evidence of opportunity was, at best, a very weak strand in the Crown's circumstantial case against Mr Fennell. First, Mr Fennell's presence in Mrs Watson's house was entirely unremarkable since he visited her up to twice daily. Secondly, since the Crown case was that Mrs Watson was killed during the daytime on 12 November 2012, the same opportunity existed for any person who could have attended Mrs Watson's house on that day. Any opportunity that Mr Fennell had was a factor that barely set him apart from other members of the population of Macleay Island.
>
> (at para. 42)

The court's analysis of the motive evidence (paras. 43 - 54) led to this finding:

> Ultimately, the evidence led by the Crown in relation to motive placed Mr Fennell in a position that was little different from any of the others on Macleay Island who had the common knowledge that Mrs Watson kept significant cash in her house and who might have had the opportunity to steal from her, but about whom there was never any suggestion of suspicion.
>
> (at para. 55)

The appeal court quickly dispatched any evidentiary significance to certain "miscellany" matters (paras. 57 - 71), before turning to the hammer evidence (paras. 72 - 81), observing that:

> (1) the hammer removed from the mangrove waters was extremely rusty - no evidence was called as to the extent that the salt water would account for the item's condition (para. 73)
>
> (2) while the Mathesons described certain peculiarities of the hammer, they did so 12 days after the newscast, in an interview during which they were only shown the discovered hammer:
>
> > 80. Thirdly, the identification of the hammer and its particular defects by Mr and Mrs Matheson occurred in a context that was prone to cause errors in memory. They did not identify the hammer for 12 days after the photo flashed up in the news report and potentially years after they had last seen it. They were aware of the context in which the identification was taking place, namely the murder of Mrs Watson. They identified the hammer by only being shown the single hammer by the police. In particular, neither Mr Matheson nor Mrs Matheson was shown any other hammers, including any of

the five hammers that were located at Mr Fennell's house.

(Paras. 77, 80)

(3) the witnesses' evidence was "glaringly improbable" given inconsistencies between their respective descriptions, the delay in time since they had last seen the hammer, the rusty condition of the item: ("An accurate identification in those circumstances would have required an astonishing visual memory"), the hammer was of the type "mass-produced and generic", the contrast between Mr. Matheson's purported recall of "the most minuscule defects" in the hammer while being unable to recollect other relevant facts such as the brand of the hammer (paras. 78 - 79).

The Court then concluded:

> ...the court may take into account the realities of human experience, including the fallibility and plasticity of memory especially as time passes, the possibility of contamination of recollection, and the influence of internal biases on memory. The court can also take into account the well-known scientific research that has revealed the difficulties and inaccuracies involved in assessing credibility and reliability. And especially is that so in a case like this where the jury has been subjected to the seductive effects of a species of identification evidence that has in the past led to miscarriages of justice. For the reasons we have given, and without impugning the honesty of Mr and Mrs Matheson in any way, their evidence was glaringly improbable.
>
> (at para.81)
>
> (footnotes omitted)

Commentary

A piece of circumstantial evidence stands to be admitted if, as a matter of logic and human experience, it is found relevant to a material fact in issue. Has the proponent of the evidence established a factual nexus in the sense that the evidence makes the proposition for which it is advanced more likely than the proposition would appear in the absence of the evidence? This is a low threshold, a modest standard of probative force, dependent on context including the nature of the case and the specific issue/element as well as the positions of the parties considering the entirety of the evidentiary record.

In applying the burden of proof upon the Crown, there is of course a general prohibition against piecemeal consideration of items of admitted evidence - individual items of evidence need not be proved beyond a reasonable doubt. The relevance of a piece of circumstantial evidence, and the weight to be assigned to it in advancing a suggested inference, requires consideration of potentially mutually strengthening facts as described in *R. v. Morin*, [1988] S.CJ. No. 80, [1988] 2 S.C.R. 345:

> .....It is not possible therefore to require the jury to find facts proved beyond a reasonable doubt without identifying what it is that they prove beyond a reasonable doubt. Since the same fact may give rise to different inferences tending to establish guilt or innocence, the jury might discard such facts on the basis that there is doubt as to what they prove.
>
> The concern which proponents of the two-stage process express is, that facts which are doubtful will be used to establish guilt. The answer to this concern is that a chain is only as strong as its weakest link. If facts which are essential to a finding of guilt are still doubtful notwithstanding the support of other facts, this will produce a doubt in the mind of the jury that guilt has been proved beyond a reasonable doubt.
>
> (at paras. 38 to 39)

While the isolation/piecemeal approach must be avoided, that caution should not be translated as a freeze against a trier forming a conclusion about the contributory strength of particular pieces of circumstantial evidence. One admitted, a trier of fact is entitled to determine the value or weight to be afforded an individual item of evidence within the context of its contribution along with all other relevant evidence: see R. v. White, [2011] S.C.J. No. 13, [2011]1 S.C.R. 433:

> Once evidence is found to be relevant, it is generally admissible and the jury is left to decide how much

> weight to give a particular item of evidence. Similarly, once evidence is determined to be relevant with respect to a particular live issue, the jury should normally be free to weigh the evidence in drawing conclusions about that live issue. This is subject to specific exclusionary rules and the judge's discretion to exclude evidence that is more prejudicial than probative.
>
> (at para. 54)

In effect, in *Fennell,* the appeal court concluded that it was unreasonable for jurors to have concluded that three weak strands of circumstantial evidence, added together, established guilt of the accused beyond a reasonable doubt.

Turning to the subject of witness identification of a tangible inanimate object, presented on its own to the witness in a police interview, or indeed for the first time when they are in the witness box, the High Court of Australia observed that such a singleton showup may be deserving of significantly diminished weight. Such would be the case in circumstances of police failure to conduct a physical or photo lineup procedure to identify a suspect. Little has been said in our jurisprudence respecting chattel identification processes, apart from Binnie J.'s observation in *R. v. Clayton and Farmer*, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725, at para. 122, that individuals may be more error-prone identifying an object, such as a vehicle, than a person. See also *R. v. Purdy*, [2008] B.C.J. No. 401, 2008 BCCA 95, at paras. 30 - 35 (leave to appeal refused [2011] S.C.C.A. No. 431)). For an informed discussion of the American position on this topic, see *Commonwealth v Thomas*, Mass. Sup. Jud. Ct., Feb. 13, 2017 (No. SJC - 12055).

R. v. Neilson

HWCE/2019-072

Alberta Court of Appeal

B.K. O'Ferrall, M.G. Crighten and J. Strekaf JJ.A.

October 23, 2019

[2019] A.J. No. 1407

Full Text: 2019 ABCA 403

"Rule" in Browne v. Dunn — Procedure and appropriate considerations .

After a judge-alone trial, Neilson was found guilty of attempted murder and related weapons charges.

The complainant testified that he was unarmed and that the accused opened the passenger door of the complainant's car, leaned in, aimed a handgun towards his temple and fired. Neilson testified that as he was entering the passenger seat of the complainant's vehicle, the complainant pulled a gun on him. Neilson testified that in self-defence, in fear for his life, while flinging himself backwards with his legs still in the vehicle, he shot the complainant with a gun which was still in the pocket of his hoodie.

In reasons for judgment, the trial judge noted the medical evidence indicating that the fired bullet entered the left floor of the complainant's mouth, suggesting it was "not from above", consistent with the complainant's version of events.

On appeal, Neilson submitted that the trial judge erred respecting the *Browne v Dunn* rule of fairness of general application. The appeal court summarized the appellant's argument:

> [32] The appellant also argues the confrontation principle arising out of the rule in *Browne v Dunn* was breached because the Crown didn't put to the appellant in cross-examination the Crown's theory that the

medical evidence indicated a bullet trajectory inconsistent with the appellant's evidence. The issue arose out of questions posed by the trial judge, following the appellant's direct and cross-examination, to clarify how the appellant exited the complainant's car. The appellant explained that he "dove kind of out of the car and twisted in the air ... one leg was still out ... I dove out and twisted it kind of like on the one shoulder...I definitely shot him before I hit the ground."

[33] The appellant refers to a statement made by Crown counsel in the course of argument that the medical evidence was consistent with the complainant's version and inconsistent with the appellant's version of the shooting:

> Now, you saw [the appellant] show us, physically, what he was doing. And I purposely didn't put, for the record, what we saw physically, because I didn't want to alert [the appellant] to one of the major faults in his evidence. And that is, he showed us twisting and rolling on to his right shoulder and right butt area. Given that, and given the physicist, you don't have to be a doctor, you don't have to be a physicist to figure this out. It would have been impossible for the shooting to happen as the way [the appellant] indicates. On any analysis of this evidence, he would be shooting at the victim from a lower level and in an upward direction. Completely inconsistent with the medical [evidence] that stated injuries described by both [the complainant] and the medical professionals. That couldn't happen.

The appeal court concluded that no reversible error was committed:

[34] As mentioned above, the rule from *Browne v Dunn* prohibits bringing contradictory evidence to impute the credibility of a witness unless you give the witness a chance to respond to that contradictory evidence under cross- examination.

[35] As argued by the appellant, "the rule from *Browne v Dunn* applies not only to contradictory evidence, but to closing argument as well" (Sydney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada,* 5th ed (Toronto: LexisNexis, 2018] at 1253). The appellant argues that the rule should apply to prevent a party from impugning the credibility of a witness in closing argument without giving the witness an opportunity to respond.

[36] This is not a case of calling contradictory evidence to challenge the credibility of the accused, as the medical reports were admitted by consent for the truth of their contents. The central question is whether failing to cross-examine the appellant on the fact that his testimony seemed to be inconsistent with the medical report should be considered to fall within the ambit of the rule from *Browne v Dunn*. It must be noted that the statement made by the Crown was not in reference to electing not to cross-examine, but rather electing not to put on the record the demonstration which the appellant gave to the court during questioning by the trial judge.

[37] Choosing not to cross-examine a witness, but instead asking the trier of fact to disbelieve a witness based on other evidence adduced in the trial, is a valid exercise and does not invoke the rule from *Browne v Dunn*. It is illogical for a trier of fact to be expected to accept evidence which they disbelieve just because it has not been subject to cross-examination: *R. v. Mete* (1971), [1973] 3 WWR 709 at 712, 1971 CanLII 1422 (BCCA).

[38] This was not a case where Crown counsel "ambushed" the appellant by impeaching his credibility in closing argument. As stated in *R. v. Quansah*, 2015 ONCA 237 (CanLII) at para 82, 125 OR (3d) 81:

> [i]n some cases, it may be apparent from the tenor of counsel's cross-examination of a witness that the cross- examining party does not accept the witness's version of events. Where the confrontation is general, known to the witness and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.

[39] The central theory of the defence was that the appellant had acted in self-defence. The central theory of the Crown was that the appellant was lying, and intended to murder the complainant. During examination-in-chief, the complainant was questioned on his assertion that the bullet went downwards, through his mouth, into his neck. This was the basis of the Crown's theory. The Crown had also

questioned the complainant about where the appellant was standing in relation to him at this point. The medical report, which was admitted by consent for the truth of its contents, was consistent with that testimony.

[40] From the standpoint of the Crown, the whole trial was about impeaching the appellant's credibility. The appellant cannot have been surprised when the Crown took the opportunity to do so in its closing argument.

[41] The rule from *Browne v Dunn* cannot be taken to mean that every element of the Crown's theory given during examination-in-chief must be put to an accused for an answer. As stated in Quansah at paragraph 89, "the rule in *Browne v Dunn* is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to the evidentiary abyss." Rather, the rule "requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach": *R. v. Lyttle*, 2004 SCC 5 (CanLII) at para 64, [2004] 1 SCR 193.

[42] Additionally, in this case defence counsel was afforded the opportunity to respond to the fact that the medical evidence appeared to support the complainant's testimony, and undermine the appellant's testimony. Defence counsel took advantage of this opportunity in their closing statements. Moreover, no complaint was made by defence counsel at trial that the rule in *Browne v Dunn* had been breached.

[43] This ground of appeal is therefore dismissed.

Commentary

In the past year, grounds of appeal based on the rule in *Browne v Dunn* have increased, such that a review of the governing principles is warranted:

(1) the rule is inapplicable to a party's own witness

* the rule "does not apply in relation to a party's own witness" and "does not compel a party to apply to cross-examine its own witness where that witness has testified to her recollection inconsistent with an earlier statement": R. v. McDermott, [2019] A.J. No. 1386, 2019 ABCA 374, at para. 11

(2) the history of the rule in Browne v Dunn

* on only one occasion in about four decades has the Supreme Court of Canada cited the case of Browne v Dunn (1893), 6 R. 67 (H.L.) - in R. v. Lyttle, [2004] S.C.J. No. 8., [2004] 1 S.C.R. 193, at paras. 64 - 65 - in Lyttle, the court confirmed the authority of the case's approach "designed to provide fairness to witnesses and parties" through a cross-examiner's questions giving notice to the witness of subject matter upon which they subsequently intend to impeach that witness, quoting Lord Herschell:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess have may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is

telling.

(at para. 64)

* subsequent jurisprudence has continued to characterize the rule's rationale in similar terms:

- *R. v. Quansah*, [2015] O.J. No. 1774, 2015 ONCA 237, at para. 77 (leave to appeal refused [2016] S.C.C.A. No. 203):

[77] The rule is rooted in the following considerations of fairness:

i. Fairness to the witness whose credibility is attacked:

The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter*, 2013 ONCA 744 (CanLII), 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70-71.

ii. Fairness to the party whose witness is impeached:

The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

...

- *McDonagh v Sunday Newspapers Ltd.,* [2015] IECA, at paras. 44-45:

44. The application of *Browne v. Dunn* in this jurisdiction was comprehensively examined by Baker J. in her judgment in *Director of Public Prosecutions v. Burke* [2014] IEHC 483. In that case a prosecution witness gave evidence which was exculpatory of the accused and the District Court stated a case for the opinion of the High Court as to whether the court was bound to acquit the accused based on the fact that an important prosecution witness was not cross-examined.

45. Baker J. rejected the suggestion that there was some ex ante rule which compelled the court to treat unchallenged evidence as requiring a particular result. She did, however, lay down important guidelines on this issue at para. 44:

" (a) In closing submissions or argument a party may not impeach the credibility of a witness if that witness's evidence has not been tested in cross-examination;

(b) *Ipso facto* a person who does not cross-examine evidence is faced with the prospect that the evidence is heard by the trial judge or the jury and is untested.

(c) There is no requirement that evidence be cross- examined, but by not cross-examining evidence the evidence goes to the fact finder as untested and un-contradicted evidence.

(d) Untested and un-contradicted evidence carries greater weight than tested contradictory evidence.

(e) It is not the function of any rule of law to direct the court to accept evidence merely on account of the fact that it has not been tested. The court must hear all of the evidence before it and is entitled to weigh the evidence, including unchallenged evidence, against the evidence as a whole adduced at the trial.

(f) A trial judge or a jury is not compelled as a matter of law to accept evidence because it is not challenged. Unchallenged evidence is part of the evidence at trial and the fact that it is unchallenged gives it somewhat greater weight, but does not direct a particular result."

* while the "later impeach" aspect includes not only an intent to subsequently lead contradictory evidence but also potentially to raise an argument in closing submissions challenging a witness' credibility on un-cross-examined material (Nemchin v Green, [2019] O.J. No. 4004, 2019 ONCA 634, at para. 27; R. v. Podolski, [2018] B.C.J. No. 847, 2018 BCCA 96, at paras. 157 - 162 (leave to appeal refused [2018] S.C.C.A. No. 322)), simply "pointing out the flaws in an accused's evidence for the purpose of aiding the trial judge in his credibility assessment of any witness does not violate the rule in Brown[e] v Dunn)": R. v. A.D.G., [2018] A.J. No. 1012, 2018 ABCA 277, at para. 31

(3) *is compliance with Browne v Dunn a "rule"?*

* various authorities describe application of the Browne v Dunn principle as essentially a "rule": Curley v Taffe, [2019] O.J. No. 2372, 2019 ONCA 368, at para. 32 ("an obligation"); R. v. Cubillan, [2018] O.J. No. 5224, 2018 ONCA 811, at para. 19 ("in order for the appellant to testify about what transpired... his lawyer was required to comply with the rule in Browne v Dunn"); Podolski, at para. 145 ("the rule... requires a party...")

* other jurisprudence presents a more flexible stance: Lyttle, at para. 65 ("the rule... is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case"); R. v. Chandaroo, [2018] Q.J. No. 8321, 2018 QCCA 1429, at para. 13 ("'The principle in Browne v Dunn is typically, but misleadingly, described as a rule. It is misleading because the principle is not absolute..."); R. v. Dyck, [2019] M.J. No. 211, 2019 MBCA 81, at para. 42 (" courts have recognized that the rule should not be applied too stringently in the criminal context")

* properly understood, the Browne v Dunn authority is more akin to a guide or principle of procedure with evidentiary implications

(3) alerting the self-represented accused

* ordinarily, a trial judge should explain the Browne v Dunn principle to a self-represented accused as part of informing them of significant procedural rules: R. v. P.C.H., 2019 N.S.J. No. 325, 2019 NSCA 63, at para. 26; R. v. Forrester, [2019] O.J. No. 1637, 2019 ONCA 255, at paras. 30, 36

(5) the degree of alleged discrepancy

* not every distinction between a witness' evidence and subsequently-led contradictory evidence warrants Browne v Dunn consideration:

> Trial judges must assess where the situation before them is to be placed on the spectrum. If it is more towards the major discrepancy/impeachment end, then trial fairness suggests that the evidence should be put directly to the witness in cross- examination. A witness should not be called a liar without being given an opportunity to explain the discrepancy... If the situation presents as more toward the minor discrepancy end of the spectrum, then the... evidence can be put in as substantive evidence without first being put to the witness for impeachment purposes.
>
> (*Nemchin,* at paras. 31-32)
>
> ...

The rule is only triggered when the potential contradiction relates to a matter of substance.

(*R. v. Willis*, [2019] N.S.J. No. 331,

2019 NSCA 64, at para. 27)

...

Compliance with the rule in *Browne v Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party to be put to that witness in cross-examination. The cross-examination should confront the witness with matters of *substance*...

(*Quansah*, at para. 81,

emphasis of original)

...

... it [the rule] does not require the cross-examiner to slog through the witness's evidence in-chief putting him on notice of every detail the defence does not accept.

(*R. v. Verney*, [1993] O.J. No. 2632, at para. 28, cited with approval in *R. v. Dexter*, [2013] O.J. No. 5686, 2013 ONCA 744, at para. 18)

...

... The rule in *Browne v Dunn* does not require counsel to engage in useless cross-examination...

(Podolski, at para. 170)

See also *R. v. Boyer*, [2018] S.J. No. 22, 2018 SKCA 6, at para. 39; *Dyck*, at paras. 42, 47

(6) *"notice" issues*

* if the prosecution believes the rule has been violated, it is expected to give notice through timely objection: Quansah, at para. 124; R. v. Manger, [2018] N.S.J. No. 193, 2018 NSCA 41, at para. 47; Dexter, at para. 34

* the trial judge should not "unilaterally" apply a Browne v Dunn remedy of adverse consideration of the credibility of a witness' evidence without providing an opportunity for the relevant party to make submissions: Dowd, at paras. 30 - 31, 33 - 34; R. v. Abdulle, [2016] A.J. No. 14, 2016 ABCA 5, at paras. 15 - 17, 19

* it is an inappropriate invitation to breach solicitor-client privilege for the court to inquire of defence counsel the reason why a complainant was not cross-examined on particular subject matter: R. v. Olusaga, [2019] O.J. No. 3532, 2019 ONCA 565, at paras. 8 - 16

(7) *remedy for breach*

* if the trial judge is satisfied that there has been a breach of Browne v Dunn, there exists "a broad discretion to determine an appropriate remedy": Willis, at para. 28; Curley, at para. 31; Dowd, at para. 28; R. v. Schoer, [2019] O.J. No. 818, 2019 ONCA 105, at para. 52 ("significant deference must be shown to that exercise of discretion"); R. v. Mohamad, [2018] O.J. No. 6302, 2018 ONCA 966, at para. 184 (appln for leave to appeal filed [2019] S.C.C.A. No. 162) ("substantial deference" owed "to assessments made by trial judges... especially with respect to the impact of any breach and the choice of remedy")

* a fair and proportionate remedy may include recall of the relevant witness (Willis, at para. 28; Curley, at para. 31; Dowd, at para. 28; R. v. Aujla, [2017] A.J. No. 1202, 2017 ABCA 379, at para. 10), the calling of relevant reply evidence (Shears v Shears, [2019] N.J. No. 214, 2019 NLCA 40, at para. 26), a trial judge potentially discounting the weight to be afforded the witness' evidence on the relevant point (s) (Curley, at para. 31; Dowd, at paras. 31, 35; Forrester, at para. 34; Schoer, at para. 54; R. v. Hardy, [2019] A.J. No. 526, 2019 ABCA 160, at para. 41; R. v. P.W.M., [2018] P.E.I.J. No. 56, 2018 PECA 24, at para. 40), perhaps to the point of no weight (R. v. D.N. [2018] B.C.J. No. 63, 2018 BCCA 18, at para. 63), or a mistrial in rare instances of significantly impaired trial fairness, or, more frequently, instructing a jury that it may afford less weight to the witness' evidence

* in cases where the failure to cross-examine on a particular point of evidence is of central significance in a jury case, in the absence of a specimen direction in the Canadian Judicial Council Model Jury Instructions, counsel might consider assisting the trial judge in crafting an instruction, tailored to the specifics of the case, having regard to the observations in Podolski:

> [187] ... in assessing evidence when making findings of fact, trial judges routinely refer to and rely on the evidence of a witness that has not been challenged on a particular point. Implicit in this practice is the assumption that unchallenged evidence may be more reliable and may carry

more weight. In our view, once the rule in *Browne v. Dunn* is engaged, it is permissible for the trier of fact to take the absence of cross-examination into account in assessing the weight to be given to that evidence.

[188]....*Browne v. Dunn* instructions in other cases have not been limited to what might be thought of as the "classic" *Browne v. Dunn* instruction to give less weight to a contradictory argument, theory, or piece of evidence that was advanced without being put to a witness. The editors' annotation in *CRIMJI* acknowledges that the failure of defence counsel to cross-examine a Crown witness can affect both the weight to be given to the contradictory defence evidence and the weight to be given to the Crown witness' unchallenged evidence. In *R. v. McNeill* (2000), 2000 CanLII 4897 (ON CA), 144 C.C.C. (3d) 551 (Ont. C.A.), Justice Moldaver suggested the following language:

... If [an instruction] is warranted, the jury should be told that in assessing the weight to be given to the uncontradicted evidence, they may properly take into account the fact that the opposing witness was not questioned about it. The jury should also be told that they may take this into account in assessing the credibility of the opposing witness.

[Emphasis added by BCCA]

[189] A similar approach was adopted in *Paris*. That case concerned the effect of a breach of the rule on the credibility of an accused who testified on a matter not put to a Crown witness in cross-examination. Justice Doherty for the Court said:

[22] Where a witness is not cross-examined on matters which are of significance to the facts in issue, and the opposing party then leads evidence which contradicts that witness on those issues, the trier of fact may take the failure to cross-examine into consideration in assessing the credibility of that witness *and* the contradictory evidence offered by the opposing party.

[Emphasis added by BCCA]

...

[191] The language used by the judge in para. 92 of the charge suggested the absence of cross-examination on a particular point might cause them to be "more inclined to accept the testimony of the witness on that point". When read in the context of the charge as a whole, and in particular paras. 398-402 (above at para. 154), we find no basis for interfering with the judge's exercise of his discretion to remedy the breach of the rule as he did. While other cases have used different language, there is nothing inherently wrong with the words used by the judge in this case. The thrust of the instructions reflects the well-settled view that the absence of cross-examination on a significant point may result in more weight being given to that evidence by the trier of fact - i.e., it may cause the trier of fact to be more likely to accept it even when the credibility and reliability of the witness has been challenged in a general way.

(8) appeal considerations

* incorrect identification of Browne v Dunn being engaged is an error of law (Willis, at para. 38; R. v. Pilkington, [2019] B.C.J. No. 2012, 2019 BCCA 374, at para. 15; Manger, at para. 47), as is a denial of procedural fairness relating to the rule: Dowd, at para. 31.

R. v. Rai

HWCE/2019-073

British Columbia Court of Appeal

R.J. Bauman C.J.B.C. and M.E. Saunders and S.A. Griffin JJ.A.

November 1, 2019

[2019] B.C.J. No. 2055

Full Text: 2019 BCCA 377

Circumstantial evidence — Alternate inferences inconsistent with guilt — Burden of proof .

In a judge-alone trial, Rai was convicted of three counts of trafficking various prohibited drugs.

The prosecution case against Rai was entirely circumstantial. An aspect of police surveillance evidence revealed Rai receiving a bundle of money from an alleged co-conspirator and lieutenant in the drug distribution scheme, Randhawa. Police seizures at Randhawa's residence included keys for a Harley-Davidson motorcycle parked there, and an invoice from Harley-Davidson Financial Services addressed to Rai.

Rai's daughter testified at trial, identifying a Harley-Davidson invoice in her father's name. She also testified to receiving monies from Randhawa which were used to make payments to Harley- Davidson. She informed the court that when she declined to take a large bundle of cash from Randhawa to use toward the motorcycle, she witnessed Randhawa give the money to her father.

The Crown's position respecting cash found in Rai's room was that it related to drug trafficking profits. It was the defendant's contention that the motorcycle was purchased on a loan basis by Rai for Randhawa.

In reasons for judgment the trial judge stated:

> Ms. Rai's evidence confirms that Mr. Rai's master bedroom was his primary abode. According to her, Mr. Randhawa handed Mr. Rai a bundle of cash. It is clear that Mr. Rai bought a motorcycle for Mr. Randhawa. It may have been a scheme to avoid showing as an asset of Mr. Randhawa's bankruptcy, **but it is not in my view proof of a loan**.
>
> ...
>
> If anything, it would appear that Ms. Rai's evidence confirms Mr. Furac's evidence that money goes up, i.e., from Mr. Randhawa to Mr. Rai. There is no evidence as to how much money was in the rubber band bundle given to Mr. Rai shortly before the execution of the search warrant. But given the marked money from the two previous purchases in May by the agent, it clearly demonstrates Mr. Randhawa, the trusty lieutenant was passing on the cash sales to his boss, and that is why the money from the two sales are found in Mr. Rai's possession.
>
> ...
>
> The evidence as to the motorcycle would seem consistent with boss awarding his trusty lieutenant a reward in the form of the Harley Davidson motorcycle.
>
> ...
>
> In the overall circumstances before me, **it is in my view much more likely** it [the motorcycle] is a reward by Mr. Rai to his trusty lieutenant for doing a good job.
>
> The defence argued there was no *actus reus*, i.e., a lack of proof of actual assistance to the others charged in the drug dealing. To the extent that Mr. Rai did not make a direct sale to the agent that is true. However, I am satisfied Mr. Rai participated in the price being set for the drug purchases of April 12, 2012, and on the evening of May 16, 2012. As well he is in receipt of a large amount of money that is only explicable as being from drug sales and two recent drug sales are evidenced in the bundles of money found in his bedroom.
>
> (emphasis added)

On appeal, Rai submitted that the trial judge erred in two ways in his approach to drawing inferences:

(1) by engaging in speculation

(2) by placing the burden on the defence to prove alternative inferences, effectively reversing the burden of proof.

The appeal court concluded that reversible error necessitated a new trial:

[79] As we have related, Mr. Rai advanced, largely through the evidence of his daughter, the "motorcycle loan" explanation for the monies (including the marked transaction money) found in his bedroom. The judge properly cited *Villaroman* as "[t]he primary direction for assessing a circumstantial case" (at para. 244) and he specifically reproduced this passage from the headnote of the case:

> The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the proof beyond the reasonable doubt standard. A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. When assessing circumstantial evidence, the trier of fact should consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. The Crown thus may need to negative these reasonable possibilities, but certainly does not need to disprove every possible conjecture which might be consistent with innocence. Other plausible theories or other reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[80] However, in specifically dealing with the alternate inference proffered by Mr. Rai, the judge appears to test it on the basis of a balance of probabilities...

...

[82] The question is not whether the "motorcycle loan" has been "proven" and is accordingly "consistent" with Mr. Rai's alternative inference. The question is not whether the "motorcycle loan" alternative is "more likely" than the "trusty lieutenant's reward" scenario accepted by the trial judge. Rather, the question is whether the existence of a "motorcycle loan" is a "reasonable inference" that can be drawn from the evidence, as an explanation for why Mr. Rai had so much cash on hand, that raises a reasonable doubt as to guilt.

[83] The judge did not address the question of whether this evidence of a motorcycle loan supported a "reasonable inference" leading to a conclusion other than guilt. Was this a "plausible theory", a "reasonable possibility"? Did this alternative inference drawn from the whole of the evidence raise a reasonable doubt as to Mr. Rai's guilt? The judge's treatment of this issue in our view, demonstrates reversible error.

Commentary

The polyvocality of circumstantial evidence is well-recognized in the sense that the evidence is capable of concurrently speaking with different and competing voices pointing both toward and away from guilt. A trier of fact must consider "other plausible theories" and "other reasonable probabilities" inconsistent with guilt where those theories are "based on logic and experience applied to the evidence or absence of evidence, not speculation": *R. v. S.B.,* [2018] O. J. No. 5186, 2018 ONCA 807, at paras. 124, 132.

It is, of course, " not incumbent on [an accused] to explain how... or to prove alternative explanations": *R. v. R.A.,* [2017] O.J. No. 4772, 2017 ONCA 714, at para. 61 (affd [2018] S.C.J. No. 13, [2018] S.C.R. 307). In the *Rai* decision, the appeal court appears to have characterized the trial judge's phrasing, "not... proof of a loan", to found error on the basis of unjustified reversal of the burden of proof.

That said, recognizing that circumstantial evidence may give rise to more than one *reasonable* inference (*R. v. Hansen*, [2018] O.J. No. 286, 2018 ONCA 46, at para. 38; *R. v. Kines* [2012] M.J. No. 355, 2012 MBCA

97, at para. 8), without rendering a verdict unreasonable for doing so, it is for the trier of fact to choose between such reasonable inferences: *R. v. Figueroa*, [2008] O.J. No. 517, 2008 ONCA 106, at para. 35; *Hansen*, at para. 38.

As a general proposition, a trial judge's reasons "are not a self- instruction on the law" and "are not intended to demonstrate to an appellate court that the trial judge knows the law": *R. v. Ludwig*, [2018] O.J. No. 5796, 2018 ONCA 885, at paras. 21, 25. In a more forgiving appellate judgment than in *Rai*, a trial judge's reference to the "most logical explanation" and the "most reasonable inference" was characterized as a justifiable expression of evaluation of competing inferences: *R. v. Steele*, [2007] S.C.J. No. 36, [2007] 3 S.C.R. 3, at paras. 45 - 46.

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