2001 CarswellOnt 4870
Ontario Court of Justice

R. v. C. (L.A.)

2001 CarswellOnt 4870

Her Majesty the Queen v. L.A.C.

Bassel J.

Heard: November 26, 2001
Judgment: November 26, 2001
Docket: None given

Counsel: *Ms Jennifer Halajian*, for Crown
Michael E. Freeman, for Accused

Subject: Criminal; Evidence; Constitutional

Headnote

Criminal law --- Search and seizure — Search without warrant — As incident of arrest — General

Accused was living with father who was separated from mother — Mother reported break in and police officer went to father's apartment to investigate — Father allowed officers to search accused's bedroom and they discovered stolen items — Father also mentioned diary entries relating to killing of dog — Accused arrived as officers were leaving and they arrested her for break in — Accused had diary in purse that she intended to bring to police station — Officers discovered diary and more stolen items in purse — Accused was charged with killing and causing unnecessary pain to dog — Voir dire to determine admissibility of evidence — Evidence admissible — Accused fully understood rights and waived them when arrested for break in — Search was incidental to arrest and involved no scheme to obtain purse so contents admissible — Alternatively, evidence was non-conscriptive and would have been discovered anyway so would not have been excluded.

Criminal law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Right to counsel — Right to be informed of right to retain and instruct counsel

Accused was living with father who was separated from mother — Mother reported break in and police officers went to father's apartment to investigate — Father allowed officers to search accused's bedroom and they discovered stolen items — Father also mentioned diary entries relating to killing of dog — Accused arrived as officers were leaving and they arrested her for break in — Officers searched her purse and discovered diary — Accused fully understood and waived rights with respect to break in — One officer interviewed accused about break in and inquired about killing dog — Accused made incriminating statements about killing dog — Accused was charged with killing dog and causing unnecessary pain to dog — Voir dire to determine admissibility of statements — Statements inadmissible — Accused entitled to be re-cautioned when focus of investigation changed especially since accused was under 18 and events were not temporally connected — Evidence was conscriptive and would not otherwise have been obtained so excluded.

Table of Authorities

Cases considered by *J. Bassel*:

R. v. Black, 70 C.R. (3d) 97, [1989] 2 S.C.R. 138, 98 N.R. 281, 93 N.S.R. (2d) 35, 50 C.C.C. (3d) 1, 47 C.R.R. 171, 242 A.P.R. 35, 1989 CarswellNS 21, 1989 CarswellNS 389 (S.C.C.) — followed

R. v. Caslake, 1998 CarswellMan 1, 1998 CarswellMan 2, 121 C.C.C. (3d) 97, 155 D.L.R. (4th) 19, 221 N.R. 281, 13 C.R. (5th) 1, 48 C.R.R. (2d) 189, [1998] 1 S.C.R. 51, 123 Man. R. (2d) 208, 159 W.A.C. 208, [1999] 4 W.W.R. 303 (S.C.C.) — referred to

R. v. Collins, [1987] 3 W.W.R. 699, [1987] 1 S.C.R. 265, *(*sub nom. *Collins v. R.)* 38 D.L.R. (4th) 508, 74 N.R. 276, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, 28 C.R.R. 122, 1987 CarswellBC 94, 1987 CarswellBC 699 (S.C.C.) — considered

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R. v. Elshaw, 7 C.R. (4th) 333, 128 N.R. 241, 67 C.C.C. (3d) 97, 59 B.C.L.R. (2d) 143, 6 C.R.R. (2d) 1, 3 B.C.A.C. 81, 7 W.A.C. 81, [1991] 3 S.C.R. 24, 1991 CarswellBC 215, 1991 CarswellBC 922 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — considered

s. 8 — referred to

s. 10(b) — considered

s. 24 — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 445(a) — pursuant to

s. 446(1)(a) — pursuant to

Young Offenders Act, R.S.C. 1985, c. Y-1

s. 2(1) "young person" — considered

s. 56 — considered

VOIR DIRE to determine admissibility of evidence.

***J. Bassel* (Orally):**

1 L.A.C. a Young Person within the meaning of the Young Offenders Act, stands charged with two Counts under the Criminal Code of Canada, namely, that on or about April 30th, 2000, she unlawfully did willfully and without lawful cause kill a dog the property of J.C. that was kept for a lawful purpose, contrary to Section 445(a); and further that on April 30th, 2000, she unlawfully did willfully cause unnecessary pain to a dog by means of kicking and burning, contrary to Section 446(1)(a) of the Criminal Code.

2 The broad issues before the Court concern rulings on the admissibility of the contents of a book/diary of this young person, seized by the police at the time of her arrest, and the admissibility of an audio video statement of the young person taken after her arrest at the police station.

3 She was arraigned on these charges in Youth Court, entered pleas of not quilty to both charges, and by agreement of Counsel, the Charter Application filed by defence counsel was commenced at the outset of this hearing, the understanding being that it would be, in effect, a blended hearing. In his Notice of Application, Mr. Freeman applies to the Court for an Order Excluding as evidence for use at the trial of these charges the diary seized from L.C. and read by the police, and the audio-video tape statement of L.C. taken at the Peel police station, for the reasons, and on the grounds set out in the Notice, and as further fleshed out on the evidence adduced in the hearing, the written and oral submissions of Counsel for the Applicant, and authorities cited, all of which I have carefully considered. Ms. Halajian for the Crown filed a Response to the said Charter Application, and called evidence, and made submissions in response to the application, all of which I have carefully considered.

4 I will be making certain findings on this Application, however, I wish to point out that these findings relate at this stage only with regard to this application, to this point.

Brief Background to this Application

5 Ms. C., who I will hereinafter refer to as L., was living with her father at at the time of these charges. Her parents were separated, and her mother was living at.

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6 At the time of these alleged incidents, she was 17 and a half years old, with a date of birth of November 24th, 1982. We heard some evidence that apparently on or about May 9th, 2000, a Break and Enter took place at the mother's apartment, and articles of jewelry, coins; and other items were stolen.

7 As a result of information received, and communications by Peel Regional Police with L.'s father, Peel Police attended at the father's home at May 10th, 2000, and met with the father, Mr. J.C. We were told that the father provided certain information to the police concerning certain items in Lisa's bedroom there, and we were told by the police that with the written consent of Lisa's father her bedroom was searched and certain items found in that bedroom which appeared to be items stolen from her mother's apartment at 2700 Aquitaine on or about May 9th.

8 Just as Peel Region Police Officer Slade was in the process of leaving the father's home. L. arrived with her girlfriend Janet. The police spoke to her, and she was taken from the residence under arrest for Break and Enter and Possession of stolen property. On the evidence at this point, I find that she had a purse with her when she entered the house, and had placed it on the stairs, and that she was told inside the house she was under arrest for Break and Enter and Possession, and when she was asked to escort the police to the police car, she came out of the house carrying the same purse.

9 I also find on the evidence that at her father's house, on May 10th, 2000, that in addition to being told the reasons for her arrest, that P.C. Belisle clearly explained and informed L. of all her required Charter rights, her rights under Section 56 of the Young Offenders Act, the Caution, a secondary caution, her right to retain and instruct counsel, her right to have a parent or other family member or other adult present, her right to free access to a Legal Aid lawyer by telephone, and that these rights were well and properly explained to her step by step, with P.C. Belisle confirming as each right was explained, that she understood them. I find that she fully understood all of her rights, and that her decision to waive those rights was informed, was not coerced either by any physical or psychological threat or ruse, and that her waiver was not only informed, but also voluntary and unconditional. She was not handcuffed until she got outside and to the police car, and on the evidence which I accept, I do not find that there was any excess tightening of the handcuffs on Lisa at the police car-or en route to the police station. Notwithstanding her complaints regarding her treatment by the police, I accept the evidence of the police and conclude that at no time was she physically or psychologically harmed, injured or threatened, and I expressly reject Lisa's evidence where it is in conflict with the police evidence. There is no evidence that she was mistreated.

10 When arrested, her purse was searched and inter alia, items were found in there which included things taken from her mother's apartment. There was also a book in it which we heard was L.'s diary. An excerpt of the book/diary has been entered as Exhibit One, and the book/diary itself has been entered as Exhibit Three. I accept the evidence of P.C. Belisle, and I find that the reasons for his searching L.'s purse at the time of the arrest was to confirm that there were no weapons, for officer safety, to see if there was any property there associated with the Break and Enter, and to see if there were any contraband drugs.

11 I also accept the evidence of P.C. Belisle, and I find that his purpose in reading this book/diary included looking for any information in it concerning the Break and Enter, any reference to its planning, as part of his investigation, to see if her mother's address or any other information about the apartment was in it, to see if there was information regarding any other Break and Enter offences, to see if there was any information about other persons involved in the said Break and Enter, and to see who else she may have spoken to regarding either the planning of or execution of the burglary.

12 As a finding in the negative. I do not find that either P.C. Slade or any other of the Peel police orchestrated or intentionally waited or lulled L. into taking the purse into the house and then taking it back out for the purposes of facilitating the seizure of the said purse.

13 I also find that P.C. Slade had been given certain information from J.C.L.'s father, while they were still at the house, to the effect that the father had looked in Lisa's diary, Exhibit Three, and had found some writing in it relating to the disappearance and death of their family dog. P.C. Slade did not read the diary at the house and it was not actually read until P.C. Belisle read it at 11 Division, which was where L. had been taken by them.

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14 P.C. Belisle told us that he read the entry in the diary concerning the killing of the dog Pippy, and that he told Slade, as well mentioning to Slade that the father had spoken about the dog back at the house when the police were there.

15 Together with the other young woman, she was escorted to the Peel police station and placed in an interview room. For a period of time, starting at 12:58 a.m. until about 1:18 or 1:19 a.m. she was alone in the interview room, and an audio-video tape, which has been filed as Exhibit Two in this application shows her sitting on a chair in the room.

16 Insofar as the sequence of events regarding the taking of the videotape, I find as follows, namely, that the video started at approximately 12:58 a.m. on May 11th with L. sitting alone in the room. The tape carries on with L. alone until about 1:18 a.m. when P.C. Slade enters the room and one minute later advises her that they are being videotaped.

17 I find that P.C. Slade had not been in Room 4, where L. was, before 1:18 a.m. and he did not have any contact with her at the station before the tape was started. Two minutes after he enters the room, and before any interrogation has taken place, Slade provides L. with what I find is a full, complete, and understandable explanation of the fact that it is a charge of Break and Enter and Possession being investigated, her Charter rights to retain and instruct counsel, Section 56 YOA rights, availability of Legal Aid and telephone number, and he gives her a properly worded caution with regard to the incident concerning the Break and Enter at her mother's apartment, including that if she wishes to answer she can, but is not obliged to. He also gave a properly worded and understood secondary caution. At this point there is no mention or reference by Slade as to the missing dog incident.

18 In my view, the manner in which these rights and cautions were explained, with regard to the Break and Enter and Possession charges, was done in a clear, understandable fashion, and that Lisa clearly signified her understanding of her rights, and clearly and unconditionally waived those rights, and voluntarily agreed to participate in a questioning by Slade.

19 My clear impression of the atmosphere, and environment during the entire audio-video interview, and I so find, was that it was completely non-oppressive or coercive. Indeed, I would categorize the way in which P.C. Slade conducted the entire interview as being calm and relaxed. The manner in which questions were posed to L., and her responses, were relaxed, courteous and of easy communication.

20 At 1:22 a.m. P.C. Slade repeats that he wants to talk about the Break and Enter, and they embark in a discussion of that incident until about 1:36 a.m.

21 At 1:36 a.m. P.C. Slade changes his focus of questions from the Break and Enter, and asked L. about some weird things which have happened at her home. One minute later, he asks her about the frying up of her dog, whereupon L. then makes certain utterances regarding her dog, and one Yokana, or Moshi.

22 When P.C. Slade changes the direction of his questioning, at 1:36 a.m., he did not re-caution L. with regard to this new area of questioning, nor did he repeat the Section 10(b) rights to counsel or availability of free Legal Aid and telephone number or go through the Section 56 Y.O.A. steps.

23 I have considered that evidence by L. concerning her account of being a being a victim of sexual and physical abuse from her brother over a considerable period of time, and her evidence that this treatment made her more vulnerable to alleged body language by P.C. Slade, and that it in effect rendered her vulnerable to answering questions and not being in control.

24 Without in any way trivializing or minimizing her evidence in this regard concerning those actions earlier by her brother as she recounted them, I do not find that during the said interview, there was any conduct by P.C. Slade, either by word, or body language that was of a sexual nature or connotation. I find that Slade's entire deportment in the room was polite, non-confrontational and relaxed, and at no time sexually improper or purporting to dominate L. or demean her.

25 I do not accept or find that there existed that type of atmosphere or situation which prevented L. from the ability to refuse to participate in the interview or affect her ability to refuse to answer certain or any questions. No other police officers or other persons came into the room while the interview was taking place. Nor do I find that there was any evidence that officers were outside the room reading her book and laughing and making fun of its contents. No promise, threat or inducement was made to

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Lisa, either from P.C. Slade, or any other person in authority, and specifically, I find that there was no promise of release from jail made to her whatever. There was no oppressive atmosphere or compulsion. She was not under any impairment, physical or otherwise which impeded her ability to fully understand the nature and consequences of what was going on, including fully understanding her rights. As I indicated the waiver of her rights was informed unconditional, and voluntary, and her responses during the video-taking were voluntary and non-coerced, insofar as they relate to the questions relating to her arrest for the Break and Enter and Possession charge.

The Search of L.'s Purse and the Reading of the Book/Diary

26 As a starting point, the onus of establishing a Charter right violation is upon the accused/applicant. However, where, as in this case, the search of Lisa's purse was without warrant, the onus is upon the Crown, on the balance of probabilities to show that the search was reasonable. Or putting it another way the warrantless search is prima facie unreasonable. See *R. v. Collins* (1987), 33 C.C.C. (3d) 1 (S.C.C.). This includes an analysis of whether the arrest of Lisa was lawful and if so, whether the search of her purse and the reading of her book/diary was reasonable and lawful.

27 On the facts I am satisfied that the Peel Regional officers did have, both subjectively and objectively, reasonable and probable grounds to arrest Lisa for the Break and Enter and Possession charges relating to her mother's apartment. They had received some information linking L. to this incident, they received certain information from J.C., L.'s father, and they attend at the father's house where L. resides, and with the express permission of the father to search her bedroom, they find certain items in her bedroom it is alleged have been stolen from her mother's apartment.

28 As I said, in my view her arrest was lawful and the charges of Break and Enter and Possession of stolen property.

29 Insofar as the search of her purse, and the examining of it contents, including the reading of the book/diary in the purse, in my view this search was lawful as a search incident to arrest. I have already made findings as to the reasons P.C. Belisle conducted the search not only of the purse, but also to read the book in it, and as a matter of law in my view, he was acting within the authority of a lawful search incident to arrest. The search of the purse and reading of the book/diary was proximate in time to the arrest, the reasonable temporal limits were not even close to being breached. There was a clear nexus of the prospects of securing evidence of the offence for which Lisa was being arrested, in addition to which there were the other valid officer safety concerns and the other reasons, on which I have already made findings, which justified the search. See *Caslake* [*R. v. Caslake*] (1998), 121 C.C.C. (3d) 97 (S.C.C.) I conclude that the search was authorized by law, the law is a reasonable one, and the manner in which it was conducted by the Peel Regional Police was reasonable.

30 If I am in error in this analysis, and the applicant's Section 8 Charter rights have been breached, I then must assess whether the admission of this evidence would affect the fairness of the trial, the seriousness of the violation, and also the Section 24 reputation to the administration of justice vis a vis admission or exclusion of the book-diary and its contents.

31 The book/diary is real evidence. It is not something which the applicant has been compelled to participate in for its creation or discovery. It is not conscriptive evidence. It is not conscripted real evidence. It exists and would be discoverable independent of any breach. I am asked to consider that on its outside cover it does not say "Diary" but that really begs the question in any event. I was not referred to any case law that suggests that a diary on a person charged and arrested, carries with it some special privilege or status.

32 These are not lawyers files where perhaps solicitor-client privilege might be claimed. This is not a situation where an accused person is desirous of gaining access to a complainant's diary for the purposes of making full answer and defence, and issues of confidentiality and privacy come into play in that type of situation. This was real evidence which was on the arrested person, and the reasons for wanting to look at it are quite reasonable and logical, as part of the officer's duties in investigation, and as authorized by law. I do not believe that the admission into evidence of the diary would affect the fairness of the trial.

33 On the issue of the seriousness of the violation, if any, I would place this at the bottom. I believe that the officer was acting in complete good faith, not acting in a capricious or arbitrary manner, or in flagrant disregard for the law. It was not part of a larger pattern of law enforcement disregard for Charter rights. Yes, another investigative technique, the obtaining of

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a search warrant could be an alternative, but in my view was not necessary or warranted. The search was done without any affront or offence to the person of L., and having been placed under arrest. L.'s reasonable expectation of privacy generally would be reduced. This was not a situation where the bodily integrity of the subject has been violated. The manner in which it was taken was reasonable, and there was no injury to her or damage occasioned to the purse itself. The infringement, if any, was not a significant departure from the charter standard.

34 On the Section 24 reputation analysis, the charges are serious, the evidence is essential to proof of the prosecution's case. I do not view the violation, if any, as serious. There was some urgency for the police to ensure officer safety regarding the contents of the purse, and to take the young person to the police station without undue delay. I consider the long term effect on the administration of justice of the exclusion or admission of the evidence, and in so considering, in my view, to exclude the excerpt. Exhibit One, and the diary, Exhibit Three, would bring the administration of justice into disrepute.

35 The Crown has satisfied the onus upon it in this matter with regard to the diary seizure, and although I recognize the application is the defendant's, the Applicant's application for exclusion of the diary is dismissed.

The Utterances by L. in the Audio-Video Interview

36 I have already made findings and conclusions to the effect that when she was told of the reasons for her arrest for the Break and Enter charge, and the consequent interview, that not only was there no atmosphere of compulsion at any time during the interview, but that her Section 56 YOA and Section 10(b) Charter rights. Legal Aid rights, and Caution were well and properly given and understood, and that she had freely, and voluntarily waived those rights, and entered into and participated willingly in the questions and answers during the said interview.

37 The problem which exists, however, is that when Lisa was arrested at her home, told that the arrest is for Break and Enter and Possession of stolen property regarding her mother's apartment, and then again, when she is in the interview room with the P.C. Slade, and earlier with P.C. Belisle, the only charges of which Slade tells her about when he is going through those steps is regarding the said Break and Enter and Possession. No mention of any proposed questioning regarding the dog Pippy, and his alleged disappearance and death are mentioned to her when her rights are being explained and when she elects to waive those rights.

38 Before P.C. Slade enters the room, he told us that he — has-already received information from Lisa's father and P.C. Belisle to the effect that the father had read some disturbing entries in her diary concerning the disappearance two weeks before of the dog, and that the father had read in L.'s diary that L. and Moses had killed the dog.

39 I recognize that Slade has not actually read the diary, but he is armed with some information from the father and from P.C. Belisle. He told us that the diary was secondary to the Break and Enter investigation, and that he had no idea that the diary was in the purse as he walked to the police car with L. He did not search her purse as they exited the house, and he did not drive her to 11 Division. He stated that he did not think that he read the actual diary, but he acknowledged that at some point he maybe read a photocopy of it.

40 At 1:36 a.m., he swings away from the Break and Enter questions, and asks her about some weird things that have happened at her house regarding the frying up of her dog. No caution, rights to counsel. Section 56(a) or otherwise is given to her, and Slade embarks into a number of questions and elicits a number of utterances from L. regarding the dog and Moshi.

41 Was there a breach of L.'s Charter and Section 56 rights, and should she have been re-cautioned when P.C. Slade changed the focus of his interrogation from the Break and Enter and Possession charge to "other things" including the dog incident?

42 It was clear from the evidence that to go through that part of Section 56 YOA again at 1:36 a.m., concerning having a parent, relative, adult present, would in all likelihood be academic, and for nought, based on her replies and the state of events some 16 minutes earlier when Slade is going through those questions and answers with her. The fact that a totally different incident is now being broached, an incident completely different in nature, time and place, however, raises a number of issues whether Lisa, now potentially facing another type of charge, of a very serious and disturbing and nature, with potentially different prejudice

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and consequences, should have been re-cautioned and told of her rights to counsel and Legal Aid with regard to this new and discrete incident.

43 I recognize that I have already concluded that she had clearly explained to her and understood her right to remain silent at the outset of the inquiry, and waived that right, however that waiver was in response to being told that questions were going to be asked regarding her mother's apartment and the Break and Enter.

44 While I do not believe that P.C. Slade was acting in bad faith. I do not understand there to have existed any urgency or extreme necessity. Nor, as pointed out by Mr. Justice Iacobucci in *Elshaw* [*R. v. Elshaw* (1991), 67 C.C.C. (3d) 97 (S.C.C.)], was there any evidence adduced by the Crown to show that P.C. Slade was unaware of his responsibilities under Section 10(b), or to re-explain or re-caution L. when the questioning made this dramatic change. To the contrary. I was very impressed with the slow, clear and patient manner in which P.C. Slade went through what I will call the necessary legal steps with L. when he told her he wished to talk about the Break and Enter. If anything, I would say that his explanation of her rights was very thorough and competently explained.

45 One must also not lose sight of the fact that at the time of these alleged offences, L. was a "Young Person" within the meaning of the Young Offenders Act, and as such, was entitled to the distinct guarantee of rights afforded to young persons in that legislation.

46 The information about the dog and its fate was not something that came out from L. spontaneously during the questioning. It was something of which P.C. Slade had information when he entered Room 4. Without any prompting by L., P.C. Slade suddenly at 1:36 a.m. broaches the subject of the weird things at her house. It concerned a totally different and unrelated offence, at a different time and place than where the Break and Enter has taken place, and it would be a very serious alleged offence, quite possibly more serious than the Break and Enter charge. It was not something just blurted out by Lisa during the questioning, but rather, it was elicited as a consequence of questioning by P.C. Slade. There was, as I already indicated, no temporal or causal nexus between the Break and Enter charge in Pael and the Cruelty to Animal charge in Toronto.

47 Was there a necessity to re-warn? In *R. v. Black* (1989), 50 C.C.C. (3d) 1 (S.C.C.), which was a case referred to by counsel in submissions here. Justice Wilson, after stressing the value of a meaningful assessment of the Charter said at page 11:

> Moreover, Section 10(b) should not be read in isolation. Its ambit must be considered in light of Section 10(a). Section 10(a) requires the police to advise an individual who is arrested or detained of the reasons for such arrest or detention. The rights accruing to a person under Section 10(b) arise because he or she has been arrested or detained for a particular reason. An individual can only exercise his Section 10(b) rights in a meaningful way if he knows the extent of his jeopardy.

48 As I see it, the decision of a person charged with an offence, and detained, as to whether to consult a lawyer can be dictated by the gravity of the charged faced. Questions concerning a new incident might very well require consideration of the waiver of rights that has been given. To have it otherwise could lead to an inference that the police, with an ultimate plan to be able to ask questions about a more serious offence, would bring the suspect to the station to ask him about another possibly less serious charge, a charge for which the detainee might, for a number of reasons elect not to obtain counsel or not stay silent after being cautioned.

49 I do not suggest that P.C. Slade was acting in bad faith here, or that he had brought Lisa to the station under the pretence of the Break and Enter charge, with a real or underlying reason to want to dig out the Cruelty to animal incident, however, I believe that where, as here, there is a fundamental and discrete change in the purpose of the investigation which relates to this very different, unrelated and serious offence, that it was incumbent on the police to not only re-state the detainee's right to counsel, but also to re-state the caution. There was, as I already stated, no urgency, nor was there any evidence as to why this step was not taken.

50 The proposed evidence here is a statement of the accused. If, as I find here, there has been a breach of the young person's Section 10(b) rights, and rights generally, this is a situation where the evidence has been obtained because of an infringement, and it is conscriptive evidence. The young person in violation of her Charter rights has been compelled to incriminate herself

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at the behest of the State by means of her statement. Even with good faith of the police, it does not, as pointed out in *Elshaw* , strengthen the case for admission to cure an unfair trial.

51 Again in referring to the *Black* decision at page 12, which was cited in *Elshaw* :

> The Crown argued that, despite the change in the charge, the preliminary advice which the appellant received might well have been unchanged. This may be so. On the other hand, given the differences in the charges as discussed, to conclude that the advice would inevitably have been the same is sheer conjecture. In my opinion, it is improper for a court to speculate about the type of legal advice which would have been given had the accused actually succeeded counsel after the charge was changed. Such reasoning runs afoul of this court's judgments in Therens, Trask. It also totally defeats the purpose of Section 10(b).

52 Applying this reasoning all the more so to this case, the young person has elected at the outset not to have legal counsel for the Break and Enter questioning. One must not forget that she was detained at the police station in the interview room. With the complete change of direction by P.C. Slade, it would be very dangerous to speculate as to whether, if she were re cautioned, she would chose to go ahead or not.

53 After submissions had been made by Counsel, Mr. Freeman had sent to me and to Ms. Halajian the full copy of a decision he had referred to, *R. v. Vaughan*, a Provincial Court decision dated October 2nd, 1985, Justice J.W. Scott, and although I am not bound as a matter of law to necessarily follow that decision, I have considered it on the issue of the obligation of the police to clearly caution a young person with regard to a specific offence, and the importance of compliance with Section 56 of the Young Offenders Act.

54 As I have already stated, the utterances by L. on the audio videotape are conscriptive evidence. Their admission into evidence would affect the fairness of the trial. This is the young person's application to exclude and the onus is on the application, however, in my view, the Charter and re-caution infringement is serious. The Crown has not proven on a balance of probabilities that the evidence would have been discovered by non-conscriptive means. I therefore conclude that the admission of that evidence would affect the fairness of the trial. The onus has been discharged, and therefore those utterances made by L. in Exhibit Two, in particular from the point of P.C. Slade commencing at 1:36 a.m. and thereafter until about 1:43 a.m. relating to what I will refer to as "the dog incident" are excluded from admission into evidence at this trial. To admit it would, in my view, having considered all of the Section 24 factors which I will not repeat here, but which I have considered, bring the administration of justice into disrepute.

55 Therefore, that part of the application regarding the audio-video, Exhibit Two, aforementioned, is granted.

Order accordingly.

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