

# Court of Queen's Bench of Alberta

**Citation: R v Stephens, 2021 ABQB 246**

**Date:** 20210330  
**Docket:** 170998470Q4  
**Registry:** Edmonton

Between:

**Her Majesty the Queen**

Crown

- and -

**Arnold Anton Stephens**

Accused

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**Mid-Trial Ruling  
of the  
Honourable Mr. Justice Douglas R. Mah**

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## **A. Background**

[1] Can an accused be compelled by the Court to remove his or her COVID mask for the purposes of dock identification?

[2] This question arose part way through Mr. Stephens' jury trial for second-degree murder. I made a mid-trial ruling. Following the conclusion of the trial, I was asked by the Crown to commit my oral ruling to a written decision. This written decision follows, for the most part, the trial transcript, except that I have added headings, full citations, a case quote to enhance understanding, and some words to provide factual context and improve readability, and made some corrections to mis-transcription.

### **B. A Couple of Quick Observations**

[3] First, mask wearing is necessitated by the protocol related to the COVID pandemic, and its purpose is to secure the health and safety of those participating in the trial. At the time of decision, wearing a facemask is mandatory in all indoor public spaces in the province. In accordance with that requirement, the accused, Mr. Stephens, has been masked throughout the proceedings.

[4] Having said that, during the trial, counsel, myself and witnesses have gone maskless for longer or shorter periods of time. This was primarily to allow the unmasked person to be heard better in this large courtroom. While a person is unmasked, the necessary health and safety precautions were observed through physical barriers and physical distancing.

[5] Second, the Supreme Court of Canada in cases such as *R v Hibbert*, 2002 SCC 39 has pointed out the frailties of dock identification and the limited, if any, probative value of such evidence. It is pointed out in *Hibbert* and other similar cases that misidentification can result in a miscarriage of justice and, in that regard, it would be incumbent upon me to provide a proper instruction to the jury with regard to any dock identification evidence that occurs during this trial, in the event that such identification ends up as a jury issue.

### **C. The Defence Relies on Section 11(c) of the Charter**

[6] The Defence resists the application on the basis of section 11(c) of the *Charter*, that is the right against self-incrimination, based on the principle that the accused should not be required to do anything to assist the prosecution. Mr. Corbett points out, quite rightly, that the accused in a criminal case is entitled to stand mute and is not required to put forward any sort of evidence until such time as the Crown has established a *prima facie* case. Even then, the Defence as an option to call evidence or not.

[7] Mr. Corbett suggests, and I accept, that there is no decided a case in Alberta which has occurred during the course of the pandemic that is binding upon me with respect to this particular issue, although there are prior cases that may be instructive. Ms. Hussain advises anecdotally that the issue has arisen a number of times in Alberta courts, and I assume both in Queen's Bench and the Provincial Court, and thus far, I am advised, the courts are split on the particular issue of whether removal of a mask results in self-incrimination.

### **D. Analogous Cases**

[8] The reference to the prior case law dealt with other phenomena, not a mask, including such things as tattoos, and malformation, and distinctive teeth. I will examine those cases briefly.

[9] *R v Cyr*, 1997 CanLII 1039 (BCSC), an appeal from the Provincial Court to the British Columbia Supreme Court, was cited to me. It is a case that is not binding upon me, and cites *Marcoux and Solomon v The Queen*, [1976] 1 SCR 763, 24 CCC (2d) 1 at p 6, a pre-*Charter* decision of the Supreme Court of Canada. Reduced to its basics, *Cyr* concluded that a trial judge does have discretion to require an accused to uncover a part or parts of his or her body during the identification process (in this case, tattoos were at issue). The passage adopted from *Marcoux* reads:

An accused cannot be forced to disclose any knowledge he may have about an alleged offence and thereby supply proof against himself but (i) *bodily condition*, such as features, exhibited in a court-room or in a police line-up, clothing, fingerprints, photographs, measurements (see the *Identification of Criminals Act*, R.S.C. 1970, c. I-1), and (ii) conduct which the accused cannot control, such as compulsion to submit to a search of his clothing for concealed articles or his person for body markings or taking shoe impressions or compulsion to appear in Court do not violate the principle. As *Wigmore, supra*, has observed, s. 2265, p. 386: "When the person's body, its marks and traits, itself is in issue, there is ordinarily no other or better evidence available for the prosecutor".

[10] The next case cited to me was *R v Whitford*, 2005 BCPC 191, where the trial judge concluded that the court did have jurisdiction to require the accused to bare her teeth, which were apparently distinctive, as part of the identification process. Here, the court said the situation post-*Charter* is the same, relying on *R v Nielsen and Stolar*, [1985] 16 CCC (3d) 29 (MBCA) at p 66, which quoted the same passage from *Marcoux*.

[11] The final case referred to me was *R v Ermineskin*, 2020 ABPC 40, another case that is instructive although not binding upon me, in which the subject was missing fingers on the hands of the accused. The trial judge decided that he would decline to exercise discretion because it amounted to conscription of the accused in the prosecution against him.

[12] Both counsel referred me to para 31 of *Ermineskin*, where the learned provincial court judge said:

I would agree that there is a discretion vested in the trial judge to direct an accused person to comply with what may be described as the normal expectations of an accused appearing in court. Passive observation of an accused at trial has always been perfectly acceptable. In nearly all cases, the accused is, or can be required, to be present. He might be seen to move about in the courtroom, and a witness may view him where he sits in court. The accused would be expected to be attired in a normal manner. There is a difficult line to be drawn here, but in my view, it must be done with the rights of the accused, described herein, firmly in mind.

#### **E. COVID is a Fortuitous Circumstance in This Case**

[13] I did raise with Mr. Corbett the fact that the circumstances of Mr. Stephens wearing a mask in court are entirely fortuitous, and I interpreted Mr. Corbett's response to be that we must take our circumstances as we find them and that I shouldn't extrapolate any decision I make today to non-COVID times or when the pandemic passes, and that what I should deal with are the exact circumstances of the present case.

[14] What I have concluded thus far is that the court does have discretion to require removal of the mask, but that discretion must be exercised with the accused's *Charter* rights in mind. I will note here, parenthetically, that thus far great pains have been taken to avoid any references to where Mr. Stephens is currently housed (i.e. the Edmonton Remand Centre). He has been allowed to sit at the counsel table. Some effort has been made to place Mr. Stephens physically in the court room so that there is no suggestion to the jury about his current housing arrangements.

[15] Mr. Corbett also indicated that it is not always necessary for the accused even to be in court, and that the accused through provisions of the *Criminal Code* can appear by telephone or video. I agree that the *Criminal Code* does have those provisions and, certainly, the court can exercise discretion over whether an accused needs to be physically in court, but similarly, the court can order an accused to be present in-person or not. So, I don't think that the existence of those provisions necessarily limits or informs the discretion that I have to exercise today.

[16] Where I come down on this really is that the circumstances of Mr. Stephens wearing the mask during trial are entirely fortuitous and due to the pandemic. I am in a sense being asked to fill in a lacuna in the law because there has been no written decision, at least at this level of Court, that has determined this issue. My concern is that if I rule in favour of Mr. Stephens, it will lead to a situation where an accused can mask himself during the trial to avoid identification in cases where identification is the only issue, whether there is a pandemic or not. Absent the pandemic, the visible face of the accused is a normal part of the trial process.

#### **F. Ruling**

[17] I conclude, therefore, that in exercising discretion to order Mr. Stephens to remove his mask for the purposes of dock identification, I am not compelling him to participate in his own prosecution because, under normal circumstances, his face would be completely visible.

[18] Although I didn't make the point clearly during my oral ruling, I will note in this written decision that an accused's face is different than his current residential address, which was withheld from the jury as irrelevant and prejudicial. However, the trier of fact is entitled to observe dock identification, in its true form, for whatever value it has.

[Discussion regarding timing and manner of mask removal omitted.]

Heard on the 11<sup>th</sup> day of March, 2021.

**Dated** at the City of Edmonton, Alberta this 30<sup>th</sup> day of March, 2021.

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**Douglas R. Mah**  
**J.C.Q.B.A.**

#### **Appearances:**

Domina Hussain  
Alberta Crown Prosecutions  
for the Crown

Austin Corbett  
Bottos Law Group  
for the Accused