



THE UPDATE

Issue #2 July 8, 2005

BAIL - BAIL PENDING APPEAL - "FRIVOLOUS" APPEAL - BAIL DENIED

R. v. Evans - May 10, 2005 Alta.
C.A. per Berger, J.A.:

Application for bail pending appeal as per s. 679(3) C.C.. Appeal from sexual assault convictions. Unreasonable verdict appeal.

Held: Application denied.

Defence unable to establish that appeal "not frivolous" as canvassed in *Passey* (1997), 121 C.C.C. (3d) 444 (Alta. C.A.). Credibility based trial. "The evidence recited in the judgment is more than ample to support the findings of fact".

G. Nickless - Defence Counsel

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CHARTER - 9 - INVESTIGATIVE DETENTION - TEST TO MEET

R. v. Budden - May 6, 2005 Alta.
Q.B. per Lee, J.:

Accused charged with weapons and drug offences. Vehicle stop. Vehicle information and license plate did not match. Open gym bag in back seat with silver item inside that "looked like a weapon". Upon questioning, accused told police there was a gun in the bag. Bag searched.

Held: Breaches of ss. 8, 9 and 10(b). Evidence not excluded.

Questioning of accused about gym bag exceeded the scope of a proper investigative detention: *Mann* (2004) SCC 52. Police had insufficient grounds to detain for a weapons offence, and no grounds to arrest. However, regarding 24(2), serious offences to be balanced against Charter breaches that were "not especially serious". Authorities review.

C. Millsap - Defence Counsel

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KIENAPPLE PRINCIPLE - CHARGES OF ROBBERY AND UTTERING THREATS - STAY ENTERED

R. v. Kneller - May 5, 2005 Alta.
Prov. Ct. per Bridges, P.C.J.:

Accused convicted of attempted robbery and of uttering threats. Single incident involving one complainant. Issue as to whether uttering threats conviction to be stayed in accordance with *Kienapple* principle.

Held: Conditional stay entered.

The commission of the offence of attempted robbery, included the offence of uttering a threat as per *Doliente* [1997] 2 S.C.R. 11. Section 343 C.C. defines robbery to include: "steals ... uses violence or threats of violence".

M. Walker - Defence Counsel

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SENTENCE - ROBBERY WITH FIREARM - BANK ROBBERY - TWO COUNTS - 5 YEARS AND 4 MONTHS JAIL

R. v. Potter - May 9, 2005 Alta Prov. Ct. per Fradsham, P.C.J.:

38 year old accused entered early guilty pleas to two counts of bank robbery with a firearm. No record for violence. 4 months pre-trial custody. Accused’s participation in robberies motivated by “desperation born of his inability to work”.

Held: 5 years 4 months jail.

5 years seen as an appropriate starting point for a single robbery with firearm. Firearm was loaded and pointed at individuals. Mitigating factors included: early guilty pleas and recovery of stolen funds. 2:1 credit given for pre-trial custody time as per **Roberts** [2005] A.J. No. 15 (C.A.). Authorities reviewed.

J. Blumer - Defence Counsel



SEVERANCE - MULTIPLE COUNTS - ANALYSIS OF LEGAL AND FACTUAL NEXUS BETWEEN COUNTS

R. v. G.G. - May 5, 2005 Alta. Q.B. per Hughes, J.:

10 count Indictment which included offences of sexual assault, harassment, break enter and attempted murder. Jury trial. 4 separate complainants. Offence dates ranged from August 2001 to March 2004. Defence application for severance of counts in accordance with s. 591(3) C.C.

Held: Severance granted.

Charges split into 3 Indictments. Legal and factual nexus must exist as between counts found on a single Indictment: **Ticknovich** [2003] A.J. No. 905 (Q.B.). Prejudice would flow to accused if counts not severed. “As Nash, J. said in **R. v. M.L.** [1998] A.J. 243 (Q.B.): “... common sense dictates that it is more likely the jury will believe the testimony of three complainants than the testimony of just one complainant””.

B. Der - Defence Counsel



YOUTHS - SENTENCE - s. 42(9) YCJA - “SERIOUS VIOLENT OFFENCE” - TEST TO BE APPLIED

R. v. K.J.S. - May 9, 2005 Alta. Prov. Ct. per Ho, P.C.J.:

Youth convicted of uttering threats and possession of a weapon for purpose dangerous. Complainant was a Child Welfare worker. Accused cut the complainant on his leg and chest with a hunting knife. Issue as to whether offence constituted a “serious violent offence” as set out in s. 42(9) YCJA.

Held: Application denied.

Offences resulted in serious bodily harm as defined in **McCraw** (1991), 66 C.C.C. (3d) 517 (S.C.C.). However, Court maintains discretion as to whether or not offences qualify under s. 42(9) YCJA. “Accused did not intend to cause harm to the case worker ... the circumstances of the present offence should not be used to trigger the future possibility of an adult sentence for this youth”.

C. Seto - Defence Counsel



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