



THE UPDATE

Issue #11 September 9, 2005

APPEALS - DEADLINE TO APPEAL - APPEAL FROM DISMISSAL OF EXTENSION APPLICATION

R. v. Harness - July 15, 2005 Alta. C.A. per McFadyen, Fruman and Paperny, J.A.:

Accused missed deadline to file a Notice of Appeal from conviction regarding stolen property charges. Application to single judge of Court of Appeal for extension of time dismissed. Issue as to whether accused could appeal dismissal to a full panel of the Court.

Held: Application dismissed.

Neither section 678(2) C.C., nor Rule of Court 840(5)(iii) authorized an appeal from the decision of a single judge of the Court of Appeal. A full panel of the Court may only reconsider the decision of a single judge regarding extensions "when the interests of justice so require, particularly when circumstances have changed".

P. Royal - Defence Counsel

BAIL - REVIEW - TERTIARY GROUND - HORRIFIC CRIMES - STRONG CASE - BAIL DENIED

R. v. Ellahib - July 20, 2005 Alta. Q.B. per Wittmann, J.:

Review from denial of bail on charges of arson causing bodily harm and manslaughter. Young children killed.

Held: Application denied.

Nature of review as articulated in *Lysyk* (2004) ABQB 256. Crown's case described as "strong". As per *Hall* (2002), 167 C.C.C. (3d) 449 (S.C.C.): "where the crime is horrific ... strongly linked to the accused, a justice system that cannot detain the accused risks losing the public confidence". Authorities reviewed.

A. Hepner, R. Snukal -
Defence Counsel

CHARTER - 9 - DETENTION - PRIVATE CITIZENS DETAINED ACCUSED - GOVERNMENT FUNCTION EXEMPTION - NO BREACH

R. v. Dell - July 15, 2005 Alta. C.A. per Cote, Hunt and Fruman, J.A. - Trial Judge: Clark, J.:

Appeal from possession of cocaine conviction. Cocaine found after accused detained and searched by staff in a private bar. Trial judge found no s. 9 breach.

Held: Appeal dismissed.

Lerke (1986), 67 A.R. 390 (C.A.) remains good law, but is limited to circumstances of arrest, as opposed to brief periods of investigative detention. No government involvement in accused's detention. "The exclusion of private activity from the Charter ... was a deliberate choice which must be respected": *Buhay* [2003] 1 S.C.R. 631. Authorities reviewed.

J. Lutz - Defence Counsel

ENTRAPMENT - TEST - REASONABLE SUSPICION TO BELIEVE ACCUSED ENGAGED IN CRIME

R. v. Guillet - July 14, 2005 Alta. Prov. Ct. per Creagh, P.C.J.:

Accused charged with cocaine trafficking. Entrapment issue. Undercover police approached accused and engaged in conversation which resulted in a sale of cocaine. Accused had not been the target of an investigation.

Held: Conviction entered.

Police did not engage in prohibited “random virtue testing”: *Barnes* (1991), 63 C.C.C. (3d) 1 (S.C.C.). Given entirety of circumstances, police were acting on a reasonable suspicion that the accused was already engaged in criminal activity. Further, as per *Mack* (1988), 44 C.C.C. (3d) 513 (S.C.C.) the police did no more than provide the accused with an opportunity to commit the crime.

D. Goldie - Defence Counsel



IDENTIFICATION EVIDENCE - PRIOR DESCRIPTION AND PHOTO LINE-UP - HEARSAY RULE EXCEPTIONS

R. v. Fouquet - July 18, 2005 Alta. Q.B. per Slatter, J.:

Murder trial. Crown sought to adduce evidence of out-of-court descriptions of accused and the identification of accused *via* a photo line-up.

Held: Evidence admissible.

Evidence of prior identification of the accused is admissible as an exception to the hearsay rule, notwithstanding that the evidence constitutes a prior consistent statement. This type of evidence is generally admissible without the necessity of a *voir dire*: *Starr* [2000] 2 S.C.R. 144. Any frailties with respect to this type of evidence may be addressed either in cross-examination of the witness, and/or in the charge to the jury.

W. Raponi - Defence Counsel



SENTENCE - SEXUAL TOUCHING - PARENT / CHILD - SERIOUS OFFENCES - 3 YEARS JAIL

R. v. B.W.Z. - July 15, 2005 Alta. Prov. Ct. per Creagh, P.C.J.:

Accused pled guilty to sexual touching. Breach of trust – accused was biological father of 12-14 year old complainant. Accused masturbated complainant’s penis countless times. Accused also on occasion masturbated himself. Accused was in his mid 40s and had no record.

Held: 3 years jail.

“The sexual abuse of a child by a parent is a crime like no other”. Conditional sentence unavailable to accused, given that the gravity of the offences necessitated a jail sentence in excess of 2 years. Principle factor in sentencing being the “need to express society’s denunciation of the conduct”: *W.B.S.* (1992), 73 C.C.C. (3d) 530 (Alta. C.A.).

P. Royal - Defence Counsel

