



THE UPDATE

Issue #13 September 23, 2005

SELF-DEFENCE - MURDER - STABBING - ACCUSED CHOSE TO ARM HIMSELF - NO "AIR OF REALITY"

R. v. Kong - August 10, 2005 Alta. C.A. per Fraser C.J.A.; Russell and Wittmann, J.A. - Trial Judge: McMahon, J.:

Accused charged with murder, but convicted of manslaughter. Defence appeal. Issue re: trial judge's refusal to leave self-defence with the jury. Accused carried a concealed knife to a party, and then used the knife in the course of a fight that broke out between people that had never met.

Held: Appeal dismissed.

"Were I to find an air of reality to self-defence ... there would arguably be no reason why Canadian citizens should not be permitted to arm themselves with concealed weapons ... because they might meet someone they think does not like them - and they decide that someone is you". Wittmann, J.A. dissented.

M. Bloos - Defence Counsel

EVIDENCE - KGB - RECANTING WITNESS - TEST TO MEET

R. v. Devine - July 8, 2005 Alta. Prov. Ct. per Norheim, P.C.J.:

Accused charged with offences including assault causing. Issue regarding proof of identity. Recanting witnesses. One of the witnesses had provided a video statement, where she had been warned of the consequences of lying, and had been "administered a form of oath" although no bible was used. Crown application to enter previous statement for truth of its contents.

Held: Application granted.

Glowatski (2001), 160 C.C.C. (3d) 525 (B.C.C.A.) followed. Prejudice to accused cured by the availability of the witness at trial for cross-examination. "There was an elaborate warning with reference to the serious consequences that could befall the witness if she gave a false statement".

B. Hurley - Defence Counsel

IMPAIRED DRIVING - CARE OR CONTROL - ACTUAL CARE OR CONTROL - PROOF OF OFFENCE

R. v. Yakobchuk - July 29, 2005 Alta. Prov. Ct. per Allen, P.C.J.:

Accused charged with care or control. Accused found sitting in his running vehicle in the parking lot of his apartment, listening to music. Accused testified that he had no intention to drive, and was in his vehicle only to listen to music. Advanced signs of impairment.

Held: Acquittal entered.

Although the putting of the vehicle into motion would have required a number of discreet steps, "this procedure was more or less automatic and would take less than five seconds." However, unlike in **Ganpatt** (1995), 177 A.R. 311, where there was a real risk that the vehicle could be set in motion, no such risk proven by Crown in present case. Accused had reached the end of his journey. Authorities reviewed.

K. Haryett - Defence Counsel

SENTENCE - \$43,000 THEFT - BREACH OF TRUST - 12 MONTHS JAIL PLUS PROBATION

R. v. Headrick - July 13, 2005
Alta. Prov. Ct. per Fradsham, P.C.J.:

46 year old accused with no record pled guilty to offences including a \$43,000 theft from Calgary Little League Baseball Assoc. Confessed to police. No restitution. Money stolen to fund gambling addiction. By the time of sentencing, accused involved in a 12 step recovery program.

Held: 12 months jail plus 18 months probation.

Serious breach of trust, where victims of the breach were “children and the group of people who volunteered to assist those children”. Primary objectives of sentence being deterrence and denunciation. Conditional sentence incapable of achieving sentencing aims. Review of case law re: breach of trust sentencing.

P. Flynn - Defence Counsel



SENTENCE - PRE-TRIAL CREDIT - CREDIT GIVEN FOR RESTRICTIVE BAIL

R. v. Newman - August 4, 2005
Alta. C.A. per Conrad, J.A.; Kent and Hawco, J. - Trial Judge: Martin, J.:

Crown appeal from jail sentences imposed for two accused convicted of aggravated assault. Issue as to whether trial judge erred in granting one-to-one credit for release on restrictive bail conditions.

Held: Appeal dismissed.

“Serving a term of house arrest is not necessarily synonymous with serving an equal term of imprisonment. Nonetheless, this court has held that there can be a credit. We note that a pre-trial custodial term often gets credit on a two-for-one basis and sometimes even a three-for-one basis. In part, the credit recognizes the possibility of early parole. As the offenders here were found by the sentencing judge to be rehabilitated by the time of sentencing, he no doubt recognized that they would be good candidates for early parole”.

A. Sanders, N. D’Souza -
Defence Counsel



SENTENCE - ROBBERY AND ARSON - TOTALITY - 4.5 YEARS JAIL PLUS PRE-TRIAL

R. v. Beckstrom - July 21, 2005
Alta. Prov. Ct. per Fradsham, P.C.J.:

Accused pled guilty to offences including 2 counts of robbery and two counts of arson. Convenience store / gas station robberies involving the production of a large knife and threats of violence. The arsons involving the burning of a vehicle and a garage. Accused largely acting out of anger after being kicked out of a restaurant. 27 year old accused with no record. 9 months pre-trial custody.

Held: 4.5 years jail.

Fit sentence would have been in excess of 7 years but for pre-trial custody time and totality principle. 3 years remains fit sentence for convenience store robberies: *Kiyoshk* (2004) ABCA 206. In accordance with *Fait* (1982) 37 A.R. 273 (C.A.), totality principle requires individual sentence to be adjusted “below the figure which would be appropriate for each offence taken in isolation”.

L. Ross - Defence Counsel



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