



THE UPDATE

Issue #24 December 9, 2005

APPEALS - FAILURE TO FILE FULL TRIAL TRANSCRIPT - APPEAL DISMISSED

R. v. Weber - Oct. 25, 2005
ABCA 358 per O'Leary, J.A.:

Application for leave to appeal from summary conviction offences under the *Income Tax Act*. Accused refused to file a trial transcript with the appeal Court, because he disputed the accuracy of the same. He requested the CD-ROM recording of the evidence. Summary conviction appeal dismissed for want of prosecution.

Held: Leave to appeal denied.

S. 821(3) CC and Rule 860.5(1) require the appellant in a summary conviction appeal to file a full trial transcript. No error in Queen's Bench denial of accused's request for the CD-ROM. "A decision to dismiss an appeal for want of prosecution under s. 825 is discretionary. The Court of Appeal will generally not interfere with the exercise of discretion unless its exercise was based on a misapprehension of some legal principle or a misunderstanding of the evidence.

EVIDENCE - EYEWITNESS ID - CONVICTION OVERTURNED

R. v. Monias - Oct. 24, 2005 ABCA
353 per Cote, Conrad, O'Leary, J.A.
- Trial Judge: Marceau, J.:

Appeal from conviction in relation to three bank robberies. Sole issue being sufficiency of eyewitness identification. Appeal related primarily to the first conviction. Approximately one month after the first robbery, the same bank was robbed. The clerk who identified the accused saw the accused acting suspiciously in the bank for a number of minutes, but did not "remember" him as the robber until he approached the front desk demanding money. A few weeks later the same clerk picked the accused out of a photo line-up.

Held: First conviction overturned.

"The problem here is the danger that [the] identification was buttressed by the ensuing robbery. Her initial failure to quickly identify (or even suspect) the second robber as the one who robbed her before, undermines her subsequent identification.

L. Wood - Defence Counsel

SENTENCE - DRUGS - COCAINE TRAFFICKING - CONDITIONAL SENTENCE

R. v. Kamoh - Oct. 24, 2005 ABPC
281 per Brown, P.C.J.:

Accused pled guilty to three counts of trafficking in cocaine. Three sales to an undercover police officer. \$120 worth of cocaine sold in each transaction. 23 year old accused with a 2001 conviction for possession of marihuana for the purpose of trafficking.

Held: Two years less one day Conditional Sentence.

Low end commercial trafficking – "dial-a-doper" scheme. Early guilty plea, accused was cooperative with police, and strong family support. Terms of sentence included 240 hours of community service work. Authorities reviewed.

D. Andrews - Defence Counsel

SENTENCE - ROBBERY - MULTIPLE STORE ROBBERIES - 3 YEARS JAIL

R. v. Lum - Oct. 26, 2005 ABPC 308 per Stevens-Guille, P.C.J.:

Accused pled guilty to three charges of robbery. Each robbery was of the same Mr. Sub. No weapons used and no actual violence. \$270 taken in first robbery, \$50 in the second, and accused left empty handed on the third. Robberies occurred over a three week period. 28 year old accused with no prior record. Troubled background involving drug addiction.

Held: 3 years jail.

Conditional sentence inappropriate given *Johnas* (1982 32 C.R. (3d) 1 (Alta. C.A.). "I have canvassed the reported cases with respect to robbery of a small late night convenience store or the equivalent. I find no case in this jurisdiction where the sentence was less than two years incarceration for a first such offence where there is no actual physical violence and no prior record." Authorities reviewed.

D. Goldie - Defence Counsel



TRIAL - PARTICULARS - S. 587 - NOT EVERY PARTICULAR MUST BE PROVEN

R. v. Johnston - Oct. 18, 2005 ABCA 347 per Ritter, J.A.:

Application for leave to appeal from obstruction conviction. At trial the accused sought particulars pursuant to s. 587 CC. Three sets of particulars were provided. Trial judge found that although one of the particulars was not proven, the other two were. Issue as to whether each stated particular must be proven.

Held: Leave to appeal denied.

"Neither the wording of s. 587 nor existing case law supports Johnston's arguments: *Govedarov* (1974), 16 C.C.C. (2d) 238 ... which states that the purpose of particulars is not to restrict the Crown's theory but to inform the accused ... Johnston argued that if a conviction can be registered by reference to any one of the three particulars, then in cases where all particulars are proven multiple convictions could result. The case law dispels such a possibility: *May* (1984), 13 C.C.C. (3d) 257.

S. Tarrabain - Defence Counsel



WITNESSES - WITNESS WARRANTS - TEST

R. v. Douglas - Oct. 27, 2005 ABQB 796 per Watson, J.:

Accused charged with murder. Application pursuant to s. 698 CC for a warrant for the apprehension of a Crown witness. Witness reluctantly testified at preliminary inquiry. Evidence that witness was evading service and had a second outstanding warrant.

Held: Warrant issued.

"A Court must be very cautious about issuing warrants for witnesses because, after all, they are not charged with offences, they are people being produced to give evidence. Nevertheless, the circumstances and the police issues and considerations that arise may drive that type of application forward": *King* (2003), 338 A.R. 332 (Q.B.).

A. Piragoff - Defence Counsel



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