



THE UPDATE

Issue #25 December 16, 2005

APPEAL - REASONS FOR JUDGMENT - *W.(D.)* - SUFFICIENCY OF REASONS

R. v. Garcia - Oct. 31, 2005 ABCA 355 per Cote, Conrad, O'Leary, J.A. - Trial Judge: Agrios, J.: Appeal from conviction on charges including sexual assault. Credibility contest between accused and complainant. Issue regarding sufficiency of reasons.

Held: Appeal dismissed.

“Although the reasons given by the trial judge are brief, they are, in our view, adequate to satisfy the standard prescribed by *Sheppard*. The trial judge made a clear finding. He was alive to *W.(D.)* ... It was not necessary for the trial judge to note and consider every inconsistency in the complainant's evidence. He referred to one inconsistency specifically as example. The trial was relatively brief and, from the outset, credibility was obviously critical. It cannot be assumed that the trial judge ignored any of the flaws in the complainant's evidence.”

G. Strangway - Defence Counsel

CHARTER - 8 - VEHICLE SEARCH - POST ARREST SEARCH - NO BREACH

R. v. Chheng - Oct. 5, 2005 ABPC 315 per Fraser, P.C.J.:

Accused charged with offences arising from the seizure of drugs and a knife from his vehicle. Accused originally pulled over for a red light violation. When accused opened his glove box to retrieve documents, police saw a large knife. Accused arrested for carrying a concealed weapon, vehicle then searched and drugs found.

Held: No s. 8 breach.

Reasonable grounds existed to arrest in relation to weapons offence. Police entitled to search both the accused, and the vehicle driven by him, without a warrant and as an incident of the lawful arrest: *Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.); *Spied* (1991), 8 C.R.R. (2d) 383 (Ont. C.A.).

J. Ouellette - Defence Counsel

EVIDENCE - REASONS FOR JUDGEMENT - *W.(D.)* - TEST

R. v. Robinson - Oct. 13, 2005 ABPC 326 per Malin, P.C.J.:

Accused charged with twelve assault and breach related offences. Credibility contest trial. Primary issue being the correct approach to employ re: *W.(D.)* test in weighing the evidence of the accused as against the complainant.

Held: Convicted of six offences.

“It is not an error for a judge to make a finding of credibility as between the complainant and accused ... while it is not the end of the journey of decision-making, it is a necessary intermediate step ... it was not an error for the trial judge here to assess the credibility of the accused in relation to that of the complainant”: *D.S.C.* [2004] N.S.J. No. 432 (C.A.). As per *Moose* [2004] M.J. No. 415 (C.A.), preferable course of action is for the trial judge to first consider the evidence of the accused, and afterwards the evidence of the complainant.

A. Boyd - Defence Counsel

**IMPAIRED DRIVING -
CHARTER - 9 - EXCLUSION
OF OBSERVATIONS OF
INDICIA OF IMPAIRMENT**

R. v. Coles - Oct. 3, 2005 ABPC
277 per Fradsham, P.C.J.:

Impaired driving trial. Issue regarding the admissibility of observations by police of indicia of impairment. Accused originally detained in relation to a hit and run allegation. 10(b) rights not provided for a number of minutes. In the interim, the accused had been questioned and physical indicia of impairment noted.

Held: Section 9 breach, compelled indicia of impairment excluded.

Observations of the accused's physical condition made as a result of either police questioning or police requests that the accused perform certain tasks, violated s. 9: *Orbanski* (2005), 196 C.C.C. (3d) 481 (S.C.C.). Only those observations made independent of questions to the accused (i.e. red eyes), or observations made after the accused was advised of his right to counsel, were admissible as proof of impairment. Authorities reviewed.

T. Foster - Defence Counsel

**SENTENCE - AGGRAVATED
ASSAULT - SERIOUS GROUP
VIOLENCE - SERIOUS
INJURY - 3 YEARS JAIL**

R. v. Turner - Oct. 28, 2005 ABCA
366 per Picard, J.A., Wachowich,
Rawlins, J. - Trial Judge: Watson, J.:

Defence appeal from 4 year jail sentence imposed in relation to two accused convicted of aggravated assault. Jury trial. Verbal confrontation on Whyte Ave. between strangers ended in a severe beating by three men. Several kicks and punches to the head. Fractures to the nasal bones, sinuses, eye socket, cheek bones and upper jaw. Jaw wired shut for 4 weeks. Young accused with no records.

Held: Appeal allowed, 3 years jail.

Trial judge under-emphasized the accused's youth, absence of record and positive presentence reports. "I repeat that the sentencing judge said here that specific deterrence was not required."

M. Bloos, G. Nickless -
Defence Counsel

**SENTENCE - ATTEMPTED
THEFT - CONVENIENCE
STORE - KNIFE - CSO**

R. v. Heaven - Oct. 27, 2005 ABCA
367 per Picard, J.A.; Wachowich,
Rawlins, J. - Trial Judge: McIntosh,
P.C.J.:

Appeal from unstated jail sentence imposed following accused's guilty plea to attempted theft. Accused entered a convenience store and grabbed the clerk who was working alone. Although accused had a knife, the clerk was unaware of this. Accused left when other customers entered the store. Full confession. Accused was subject to a great deal of stress at the time of offence.

Held: Appeal allowed. 18 month conditional sentence imposed.

"The trial judge here seemed to feel compelled to impose a term of incarceration without considering as required by *Proulx* ... whether a conditional sentence could adequately address deterrence and denunciation. Such a failure to do so we consider an error".

A. Attia - Defence Counsel

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