



THE UPDATE

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EVIDENCE - CROSS EXAMINATION - LIMITS - CHILD WITNESS

R. v. R.K.A. - Nov. 3, 2005 ABCA 379 per Fraser, C.J.A., Ritter, O'Brien, J.A - Trial J.: Mason, J.:

Appeal from conviction on sexual assault related offences. Child complainant. Primary ground of appeal related to limits placed by the trial judge upon an attempted re-cross-examination of the complainant after the Crown partially rehabilitated the child's evidence in redirect.

Held: Appeal dismissed.

"The trial was by judge alone and the trial judge expected that the child would go back and forth, saying, when examined by the Crown, that he had been truthful when he spoke to the police, and then, when examined by the defence, agreeing ... that his mother was the source of these accusations ... Moreover, defence had an opportunity to ask the mother about whether she had initiated disclosure but did not do so". Accused not denied the right to fully cross-examine.

A. Sanders - Defence Counsel

GUILTY PLEAS - STRIKING OF GUILTY PLEAS - TEST PRESSURE FROM COUNSEL

R. v. Krassman - Nov. 2, 2005 ABPC 318 per LeGrandeur, P.C.J.:

Application by accused to strike guilty pleas to charges of fraud and theft. Accused, who was described as "experienced in the criminal justice system", alleged that she was innocent and that she had been pressured by her counsel to plead guilty. She testified that she met her lawyer for the first time 10 minutes before Court, that her lawyer refused to run a trial, and told her that if she "did not plead guilty, she wasn't going to help her". Legal Aid officer testified and confirmed that accused had complained about her appointed lawyer.

Held: Application granted.

"While the quality of the evidence prompting the striking or withdrawal of a guilty plea cannot be speculative ... I would hesitate to place the burden of persuasion at a point threatening adjudicative fairness": *Moser* (2002), 163 C.C.C. (3d) 286 (Ont. S.Ct.). Court left in doubt regarding validity of pleas.

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY - READINGS ON CERTIFICATE

R. v. Cooper - Nov. 4, 2005 ABPC 258 per Semenuk, P.C.J.:

Impaired driving trial. Evidence to the contrary. Accused blew 100 mg%. Expert evidence put accused's blood-alcohol between 25-78 mg% depending upon elimination rates.

Held: Acquittal entered.

Expert evidence within the context of evidence to the contrary need only raise a reasonable doubt. Therefore, it is not necessary for the accused to adduce evidence directly attacking the readings set out on the Certificate. "Such evidence may tend of itself to discredit the analysis ... even though no direct attack is made on the functioning of the instrument": *Kucher* (1980), 48 C.C.C. (2d) 115 (Alta. C.A.). Although as per *Generoux* (2005) ABQB 202 the readings on the Certificate may be weighed in assessing evidence to the contrary, the readings are only one of many factors to be balanced. Authorities reviewed.

P. Fagen - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY - ROADSIDE SCREENING

R. v. Hodge - Nov. 4, 2005 ABPC 257 per Semenuk, P.C.J.:

Impaired driving trial. Evidence to the contrary. Accused blew 110 mg%. Expert evidence put accused's blood-alcohol concentration between a range of 39 - 89 mg% depending upon elimination rate variability.

Held: Conviction entered.

Accused's evidence rejected. On the facts of this case, roadside screening test failure considered neutral. Accused testified that he had finished drinking just minutes before roadside screening test. Police failure to wait 15 minutes prior to screening test eliminated probative value of the test:

Bernshaw (1995), 95 C.C.C. (3d) 193. Further, discrepancy between what accused told police he had to drink upon first being stopped, and what he testified to, not to be considered in weighing evidence to the contrary. As per *Ellerman* (2000), 255 A.R. 149 (C.A.) statements made by a motorist regarding alcohol consumption upon first being stopped are only admissible as evidence giving rise to formulation of grounds for police to demand breath samples.

A. Larsen - Defence Counsel



SENTENCE - SEXUAL ASSAULT - CHILD VICTIM - BREACH OF TRUST - 18 MONTHS JAIL

R. v. A.R.F. - Nov. 3, 2005 ABPC 314 per Wilkins. P.C.J.:

Accused convicted following trial of sexual assault and sexual touching. Complainant was accused's stepdaughter who was between 12-13 years old at time of offences. Sexual assault was a single occurrence of digital penetration of child's vagina, while the sexual touching was a fondling of her breasts on a separate occasion. 38 year old accused with a 21 year old unrelated record. Accused denied guilt and did not believe that any type of counselling was necessary.

Held: 18 months jail plus 2 years probation.

Conditional sentence inappropriate. Deterrence and denunciation paramount given breach of trust: s. 718.2(a)(ii)-(iii). Only mitigating factor being accused's steady employment. "This is a very serious offence and a violation of this young girl's integrity". Authorities reviewed.

R. Batting - Defence Counsel



TRIAL - CROWN'S RIGHT TO A FAIR TRIAL - TRIAL JUDGE ACQUITTED IN MIDDLE OF TRIAL - APPEAL ALLOWED

R. v. Mire - Nov. 4, 2005 ABQB 829 per Martin, J.:

Crown appeal from acquittal following an impaired driving trial. Trial was in Banff. Accused was a tourist from West Virginia who returned to Banff for his trial. Alleged 10(b) violation. Accused testified on the voir dire. In the middle of accused's evidence trial judge took a break, and upon return commented that it was after 4:00 pm, that he had staff who had to travel back to Calgary, that the Court had had a busy day, and that the accused's evidence up to that put had been impressive. "OK, I've heard enough. It's quarter after four ... largely because I refuse to sit any longer today, and because I think it would be an injustice to bring the accused back, I find him not guilty."

Held: Appeal allowed.

Crown's right to a fair trial violated. Deciding a case prior to its conclusion is fatal: *Jahn* [1982] 3 W.W.R. 684 (Alta. A.C.). Charges stayed by Crown.

J. Ogle - Defence Counsel



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