



THE UPDATE

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CHARTER - 11(B) - DELAY - IMPAIRED DRIVING - 22 MONTH DELAY - NO STAY

R. v. Nikkel - Dec. 2, 2005 ABPC
344 per Fradsham, P.C.J.:

Impaired driving trial. *Askov* application. 22 month delay between the offence date and trial. Trial was twice adjourned. The first adjournment was at defence request, while the second was caused by courtroom over booking. The total period of delay caused by limits on institutional resources was just over 11 months.

Held: No 11(b) breach.

As per *Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.) a period of institutional delay of between 8-10 months is a useful guide to Provincial Courts. "In the case at Bar, the delay caused by 'limits on institutional resources' slightly exceeds the 8-10 month guideline suggested by the Supreme Court of Canada. However, when I consider that fact in the context of the accused having suffered no consequential prejudice, I am satisfied that there has occurred no violation of the accused's section 11(b) Charter right".

T. Foster - Defence Counsel

IMPAIRED DRIVING - CHARTER - 8 - ROADSIDE TEST - MOUTH ALCOHOL - 15 MINUTE WAIT

R. v. Szybunka - Dec. 2, 2005
ABCA 422 per Berger, J.A.:

Application for leave to appeal from impaired driving conviction. Accused seen by police leaving a bar parking lot, and then stopped at a Checkstop. Roadside test administered and accused failed. Leave sought on the issue as to whether or not there was an obligation on police to inquire of the accused and confirm that at least 15 minutes had passed since his last drink.

Held: Leave to appeal denied.

Bernshaw [1995] 1 S.C.R. 254 is dispositive. "The central inquiry is whether there is any evidence which might have caused the investigating constable to question when the Applicant had his last drink. Absent such evidence, there is no requirement ... to determine when the last drink was consumed or defer the administration of a screening test for 15 minutes ... *Bernshaw* speaks of 'credible evidence to the contrary'".

B. Gunn - Defence Counsel

IMPAIRED DRIVING - CHARTER - 10(B) - WHETHER PHONE BOOKS MUST BE PROVIDED TO ACCUSED

R. v. Nitschke - Nov. 28, 2005
ABPC 338 per Lamoureux, P.C.J.:

Impaired driving trial. Issue regarding alleged 10(b) breach. Accused asserted right to counsel, and immediately upon arrival at the police detachment he made a four minute phone call, and then knocked on the door and advised the officer that he was finished. Police officer could not remember whether or not accused had been provided phone books or a "Brydges list".

Held: No 10(b) breach.

Prima facie a detainee must be provided with phone books and the list of duty counsel. However, in the present case the accused dialled the phone immediately and reached counsel of choice. "There is no requirement for a police officer to provide a telephone book and a list of counsel where an accused already has a telephone number and proceeds to call the number ... unless there is evidence ... that the accused did not actually successfully make contact with legal counsel"

R. Snukal - Defence Counsel

SENTENCE - ASSAULT - DOMESTIC VIOLENCE - NUMEROUS ASSAULTS - 16 MONTHS JAIL

R. v. Blair - Nov. 30, 2005 ABCA 414 per Costigan, Lutz and Nation, J.A.: - T. Judge: Brand, P.C.J:

Defence appeal from 16 month jail sentence plus probation. One month pre-trial custody. Domestic violence. "The intoxicated appellant committed numerous assaults on the complainant over the course of several hours by repeatedly striking her in the head.

The next day, the appellant assaulted the complainant again by repeatedly kicking her in the legs."

Accused on probation at the time for related offences against the complainant. Lengthy related record. Longest previous sentence for spousal assault was 90 days.

Held: Appeal dismissed.

Assaults committed over a prolonged period. Gravity of offence compounded by fact that accused was on probation and subject to a no-contact order. "The sentence imposed was well within the range of sentences imposed for repeated assaults on a spouse by a repeat offender."

A. Sanders - Defence Counsel

SENTENCE - DRUGS - PRODUCTION OF MARIHUANA - 170 PLANTS - 14 MONTHS JAIL

R. v. Henwood - Nov. 30, 2005 ABCA 415 per Costigan, Lutz and Nation, J.A. - T. Judge: Daniel, P.C.J.:

Defence appeal from 14 month jail sentence imposed in relation to charges of possession for the purpose and production of marijuana. Commercial grow operation. 170 plants with a maximum profit of \$600,000. Accused had a minor record, but "continued to obtain and use marihuana" after being charged.

Held: Appeal dismissed.

Trial judge did not err in declining to impose a conditional sentence.

In view of accused's "pro-marihuana" stance, trial judge's finding that accused was a risk to re-offend reasonable. "It is manifestly dangerous to the community to sentence to house arrest a person convicted of operating a home-based commercial marihuana growing operation, who persists in obtaining and using marihuana."

M. Bates - Defence Counsel

SENTENCE- PAROLE ELIGIBILITY - 743.6 CC - FACTORS TO CONSIDER

R. v. Lam - Nov. 25, 2005 ABQB 886 per Burrows, J.:

Accused convicted following trial of conspiracy to traffic in cocaine and trafficking in cocaine. 10 year jail sentence imposed. Crown application pursuant to s. 743.6 CC for an order that accused serve half of the sentence prior to getting parole. Crown called a Parole Officer who testified that given the nature of the offences, absent a 743.6 order, the accused would likely be eligible for accelerated release after one sixth of his sentence.

Held: Application dismissed.

As per *Zinck* (2003), 171 C.C.C. (3d) 1 (S.C.C.), 743.6 CC should not be applied in a routine manner, and increasing the length of a jail term to manipulate the term of parole ineligibility is improper. "I expect that many, if not most ... right thinking Canadians would agree with the Crown's submission ... However at very least the authorities instruct me not to create a judicial exception to Parliament's policy in a routine, mechanical or automatic way which would be as applicable in any other ordinary case of wholesale commercial cocaine trafficking as this one".

G. Lazin - Defence Counsel

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