



THE UPDATE

Issue #17 April 28th, 2006

CHARTER - 9 - ARBITRARY DETENTION - PRIVATE SECURITY - NO BREACH

R. v. Castor - Mar. 3, 2006 ABPC
64 per Allen, PCJ:

Accused charged with assaulting a private security guard at a shopping mall. Accused stopped by security in the investigation of a liquor theft. Accused refused to remain and/or answer questions. When the accused threatened security, he was arrested.

Held: No s. 9 breach.

Security staff not acting as state agents. Police were not present at the time, and security were not acting under police direction. Although as per *Lerke* (1986), 67 AR 390 (CA), an arrest is a state function, when the accused was first stopped he was not being arrested. The arrest arose only after the accused threatened security. No detention as there was no physical or psychological restraint. “[I]n *Mann* the Court held that not every instance of delay or interview amounts to a ‘detention’.

M. Gourlay - Defence Counsel

IMPAIRED DRIVING - CHARTER - 10(B) - DETENTION - TEST

R. v. Nightingale - Mar. 6, 2006
ABPC 79 per Creagh, PCJ:

Impaired driving causing bodily harm trial. Accused questioned by police while enroute to hospital in an ambulance. Responses in part gave rise to grounds for a blood warrant. Alleged 10(b) breach, and application to excise statements from search warrant Information.

Held: No 10(b) breach.

No detention. As per *Mann* (2004), 185 CCC (3d) 308 (SCC), “no significant physical or psychological restraint” exercised over accused. “If ... she was detained ... this case would fall within the rationale of the decision of our Court of appeal in *Ellerman* (2000), ABCA 47 ... the questions asked clearly functioned as a screening device ... but not in the assessment of whether the Crown has proven the case beyond a reasonable doubt”.

D. Bottos - Defence Counsel

IMPAIRED DRIVING - PROOF OF BLOOD-ALCOHOL - TECHNICIAN'S EVIDENCE

R. v. Fox - Mar. 6, 2006 ABQB
173 per Slatter, J:

Appeal from conviction on 253(b) charge. No Certificate prepared, and case proceeded by viva voce evidence from technician. Technician testified as readings of “171 milligrams per 100 millilitres”. The words “alcohol” or “blood” were not used.

Held: Appeal dismissed.

In view of the entirety of the evidence (including the use by the technician of the words “alcohol” and “blood” in other parts of his evidence) trial judge was entitled to draw an inference as to what the technician meant. “Given that the Appellant was charged with having an excessive amount of alcohol in his body, given that the witness was a trained Intoxilyzer technician ... it was clearly open to find ... that the witness was referring to milligrams of alcohol in 100 millilitres of blood”.

M. Bloos - Defence Counsel

SENTENCE - MURDER - SHOOTING - PAROLE INELIGIBILITY - 21 YEARS

R. v. Fattah - Mar. 3, 2006 ABQB 178 per Macklin, J:

Accused convicted of second degree murder. Issue regarding parole ineligibility period. Accused shot victim 9 times as a result of an escalating feud. Psychiatric evaluation found accused to be a "very dangerous young man". Previous record included 21 convictions, including: robbery, assault and possession of a weapon. Accused was subject to a firearms prohibition at the time of the offence.

Held: 21 year parole ineligibility.

As per s. 745.4 CC, factors considered included: character of accused, nature of offence and jury recommendation.

S. Tarrabain - Defence Counsel

SENTENCE - THEFT FROM EMPLOYER - \$26,800 - 1 YEAR JAIL UPHELD

R. v. Jones - Mar. 7, 2006 ABCA 79 per O'Brien, Lutz, Cairns, JA - T. Judge: Fradsham, PCJ:

Defence appeal from 1 year jail sentence in relation to accused who stole \$26,800 from her employer. Accused had as gambling addiction. No record. Timely guilty plea. Conditional sentence rejected by sentencing judge.

Held: Appeal dismissed.

Sentencing judge conducted a proper review of the relevant factors and law, and concluded that the principles of deterrence and denunciation could not be achieved through a conditional sentence. Sentence imposed fell within the acceptable range and was not unfit.

J. Brunnen - Defence Counsel

TRIAL - SEIZURE OF TRIAL JUDGE - JURISDICTION - FACTORS TO CONSIDER

R. v. Laflar - Mar. 6, 2006 ABQB 183 per Lee, J:

Application for certiorari in relation to Judge Spence's decision to seize himself with a trial. Matter originally appeared before Judge Wenden, who before adjourning the trial made a consent order regarding disclosure. When matter appeared before Judge Spence for trial, issue arose as his jurisdiction, given that Judge Wenden had previously made a previous ruling regarding the case.

Held: Certiorari denied.

Judge Wenden did not hear any evidence, and did not make a Charter ruling in the traditional sense spoken of in *Mills* [1986] 1 SCR 863. Accordingly, he was not seized with the trial. Further, although disclosure motions are generally to be heard by the trial judge, a judge of the trial court does have jurisdiction to hear such motions, without seizing himself. Authorities reviewed.

S. Haer - Defence Counsel

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