



THE UPDATE

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APPEALS - WHETHER SENTENCE APPEAL MAY PROCEED BEFORE CONVICTION APPEAL

R. v. Owusu - Mar. 28, 2006
ABCA 91 per Conrad, JA:

Accused originally convicted of sexual assault and received a conditional sentence. Accused appealed conviction, and Crown appealed sentence. Crown application to have sentence appeal proceed first. "Crown's concern ...is the practice of this court crediting an accused on a 1:1 basis for time served on a conditional sentence when the court determines the interests of justice are better served by a term of imprisonment".

Held: Application denied.

"The usual practice of hearing conviction appeals before sentencing appeals is designed to promote confidence in the justice system and encourage judicial efficiency. It should not be departed from unless there are exceptional circumstances."

H. Silver - Defence Counsel

BAIL - REVIEW OF DENIAL OF BAIL - 520(7) CC - FACTORS TO CONSIDER

R. v. MacIsaac - Mar. 24, 2006
ABQB 215 per Macklin, J:

Accused charged with offences including impaired and dangerous driving causing death. Allegation that accused went through a red light at 100-120 km/hr. 237.6 grams of marihuana found in the vehicle. Bail denied in Prov. Ct. and upon first QB review. Second QB bail review.

Held: Bail granted.

As per 520(7) CC, previous denial of bail to be vacated where accused "shows cause". Reviewing judge is to review the totality of circumstances, "both new and old": *Lysyk* (2003) ABQB 256. New circumstance being that preliminary inquiry not scheduled to proceed for over 8 months. "A reasonable citizen would be upset at the thought that accused people are required to wait in custody so long before their trials can be heard": *White* (2006) ABCA 65.

P. Royal - Defence Counsel

IMPAIRED DRIVING - CARE OR CONTROL - RUNNING VEHICLE - ACQUITTAL

R. v. Ogrodnick - Mar. 27, 2006
ABQB 91 per Wittmann, J:

Appeal from conviction on charge of care or control. Upon leaving a bar, accused entered his vehicle and started it to stay warm. Arrangements had been made for a taxi. Accused then fell asleep and was found by police.

Held: Appeal allowed. Acquittal entered.

"Speculation and conjecture about future conduct is no basis for a criminal conviction. It is one thing to convict a person ... because the level of intoxication demonstrated unpredictability ... It is an entirely different matter to ... accept that a person does not intend to drive, yet convict solely because that person might change his or her mind ... To ground a conviction, the inquiry into the risk of changing one's mind must establish a concrete and tangible risk of deliberately setting the vehicle in motion". Authorities reviewed.

S. Prithipaul - Defence Counsel

IMPAIRED DRIVING - CARE OR CONTROL - RUNNING VEHICLE - ACQUITTAL

R. v. Barber - Mar. 27, 2006
ABQB 90 per Wittmann, J:

Appeal from conviction on care or control charge. Accused found asleep in a running vehicle. Accused started the vehicle because it was a diesel and it needed to be started in cold weather. Trial judge accepted that accused did not intend to drive, but convicted on a finding of *de facto* care or control.

Held: Appeal allowed, acquittal entered.

Companion case to **Ogrodnick** (2006) ABQB 91. "I have concluded that, if the circumstances do not present a tangible risk of either inadvertent or deliberate setting in motion of the vehicle, care or control does not exist": **Friesen** [1991] AJ No. 811 (CA). Trial judge erred in conflating the possibility of changing one's mind re: driving, with the intent to drive required by s. 258(1)(a) CC. In the present case, "the risk was nothing more than speculation that the appellant might change his mind".
Authorities reviewed.

W. Smith - Defence Counsel

SENTENCE - THEFT FROM EMPLOYER - \$7,200 - CSO OVERTURNED ON APPEAL - 90 DAYS JAIL

R. v. Kuntz - Mar. 28, 2006 ABCA 96 per O'Brien, Lutz, Cairns, JA - T. Judge: LeGrandeur, J:

Crown appeal from conditional sentence imposed in relation to a \$7,200 theft for an employer. Accused worked as a bookkeeper. No restitution paid.

Held: Appeal allowed.

90 day intermittent jail sentence imposed, given that accused had completed much of her conditional sentence. Accused had 13 prior convictions, 11 of which were theft related. Given lengthy record, conditional sentence inconsistent with the principles of sentencing set out in s. 718 CC.

In Person

SENTENCE - THEFT FROM EMPLOYER - \$9876.37 - JOINT SUBMISSION FOR CSO RESTORED ON APPEAL

R. v. Mumby - Mar. 29, 2006
ABCA 103 per Russell, Gallant, Read, JA - T. Judge: Norheim, PCJ:

Defence appeal from 7 month jail sentence imposed in relation to two charges of theft from employer totalling \$9876.37. Trial judge rejected a joint submission for either a conditional sentence or probation.

Held: Appeal allowed.

6 month conditional sentence imposed. "In construing both **McKinnon** (2005) ABCA 8 and **McTighe** (2005) ABCA 30, the sentencing judge did not err in surmising that 'barring exceptional circumstances' the paramount emphasis in such cases must be on deterrence and denunciation, and that the usual sentence will one of incarceration. However, the sentencing judge erred in determining, at the outset, that he was nonetheless bound to reject a conditional sentence."

L. Stevens - Defence Counsel

Anderson Dawson Knisely Stevens & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780) 424-9058 Fax: (780) 425-0172

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