



THE UPDATE

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BAIL PENDING APPEAL - IMPAIRED CAUSING DEATH - PUBLIC INTEREST TEST

R. v. Rhyason - Apr. 10, 2006
ABCA 120 per Berger, JA:

Bail pending appeal application following accused's conviction for impaired driving causing death. Issue regarding the finding that the arresting officer had reasonable grounds. Accused's record included a previous impaired conviction, breach of recognizance and six speeding tickets.

Held: Bail denied.

Appeal not frivolous. "Public interest" component of bail including both the protection of the public and public respect for the administration of justice. "To overcome a compelling concern for the protection of the public, an initial assessment of the appeal should indicate a strong prospect of success without being conclusive. If a judge so finds, reviewability overcomes enforceability, warranting judicial interim release." Authorities reviewed.

S. Prithipaul - Defence Counsel

EVIDENCE - OATH HELPING - JURY TRIAL - LIMITING INSTRUCTION REQUIRED

R. v. Cahill - Apr. 10, 2006 ABCA
119 per Picard, Ritter, Sulyma, JA
- Trial Judge: Acton, J:

Appeal from conviction on aggravated assault charge. Jury trial. Investigating officer asked why a *KGB* statement was not taken from the complainant. Officer's answer to the jury was that a *KGB* statement was not necessary because he believed that the witness was truthful.

Held: Appeal allowed, new trial.

Evidence adduced for the purpose of proving the truthfulness of another witness is generally inadmissible, and the admission of such evidence is normally fatal to a guilty verdict: *Marquard* [1993] 4 SCR 223. If evidence is admitted, a limiting instruction is necessary. Evidence ought not to have been admitted in the absence of a voir dire weighing probative value against prejudicial effect.

P. Royal - Defence Counsel

PRELIMINARY INQUIRY - 536.3 CC - FOCUS HEARING - POWER OF COURT TO LIMIT SCOPE OF HEARING

R. v. J.P.L. - Apr. 7, 2006 ABPC
113 per Lamoureux, PCJ:

Accused charged with sexual touching of a young person. Defence requested a preliminary inquiry, listing the complainant as the only required witness and with the only issue being "credibility". Focus hearing conducted by Court.

Held: Complainant not require to testify at hearing

Preliminary inquiry Court cannot make findings of credibility. Purpose of s. 536 CC being, in part the "better protection for victims and witnesses". Given that credibility was the only stated issue, defence not entitled to cross-examine young complainant. As per 540(7) CC, hearsay evidence may be admissible at preliminary inquiry. To arrive at committal to stand trial, Crown entitled to enter complainant's statement through investigating police officer.

J. Kelly - Defence Counsel

SENTENCE - POSSESSION OF CHILD PORNOGRAPHY - 4 MONTHS PRE-TRIAL CUSTODY PLUS PROBATION

R. v. McCrindle - Apr. 11, 2006 ABPC 105 per Fradsham, PCJ:

Accused pled guilty to possession of child pornography. 229 images. 49 year old accused, diagnosed as suffering from pedophilia. Previous record included a 2002 conviction for sexual interference. 4 months pre-trial custody.

Held: Time in custody plus 3 years probation.

Two mitigating factors: guilty plea; the pictures were primarily “posing pictures” as opposed to the display of graphic sexual acts such as intercourse. Deterrence and denunciation paramount: *North(D.G.)* (2002) 303 AR 321 (CA). Terms of probation included prohibition from use of internet but for employment.

M. Tyndale - Defence Counsel

SENTENCE - PRINCIPLE - EARLY GUILTY PLEA - CREDIT TO BE GIVEN

R. v. Downey - Apr. 11, 2006 ABCA 108 per O’Brien, Sulatycky, Mahoney, JA - Trial Judge: Clozza, PCJ:

Accused pled guilty to assault upon a prison guard and possession of brass knuckles. Accused was a serving prisoner. Minor incident wherein the accused pushed the guard backwards. Very early guilty plea. Appeal from global 5 month jail sentence.

Held: Appeal allowed, sentence reduced to 3 months.

Trial judge erred in not making the sentence concurrent given that they arose from the same transaction. Primary error being failure to give adequate credit for very early guilty plea. The guilty plea “results in a saving of time and expense for those involved in the administration of justice”.

M. Marcovitch - Defence Counsel

SEXUAL ASSAULT - PROOF OF SEXUAL NATURE OF ACT

R. v. Strelek - Apr. 5, 2006 ABPC 98 per McDonald, PCJ:

Sexual assault trial. Accused sat next to female complainant on bus, removed his shoe and rubbed his foot against her leg for a few minutes, and then later touched her leg with his hand. Complainant never said anything, but testified that she was “crying to herself”.

Held: Conviction entered.

Issue as to whether or not the touching was sexual in nature. As per *Chase* (1987) 37 CCC (3d) 97 (SCC), factors to consider include: the part of the body touched, the nature of the contact, and the situation in which the contact occurred. In accordance with *V.(K.B.)* 82 CCC (3d) 382 (SCC), sexual assault does not require proof of sexual gratification. “Whether the accused ‘received his jollies’ by this action or not, is not pertinent”.

H. Van Harten - Defence Counsel

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