



THE UPDATE

Issue #25 July 7, 2006

APPEAL - UNREASONABLE VERDICT - SEXUAL ASSAULT - CONSENT

R. v. Ashlee - May 10, 2005
ABQB 991 per Macklin, J - Trial
Judge: Bridges, PCJ:

Appeal from sexual assault conviction. Passing by motorist claimed to see two accused fondling the breasts of a female he described as "out cold". Upon police arrival both accused and complainant were lying on the sidewalk unconscious, and each accused had a hand on one of the complainant's breasts. Complainant not called at trial.

Held: Appeal allowed, acquitted.

Unreasonable verdict test met. Trial judge could not have properly found beyond a doubt that the complainant was unconscious, and did not consent, to the original touching. 273.1(2)(b) CC could not be invoked. As per *Cook* (1997), 114 CCC (3d) 481 (SCC), "... the failure by the Crown to call the victim will be at its own peril".

P. Royal, K. Gubbins -
Defence Counsel

SENTENCE - DRUGS - POSSESSION OF COCAINE FOR TRAFFICKING - CSO

R. v. Bricker - May 9, 2006 ABPC
130 per Allen, PCJ:

Accused pled guilty to possession of cocaine for the purpose of trafficking. Vehicle stop. 15.2 grams of cocaine estimated to be worth \$1320 seized. 20 year old accused with no record at time of offence, however, subsequent to drug offence accused was charged with and convicted of aggravated assault.

Held: 22 month conditional sentence.

"Cocaine is a dangerous and addictive drug. The social problem created by its misuse are many and well known ... in some circumstances the important objectives of denunciation and deterrence can be accomplished by a conditional sentence order". Mitigating factors included accused's youth and guilty plea. Authorities reviewed.

P. Moreau - Defence Counsel

SENTENCE - ROBBERY - ACCESSORY AFTER THE FACT - 18 MONTH CSO

R. v. Vanderheyden - May 1, 2006
ABPC 121 per Semenuk, PCJ:

Accused pled guilty to accessory after the fact to a robbery. Robbery of a Esso Station with a firearm. Robbery committed by a third party. Accused drove the robber from the Esso, knowing just seconds before he entered the car that he had committed the robbery. Money split between accused and third party and used to buy drugs. 20 year old accused, positive PSR. Accused had been clear of cocaine for 2 years.

Held: 18 month conditional sentence.

Court of Appeal has upheld the "judicious use" of conditional sentences in armed robbery cases: *Mo* (2002) 299 AR 266, *Heaven* (2005) ABCA 367. Mitigating factors included guilty plea, cooperation with police, and efforts toward rehabilitation.

J. Hooker - Defence Counsel

**SEX OFFENDER REGISTRY -
490.023 CC - TEST TO APPLY**

R. v. G.E.W. - May 1, 2006 ABQB
317 per Slatter, J:

Application pursuant to s. 490.023
CC to exempt accused from
complying with Sex Offender
Information Registry (SOIRA). 41
year old accused convicted in 2003
of sexual assault against his
common law. SOIRA came into
effect while accused was serving
his sentence.

Held: Exemption granted.

Accused presented affidavit
evidence. Accused newly married
with two small children who was
overcoming alcoholism. Test set
out in *Redhead* (2006) ABCA 84.
Accused having to show that the
impact of the order upon him
would be “grossly
disproportionate” to the public
interest. Test met. Offence
committed was a dated isolated act,
with significant rehabilitative
progress having been made in the
interim.

B. Leebody - Defence Counsel

**SEX OFFENDER REGISTRY -
490.023 CC - TEST TO APPLY**

R. v. Putrus - May 19, 2006
ABQB 313 per Mahoney, J:

Crown application under s.
490.012 CC to order accused to
comply with Sex Offender
Information Registry (SOIRA).
Accused convicted of sexual
assault in Jan. 2006 and received a
CSO. Accused, while working as
a tailor and fitting a female
customer with jeans, licked her
genital area.

Held: Application denied.

Single incident assault that lasted
only a few seconds. Both
Redhead (2006) ABCA 84 and *RC*
[2005] 3 SCR 99 require that
evidence be presented showing a
“grossly disproportionate” impact
upon privacy interests as opposed
to the public interest. Accused had
no record, was in a stable
relationship. The offence was
“fleeting with no restraint, no
physical injury”.

D. MacLeod - Defence Counsel

**TRIAL - PRACTICE -
ABILITY OF COUNSEL TO
WITHDRAW - RIGHT TO
SELF REPRESENTATION**

R. v. O.F.B. - May 2, 2006 ABCA
130 per Cote, O'Brien, Martin, JA -
Trial Judge: Norheim, PCJ:

Appeal from conviction on a
charges including sexual assault.
Defence counsel originally
received instructions to abbreviate
the proceedings by way of an
agreed statement of facts.
However, the accused later refused
to admit the facts. Defence
counsel sought leave to withdraw,
but the application was denied and
the trial ordered to proceed.

Held: Appeal dismissed.

No unfairness created. “The right
to represent oneself was not
asserted nor was counsel forced on
an unwilling accused. It was
counsel who sought leave to
withdraw. The appellant had not
dismissed him or expressed a lack
of confidence in him”.

Counsel not stated

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