



THE UPDATE

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ABUSE OF PROCESS - POLICE VIOLENCE - NO STAY

R. v. M.L.M. - June 30, 2006
ABPC 170 per Lipton, PCJ:

Accused charged with offences including dangerous driving. Police believed accused to be a gang member, who may be armed. High risk takedown, wherein "it is standard police procedure to smash all car windows using a centre punch. The breaking of the glass temporarily stuns the occupant ... thereby decreasing the chance of a violent reaction". During arrest, accused had a piece of glass lodged in his eye, and suffered permanent vision loss. Application for stay of proceedings.

Held: Application denied.

Circumstances of arrest would not shock the conscience of the community. No finding made that police acted illegally. "It is certain that this arrest was both difficult and forceful. I am not prepared, however, to go beyond this conclusion".

B. Border - Defence Counsel

APPEAL - REASONS - *W.(D.)* - REASONABLE DOUBT

R. v. G.K.C. - July 17, 2006 ABCA
223 per Hunt, Fruman, Brooker, JA
- Trial Judge: DeBow, PCJ:

Appeal from sexual assault conviction. Oath against oath case. *W.(D.)* formula not followed by trial judge in his acceptance of the complainant's evidence.

Held: Appeal allowed, new trial.

"The emphasis [the trial judge] put on the complainant's testimony leads to a concern that he treated this as a credibility contest in which, having accepted the complainant's testimony, he had no option but to reject that of the appellant ... Although a trial judge need not formulaically recount the *W.(D.)* test ... it is not apparent from the reasons given by the trial judge in the context of the entire record whether the appellant's testimony, or indeed all of the evidence, left the trial judge with a reasonable doubt".

W. deWit - Defence Counsel

FAILURE TO APPEAR - 145(2) CC - TEST TO APPLY

R. v. Charles - July 11, 2006 ABCA
216 per Hunt, Fruman, Brooker, JA:

Accused originally charged with 3 offences and released on a recognizance requiring him to appear in Court on date certain, and "thereafter as required by the court". Accused appeared at first appearance, but then failed to attend on a second occasion, resulting in a charge under s. 145(2) CC. Acquittal entered at trial on the basis that the wrong charge was laid.

Held: Appeal allowed, conviction.

"The specific question to be determined is whether ss. (a) and (b) of s. 145(2) enumerate two separate and distinct offences ... Parliament has provided several indications that s. 145(a)-(b) is one offence, not two separate and distinct offences ... Accordingly, it is unnecessary for a charge alleging contravention of s. 145(2) to specify whether the offence is under ss. (a) or (b) of that section."

Accused unrepresented

**IMPAIRED DRIVING -
ROADSIDE DEMAND -
“FORTHWITH”**

R. v. Neitsch - July 5, 2006 ABCA
213 per Berger, JA:

Defence application for leave to appeal from conviction under s. 253(b) CC. Issue regarding sufficiency of wording of screening demand. The word “forthwith” was not used in the demand.

Held: Leave granted.

Leave granted on the following question: “When a roadside demand made under s. 254(2) of the Criminal Code does not contain the word ‘forthwith’ or equivalent language, may the court, in deciding whether the demand for forthwith compliance was made, review all of the evidence from the start to finish of the investigation, or should the court be restricted to evidence that is contemporaneous with the making of the demand?” Authorities reviewed.

T. Kantor - Defence Counsel

**SENTENCE - CHILD
PORNOGRAPHY -
POSSESSION - 90 DAYS JAIL**

R. v. Peterson - July 7, 2006 ABPC
177 per Skene, PCJ:

Accused pled guilty to possessing and accessing child pornography, contrary to ss. 163.1(4) and (4.1) CC. 3800 images found on accused’s computer, and 3500 additional images found on storage media. Children ranged in age from 4-14. Images included bondage, anal and vaginal intercourse. 50 year old accused, no record, college education. CSO application..

Held: 90 days jail plus 2 years probation.

Deterrence and denunciation paramount: *Hunt* (2002) ABCA 155. “It also is abundantly obvious that without the ‘clients’ like the accused who pay for this pornography, for the most part it would not exist”: *Moen* 2006 SKPC 1.

L. Burgis - Defence Counsel

**SENTENCE - IMPAIRED
DRIVING CAUSING DEATH -
3.5 YEARS JAIL**

R. v. McKinley - July 10, 2006
ABPC 152 per Wilkins, PCJ:

20 year old accused with an unrelated record plead guilty to impaired driving causing death. Single vehicle accident. Accused’s passenger, and best friend, was killed. Strong signs of impairment. Blood-alcohol readings in the range of 150 - 270 mg%. Accused did little to address an alcohol problem, and the PSR concluded that little remorse was shown – “tended to view the offence as it is affecting him”.

Held: 3.5 years jail.

Range of sentence being 2-4 years. Denunciation and deterrence paramount: *Horon* 58 CCC (3d) 418 (ABCA). Given the absence of remorse, the personal loss of accused’s best friend not treated as a significant mitigating factor.

A. Hepner - Defence Counsel

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