



THE UPDATE

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ASSAULT - CORRECTION OF CHILD - TEST - 43 CC

R. v. T.J.R. - July 24, 2006 ABPC 192 per Dunnigan, PCJ:

Accused charged with assault upon his 2 year old daughter. Child soiled her diaper and wiped the contents thereof on her bed, the wall and herself. The accused immediately took his daughter across his knee and delivered "two, no more than three wacks". The spanking caused noticeable bruising. "The skin was broken, as were the blood vessels, but there was no open wound or bleeding".

Held: Conviction entered.

As the child had just turned 2, she was barely old enough to potentially benefit from corporal punishment: *Canadian Foundation* (2004) 180 CCC (3d) 353 (SCC). Section 43 only exempts from criminal sanction minor corrective force of transitory nature, and does not apply to outbursts of violence motivated by frustration. Accused in present case found to have acted out of upset and anger. Authorities reviewed.

D. Ellert - Defence Counsel

EVIDENCE - STATEMENTS - STANDARD OF PROOF

R. v. Ng - August 1, 2006 ABCA 230 per Berger, Costigan, O'Brien, JA - Trial Judge: Belzil, J:

Appeal from conviction on 2 counts of first degree murder. Jury trial. Key issue at trial being whether criminal intention proven, given defence evidence that accused was in a dissociative state at material times. Crown witness alleged that accused made the following statement relevant to intention: "I hate your wife. I want to kill your whole family". Issue as to whether Crown had to prove beyond a reasonable doubt that the statement was made.

Held: Appeal dismissed.

Statement need not be proven beyond a reasonable doubt. "The reasoning of *Flynn* (1996), 111 CCC (3d) 521 does not extend to cases where the Crown has introduced items of circumstantial evidence that are subject to different interpretations and are not individually crucial to the determination of the ultimate issue".

L. Stevens - Defence Counsel

IMPAIRED DRIVING - CHARTER - 9 - POST BREATH SAMPLING DETENTION

R. v. Saxby - August 1, 2006 ABPC 201 per Ayotte, PCJ:

Impaired driving trial. Significant symptoms of impairment and accused blew 300 mg%. Accused held in custody for 7 hours post breath sampling. Police gave accused opportunity to call someone to pick him up. When he was unable to reach anyone he was lodged in cells, even though police knew accused was staying at the Super 8 less than a block away. Alleged s. 9 breach.

Held: No s. 9 breach.

Weaver (2005), 194 CCC (3d) 350 applied. Police uncomfortable releasing accused without having someone to care for him. 115(1) GLA applying in principle, as accused would have been intoxicated in a public place if released. No evidence or allegation of negligence or mistake by police. Average citizen would not view a stay of proceedings as a suitable remedy. Authorities reviewed.

M. Clancy - Defence Counsel

**IMPAIRED DRIVING - PROOF
- EQUIVOCAL EVIDENCE**

R. v. Baustad - August 1, 2006
ABPC 202 per Semenuk, PCJ:

Impaired driving trial. Issue as to whether impairment proven beyond a reasonable doubt. Defence argued that the evidence was equivocal. Driving pattern included weaving in the lane, speeding and turning without signalling. Strong odour of alcohol, bloodshot eyes and slurred speech.

Held: Conviction entered.

As per *Schiefner* (2004) ABPC 193: "Equivocal evidence of impairment, slight or otherwise, will not suffice to satisfy this burden. I interpret the word 'equivocal', in the Webster's Dictionary sense, to mean 'subject to two or more interpretations' and 'uncertain'". Evidence in present case not equivocal.

J. Oman - Defence Counsel

**SEX OFFENDER REGISTRY -
151 CC - ORDER DENIED**

R. v. Gilbert - July 31, 2006 ABPC
186 per Allen, PCJ:

Accused pled guilty to sexual interference, and Crown brought application to have accused comply with the Sex Offender Registry. Assault occurred upon a 12 year girl (daughter of accused's landlady) and involved the rubbing of accused's penis to the point of ejaculation. 23 year old accused who suffered a brain injury. Due to the injury, the accused lost 7 years of memory and had impaired cognitive thinking.

Held: Application denied.

Redhead (2006) ABCA 84 applied. SOIRA order would have a grossly disproportionate effect upon accused's privacy interests, as opposed to the public interest of effectively investigating crimes of a sexual nature". Authorities reviewed.

G. Grieco - Defence Counsel

**YOUTHS - SENTENCE -
ADULT SENTENCE - 64 YCJA**

R. v. C.W.W. - July 25, 2006 ABPC
191 per Easton, PCJ:

Accused pled guilty to robbery and possession of a weapon. Crown made application to have accused liable to an adult sentence, as per s. 64(1) YCJA. Robbery of a store with a knife. Store janitor stabbed. 16 year old accused with lengthy record.

Held: Application granted.

Sentence must be of sufficient length to hold accused "accountable". Accordingly, sentence must be long enough to both reflect the seriousness of offence and to provide reasonable assurance of rehabilitation: *J.M.* [2004] OJ No. 2796. When seeking an adult sentence, "the court must hold the Crown to a very heavy onus, requiring clearly convincing evidence". In present case, youth sentence would not be of sufficient length. Authorities reviewed.

C. Seto - Defence Counsel

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