



THE UPDATE

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CHARTER - 8 & 9 - JETWAY PROJECT - NO BREACH

R. v. Rajaratnam - Nov. 7, 2006 ABCA 333 per Fruman, Martin, Watson, JA - Trial J: Rowbotham J

Appeal from conviction for possession of cocaine. Jetway Project. Accused spoken to by plain clothed police at Calgary bus depot. Accused told that he was free to leave and did not need to speak. Police sniffed accused's bags after they were loaded on a trolley, and smelt fabric softener sheets, which they knew to be used to camouflage the smell of drugs. Accused then arrested, and 2 bricks of cocaine found in luggage.

Held: No Charter breach.

No s. 9 breach as accused was not detained. As per *Mann* [2004] 3 SCR 59, not every conversation with police constitutes a detention. Accused's interaction with police was consensual. No s. 8 breach, as reasonable grounds existed to arrest. As for the sniff of the luggage, "public officials should not have to avert their senses ... from detecting emissions in the public domain": *Tessling* [2004] 3 SCR 432.

H. Wolch - Defence Counsel

POSSESSION - 4(3) CC - RULE IN HODGE'S CASE

R. v. Grant - Nov. 8, 2006 ABPC 306 per Allen, PCJ:

Trial on drug and weapons charges. Issue as to whether Crown had proven possession. Main Crown witness was staying at a secure women's shelter. Accused (who was known to the witness) was found by police hiding in a closet in her room, having snuck in through a window. A search ensued, and a bag containing drugs and a weapon was found on the floor of the room in which the accused was hiding in the nearby closet.

Held: Convictions entered.

As per *Cooper* (1977), 34 CCC (2d) 18 (SCC) the rule in *Hodge's Case* requires that guilt be the only reasonable inference to be drawn. Unreasonable to conclude that Crown witness would have brought the contraband into an environment wherein she knew that a search was probable. Authorities reviewed.

P. Royal - Defence Counsel

PRELIMINARY INQUIRY - 540(7) CC - HEARSAY

R. v. J.P.L. - Nov. 8, 2006 ABPC 313 per Lamoureux, PCJ:

Preliminary inquiry on charge of sexual touching. Young complainant. Crown application pursuant to s. 540(7) CC to introduce the statement given by the complainant to police as the only evidence given at the preliminary inquiry to meet the test in *Sheppard*.

Held: Application granted.

"The words 'credible' and 'trustworthy' as used in s. 540(7) are to be interpreted in the same manner as provided in s. 518 ... the evidence must have a *prima facie* air of reliability prior to allowing the Court to consider it as meeting the test in *Sheppard*". Factors to consider include: whether the evidence was elicited through open-ended questions, potential contamination of the witness prior to police interview, whether the interview was conducted in a child friendly atmosphere, and whether the evidence appears consistent with other evidence adduced. *CM* [2005] OJ No. 1071 followed.

J. Kelly - Defence Counsel

SENTENCE - MENTAL DISORDER - MITIGATION

R. v. Muldoon - Nov. 10, 2006
ABCA 321 per O'Brien, Hart,
Hawco, JA - Trial J: Wilkins, J:

Accused pled guilty to robbery of a convenience store and possession of an axe. Crown appeal from 2 years less 1 day conditional sentence. After robbing the store, accused stayed at the scene awaiting police arrival. He was in possession of body armour and psychiatric medications. Accused told police that he committed the robbery to force a confrontation with police, and he wore body armour to ensure that they would shoot him in the head. Accused suffered from severe depression, and had been hospitalized in psychiatric wards in the past.

Held: Appeal dismissed.

Sentence not unfit. Sentencing judge placed particular emphasis upon mental state of accused. "Respondent's counsel cited a number of cases in which stress and mental disorder were regarded as a mitigating factor": *Heaven* 2005 ABCA 367; *Trins* 2001 ABCA 129; *Tremblay* 2006 ABCA 252.

A. Sanders - Defence Counsel

SENTENCE - EFFECT OF PAROLE REVOCATION

R. v. Lavallee - Nov. 8, 2006
ABCA 324 per Costigan, Hembroff,
Sulyma, JA - Trial J: Kerby, PCJ:

Defence appeal from 12 month jail sentence imposed after accused pled guilty to impaired care or control. Accused had 9 prior related convictions. Because accused was on parole at the time of the offence, he lost his parole eligibility, requiring him to also serve approximately 17 months of a previous sentence. Issue as to whether sentencing judge failed to consider the global effect of the sentence.

Held: Appeal dismissed.

"The fact that an offence was committed while the appellant was on parole is an aggravating factor. Care should be taken to avoid the inconsistency that might arise from treating the commission of the offence while as aggravating on the one hand yet mitigating the sentence because of the consequence of parole revocation of the other ... There should be no benefit to committing an offence while on parole: *DFP* 2005 NLCA 31. Therefore, the fact that an accused has to complete the unfinished portion of a previous sentence may have little significance to the sentencing process: *Saran* (1996), 113 Man R (2d) 205.

B. Parker - Defence Counsel

SENTENCE - PRINCIPLE - LENGTH OF SENTENCE

R. v. Vanderyse - Nov. 14, 2006
ABCA 340 per O'Brien, Hart,
Hawco, JA - Trial J: Millar, PCJ:

Defence appeal from 2 year jail sentence imposed following accused's guilty plea to 2 charges of possession of cocaine. The original 2 year sentence was the product of a joint submission. "It appears that the joint submission was motivated by a desire on the part of counsel that the appellant obtain the benefit of programs offered by a federal facility".

Held: Appeal allowed, sentence varied to time served.

The 2 year jail sentence was disparate to sentences for simple possession. The accused was not charged with trafficking. It is an error in principle to impose a sentence longer than appropriate to an offence merely to achieve some rehabilitation. 2 year jail sentence was unfit.

A. Sanders - Defence Counsel

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