



THE UPDATE

Issue #5 February 2, 2007

APPEAL - REASONS - REASONABLE DOUBT

R. v. Hughes - Dec. 12, 2006
ABCA 389 per Conrad,
McFadyen, Berger JA - T Judge:
Norheim PCJ

Appeal from theft from employer conviction. Finding of guilt based upon 3 facts: (1) thefts occurred while accused was working; (2) sale of an unusual product was not entered by accused; (3) thefts appeared to stop after accused failed to return to work. Accused testified and denied offence.

Held: Appeal allowed, new trial.

The accused's "testimony is referred to in the trial judgement, but no mention is made of the *W.D.* ... instruction. There is yet a further concern. The judge observed that 'the law does not require absolute proof, it requires that the court be confident to a moral certainty that the charge has been proven against the accused. There is ample authority that it is an error in law to define reasonable doubt in terms of 'moral certainty'": *Lifchus* [1997] 3 SCR 320.

L. Rodger - Defence Counsel

APPEAL - UNREASONABLE VERDICT - REASONS

R. v. Grey - Dec. 7, 2006 ABCA
377 per Cote, Fruman, Costigan, JA
- T. Judge: Goodson, PCJ:

Appeal from conviction on break and enter charge. Central issue at trial was whether accused had a lawful excuse to be in the complainant's home. Accused and complainant had been living together, and accused entered residence through an unlocked door. Complainant's evidence re: lawful excuse was "unclear". At best it appeared that the complainant told her daughter to tell the accused to leave.

Held: Appeal allowed, acquittal.

Very brief reasons. Initially trial judge stated that there was unequivocal evidence that the accused was asked to leave. Reasons then ended with: "... there is not in the evidence any conclusive evidence that ...". Trial judge never finished the sentence. Trial judge misapprehended critical evidence and reversed the onus on proof of lawful excuse.

D. Hatch - Defence Counsel

BAIL - 523 CC - REVIEW - JURISDICTION - MURDER

R. v. Aucoin - Dec. 11, 2006 ABQB
895 per Wachowich, J:

Accused charged with a number of offences including murder. Accused denied bail in Queen's Bench. Accused later applied in Queen's Bench for an order vacating the previous denial on the basis of a substantial change in personal circumstances. Issue as to whether Court having jurisdiction to hear second bail application.

Held: No jurisdiction.

"If an accused's trial has not yet begun, and that accused is charged with an offence listed in s. 469, and either the Crown or the accused seeks to vacate a prior Part XVI order to which s. 532(1.1) does not apply, the party seeking to vacate that order must have the consent of the other party ... If the requisite consent is not forthcoming, the party seeking to vacate the order has no choice other than to proceed through the regular channels of review ... to the Court of Appeal via ss. 522(4) and 680(1)". Authorities reviewed.

M. Reeves - Defence Counsel

IMPAIRED DRIVING - REASONABLE GROUNDS

R. v. Carr - Dec. 7, 2006 ABQB
860 per Clackson, J:

Appeal from impaired driving conviction. Issue as to whether reasonable grounds existed to demand breath. Accused failed a screening test. Officer testified that the failure meant that the accused's blood-alcohol exceeded 100 mg%. However, officer conceded in cross-examination that he did not know how the instrument was calibrated, and that it was possible that a fail reading could have meant a blood-alcohol concentration of 80 mg%.

Held: Appeal dismissed.

Whether officer had reasonable grounds is a question of fact: **Bernshaw**. As per **Oduneye** (1995), 169 AR 353 (CA), the issue is the officer's belief, not the accuracy of it. "The officer was not sure how the instrument was calibrated but he was clear that he understood that fail reading meant the Appellant was over .08. That is sufficient in this case".

C. Luchak - Defence Counsel

JURIES - ORDER OF OPENING ADDRESSES BY COUNSEL

R. v. White - Dec. 7, 2006 ABQB
883 per Moreau, J:

Accused charged with the murder of his wife. Jury trial. Defence applied to make an opening statement to the jury at the beginning of the trial following the Crown's opening. Trial expected to last 4 weeks. Defence undertook to call evidence.

Held: Application granted.

Section 651(2) CC allows the trial judge discretion to permit a defence opening at the beginning of the trial. Factors to consider include: length of trial, complexity of issues, defences not readily apparent to the jury, whether or not defence undertakes to call evidence. No unfairness to the Crown in permitting the defence opening. "It will be fairer to the accused and to the jury that the jury receive a 'preview' from Crown counsel and defence counsel, early in the trial, of the evidence each expects to elicit". Authorities reviewed.

L. Stevens, R. Shaigec -
Defence Counsel

STATEMENTS - EDITING OF ACCUSED'S STATEMENTS

R. v. White - Dec. 7, 2006 ABQB
788 per Moreau, J:

Accused charged with the murder of his wife. Jury trial. Accused provided a number of statements to police. Defence application to edit statements, deleting: (1) exchanges regarding the right to silence; (2) inadmissible evidence; (3) statements whose prejudicial effect outweighed probative value.

Held: Application granted.

Inadmissible portions of the accused's statements ought to be excised prior to consideration by the trier of fact: **Beatty** [1944] SCR 73. As per **Chambers** (1990), 59 CCC (3d) 321, pre-trial silence cannot be used against an accused. Thus, it would be unfair to admit portions of interviews wherein accused refused to answer the questions posed. Also, portions of interview where police theory put to accused, and where accused compared by police to Scott Peterson, edited. Authorities reviewed.

L. Anderson - Defence Counsel

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