



THE UPDATE

Issue #8 February 23, 2007

HEARSAY - *KHAN* - 4 YEAR OLD - RELIABILITY

R. v. White - Dec. 7, 2006 ABQB 888 per Moreau, J:

Murder trial. Accused charged with killing his wife. Killing alleged to have occurred in the family home at night. Crown sought to introduce *Khan* statements of the couple's 4 year old daughter. Statements included: "Mommy said no more hitting. And daddy said yes hitting" and "Mom had blood on her neck and her heart stopped". Statements made to grandmother weeks and months after accused's arrest.

Held: Statements inadmissible.

Necessity conceded. Threshold reliability not established. Factors weighing against admission included: timing of the statements and lack of contemporaneity; emotional condition of the child - "sadness"; the child's difficulties with perception and recall: the child's descriptions were "bits and pieces"; the defence expert's evidence re: the suggestibility of the child. Probative value outweighed by prejudice.

L. Stevens, R. Shaigec -
Defence Counsel

IMPAIRED DRIVING - 10(B) - "AS SOON AS PRACTICABLE"

R. v. MacDonald - Dec. 18, 2006 ABPC 329 per Fradsham, PCJ:

Impaired driving trial. When 10(b) rights provided, accused unequivocally declined to call a lawyer. Nevertheless, arresting officer put the accused in the phone room, and dialled a number of lawyers until the accused was put in contact with counsel. Approximately 25 minutes spent in phone room.

Held: Samples not taken as soon as practicable.

Arresting officer was well intentioned. "However, the Constable's actions made it clear that the Accused's decision not to speak with counsel was not going to be honoured ... the conclusion that I do draw, is that the Accused selected and contacted counsel because it was evident that there was no other course of action realistically open to him". Crown having onus of proving beyond a reasonable doubt that the actions of the officer did not significantly delay the taking of breath samples. Onus not met.

J. Livergant - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY

R. v. Nielsen - Dec. 18, 2006 ABPC 367 per Allen, PCJ:

Impaired driving trial. Evidence to the contrary. Straddle case. Accused's evidence regarding consumption raised a reasonable doubt. Issue regarding expert evidence. Testing of accused established an alcohol elimination rate of 19 mg% per hour. Dr. Malicky testified however, that he had to in part rely upon average elimination rates. Therefore, accused's probable blood-alcohol concentration while driving ranged from 42-123 mg%.

Held: Conviction entered.

As per *MacDonald* 2006 ABCA 177, expert evidence not constituting evidence to the contrary. "The expert relied upon well recognized studies concerning the elimination rates in all individuals. These studies establish that individuals eliminate alcohol at a rate between 10 milligrams and 20 milligrams ... per hour. If the evidence of the expert established the slowest eliminators would be below the legal limit, then there is a reasonable doubt": *Sveahun* 2006 ABPC 275.

W. Tatarchuk - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY

R. v. Milne - Dec. 19, 2006 ABPC 331 per Lamoureux, PCJ:

Impaired driving trial. Evidence to the contrary. Accused's evidence regarding consumption was relatively equivocal. Also, the defence expert, Dr. Malicky, relied upon a scientific average of elimination rates ranging from 10-20 mg%. The expert opined as to various possible blood-alcohol concentrations at the time of driving within a very wide range.

Held: Conviction entered.

"Dr. Malicky's testimony ... continues to be speculative in nature. While Dr. Malicky is able to tell the Court that the consumption of food, will increase the rate of elimination he still cannot replicate the events of the night in question and provide an opinion on the accuracy of the breathalyzer test based on those replicated facts. This Court agrees with the criticism of Dr. Malicky's testimony as outlined in the *MacDonald* decision, in that it is essentially speculative and not capable, in this case, of raising a reasonable doubt".

A. Pearse - Defence Counsel

SENTENCE - PRE-TRIAL CUSTODY - CREDIT

R. v. Munoz - Dec. 14, 2006 ABQB 901 per Wilkins, J:

Accused convicted following jury trial of several serious offences, including robbery and aggravated assault. Significant periods of pre-trial custody at Edmonton Remand Centre. Also, 70 days spent either in-transit to or in custody at the Fort McMurray RCMP detachment. Issue regarding credit for pre-trial custody.

Held: 2 years less a day jail plus probation.

Conditions at Fort McMurray RCMP jail not so severe so as to constitute a violation of s. 12 of the Charter. But, 3:1 credit warranted. "No other Provincial Remand facility would deny Munoz a daily shower; the ability to brush his teeth and shave daily; warm water in his cell sink; the use of a pillow or pillow slip; or subject him to periods of 24 hour lock-up for multiple days on end". 22 months spent by accused at Edmonton Remand Centre while he was a serving prisoner on other matters. 11 months credit given for time spent as a serving prisoner under Remand conditions. Authorities reviewed.

T. Engel, N. Sissons - Defence Counsel

SENTENCE - SEXUAL ASSAULT - DISABLED VICTIM - 6 YEARS

R. v. Rusk - Dec. 15, 2006 ABPC 365 per Hamilton, PCJ:

Accused pled guilty to sexual assault. Joint submission for 3 year jail sentence. Complainant was a spastic quadriplegic with cerebral palsy, who was confined to a wheelchair. Accused (a stranger) followed complainant home after shopping at Safeway and assaulted her as she was entering her apartment. Accused "pulled up her shirt, felt her left breast with his hand, kissed her on the lips and bit her breast".

Held: 6 years jail.

Joint submission unreasonable. Accused's record included: 1979 attempted murder, 1985 sexual assault and 1997 sexual assault. Unfavourable PSR. Accused suffered from chronic alcohol abuse and anti-social personality disorder. Complainant was wholly incapable of defending herself or calling for help. "The fact that the accused perpetrated this horrific act upon someone so defenceless is a greatly aggravating factor". Sentence reduced to 5 years and 3 months due to pre-trial custody.

K. Molle - Defence Counsel

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