



THE UPDATE

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

R. v. M.A.M. - Dec. 7, 2006 ABCA 381 per Cote, Fruman, Costigan, JA - T Judge: Goodson, PCJ:

Appeal from sexual assault conviction. Brief oral reasons given at trial. Trial judge expressed preference for complainant's evidence over the accused's. A conviction was then entered, following which the court recited the three questions in *W.(D)*. and answered them in the negative, giving no further explanation.

Held: Appeal allowed, new trial.

Trial judge never expressly rejected accused's evidence, and appeared to have accepted part of it. "The bare recitation of the *W.(D)*. test at the end of the reasons, after the conviction was entered, does not cure this error because it provides no analysis or explanation". As per *Gagnon* 2006 SCC 17 the two stage test was met: (1) the reasons were inadequate, (2) meaningful appellate review was prevented.

B. Leebody - Defence Counsel

IMPAIRED DRIVING - 10(B) - 1-866 PHONE NUMBER

R. v. Kurich - Jan. 9, 2007 ABPC 11 per Malin, PCJ:

Impaired driving trial. Alleged 10(b) breach. Upon arrest, 10(b) warning referred to the "free legal service" and a "toll free number". Accused later put in phone room with phone books, lawyer's numbers and 24 hour Legal Aid number. However, the portion of police 10(b) card setting out the 1-866 # for duty counsel was not read.

Held: No 10(b) breach.

As per *Bartle* [1994] 3 SCR 173 regarding the obligation to advise of duty counsel services: "what must be considered is whether, despite the absence of precise words ... the essence of the appellant's right to immediate and temporary free legal advice was adequately communicated to him". Test met. The 24 hour Legal Aid number was posted in the Checkstop van. "I do not consider the Constable's decision not to recite the actual number as a failure to provide the accused with the information he needed". Authorities reviewed.

S. Beaver - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY

R. v. Craig - Dec. 6, 2006 ABPC 327 per Maloney, PCJ:

Impaired driving trial. Evidence to the contrary. Certificate of Analysis set out readings of 130 and 120 mg%, 22 minutes apart. Expert evidence was that a decline from 130 to 120 mg% in 22 minutes would equate to an alcohol elimination rate of 27 mg% per hour. However, Crown and defence expert agreed that 2 breath samples 22 minutes apart was not a scientifically acceptable means of establishing elimination rates. If the elimination rate was 27 mg%, blood-alcohol concentration at the time of driving would have been zero.

Held: Expert evidence inadmissible.

Expert evidence was speculative and therefore inadmissible in accordance with *MacDonald* 2006 ABCA 117. As per *Sveahun* 2006 ABPC 275, "it is illogical for the defence to argue accuracy of the Certificate of Analyses readings for the purpose of determining an elimination rate at the relevant time to rebut the intended presumptions of these readings as evidence to the contrary".

G. Dunn - Defence Counsel

JURISDICTION - MISTRIAL - POST JURY CONVICTION

R. v. Song - Jan. 9, 2007 ABQB 37 per Burrows, J:

Accused convicted by a jury of second degree murder. Prior to sentencing the defence applied for mistrial. Trial started with a trial on the issue of fitness, and accused was found fit by a jury. New jury then empanelled, trial proceeded, and accused was convicted. New counsel then retained, who argued that the accused was not fit, and sought a mistrial.

Held: Court having no jurisdiction to grant a mistrial.

“The power or duty of the trial judge to intervene when a jury verdict is returned and to make inquiries relating to the true nature of the verdict is one to be exercised prior to the discharge of the jury”: **Head** [1986] 2 SCR 684. Trial judge’s very limited jurisdiction arises only where “the proper recording of a jury verdict is in doubt”: **Ferguson** 2006 ABCA 36.

M. Bloos - Defence Counsel

SENTENCE - LEAVING THE SCENE - 1 YEAR JAIL

R. v. Hammadieh - Dec. 13, 2006 ABQB 897 per McDonald, J:

Accused pled guilty to leaving the scene of an accident and public mischief. Accused, while drinking and driving, collided with a taxi cab. Serious collision. Accused took no steps to inquire of the well-being of those in the other vehicle. After driving away from the scene, accused reported his vehicle stolen and then abandoned it.

Held: 1 year jail.

Rees [1993] AJ No. 700 (CA), wherein accused received 1 year sentence for leaving the scene, on all fours with present case. Conditional sentence inappropriate. “Deterrence is an extremely important factor for such matters. Driving is a chosen activity. It is a highly regulated activity. Since the audience for potential drivers is possibly more encompassing than for any other activity in society, the message must be widespread and unambiguous”: **Gratton** (2003) 356 AR 334 (QB).

D. Royer - Defence Counsel

SENTENCE - SEXUAL ASSAULT - ELDERLY VICTIM - 5 YEARS

R. v. Okumu - Dec. 1, 2006 ABQB 856 per Brooker, J:

Accused convicted of sexual assault following trial. 91 year old victim under accused’s care at a nursing home. Accused found, with his pants down, standing between the victim’s legs which were up on his shoulders, making thrusting movements. Court unable to find whether penetration occurred. Victim suffered from dementia.

Held: 5 years jail.

Serious sexual assault. Penetration not required in order for a sexual assault to be classified as serious: **D.K.** [1994] AJ No. 505. “Seriousness must be considered not only with reference to the nature of the actual touching but to the degree of violation of the victim”: **T.L.G.** 2006 ABCA 313. Accused had no record. However, 3 year starting point set out in **Sandercock** is premised upon an accused with no record. Serious breach of trust.

M. Stephensen - Defence Counsel

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