



THE UPDATE

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CIRCUMSTANTIAL CASE - IDENTITY - *HODGE'S CASE*

R. v. Pawlick - Jan. 17, 2007
ABCA 9 per McFadyen, Picard,
Martin, JA - T Judge: Thomas, J:

Appeal from conviction on charges including bank robbery. Sole issue at trial was proof of identity. Circumstantial case, including: presence at the scene, footprint identification, nervous demeanour and a dye-stained glove in accused's pocket. Expert evidence established that the dye found was used by banks in explosive dye packs. Same type of dye also used in some manufacturing industries.

Held: Appeal dismissed.

In a circumstantial case on the question of identity, the evidence must be consistent with the accused having committed the act, and inconsistent with any other rational conclusion: *Charemski* [1998] 1 SCR 679. No explanation from accused re: dye, other than it "might" have come from a construction site. "The judge was not required to consider ... fanciful or speculative explanations not grounded in evidence".

K. Teskey - Defence Counsel

IDENTIFICATION EVIDENCE - POLICE EYEWITNESS

R. v. Lam - Jan. 17, 2007 ABPC 19
per Lamoureux, PCJ:

Accused charged with trafficking in cocaine. Two sales to an undercover police officer. Issue regarding identity. Undercover officer took very generic notes regarding accused's appearance: black, 18 years old, slim, short hair, white t-shirt, grey pants. Dock identification at trial.

Held: Acquittal entered.

"In the context of gathering identification evidence, police officers are charged with the responsibility of accurate, detailed, careful note taking ... the Court will expect that details of identification of individuals who are subsequently accused of crimes will be rich with ... detail". Officer's note description "completely generic and unhelpful". The description of the accused as a "black male" described as "meaningless" as per *McIntosh* (1997), 117 CCC (3d) 385. Eyewitness identification case law reviewed.

S. Virk - Defence Counsel

IMPAIRED DRIVING - 254(2) DEMAND - "FORTHWITH"

R. v. Swenson - Jan. 17, 2007 ABPC
20 per Lamoureux, PCJ:

Impaired driving trial. Motor vehicle collision on a busy roadway. Issue as to whether screening demand was read forthwith. Suspicion that accused had alcohol in his body formed at 1529 hrs. Screening demand read 7 or 8 minutes later. "This particular case is not a usual case of its kind. Constable Oberg was faced with a number of complex duties".

Held: Demand forthwith.

Police were investigating a multiple vehicle collision on a cold wintery day. First duty of police being to ensure safety of roads. 7 or 8 minute delay justifiable in the circumstances. "This case clearly falls within the category of unusual circumstances thus allowing the court some degree of flexibility in interpreting the term 'forthwith': *Woods* [2005] SCJ No. 42.

I. Savage - Defence Counsel

**IMPAIRED DRIVING - 254(2)
DEMAND - CHANGE OF MIND**

R. v. Jensen - Jan. 18, 2007 ABPC 15 per Ogle, PCJ:

Trial on charge of refusal to provide a screening sample. Demand read at 8:06 p.m.. After 3 unsuccessful attempts to blow, accused was charged at 8:10 p.m.. After being Chartered and cautioned at 8:21 p.m., accused said words to the effect: "Give me a break. Give me another opportunity to blow".

Held: Conviction entered.

Issue as to whether accused ought to have been given another chance to blow (i.e. change of mind) as per **Cunningham** (1989), 49 CCC (3d) 521. Accused's offer to blow was too late. "Due to the 'forthwith' requirements of s. 254(2) ... as enunciated in **R. v. Woods** (2005), 197 CCC (3d) 353, there is a much narrower window for an accused to comply with an approved screening demand then there is for compliance with a 'regular' breath demand pursuant to s. 254(3)".

C. Rice - Defence Counsel

**SENTENCE - PRODUCTION
OF MARIHUANA - 14 MONTHS**

R. v. Lieu - Jan. 19, 2007 ABPC 22 per Fradsham, PCJ:

Accused pled guilty to production and possession of marihuana. Grow operation. Accused ran the operation, and was not a mere crop sitter. 274 marihuana plants with the potential of producing 822 ounces of marihuana. Operation could have produced profits in the range of \$128,000 to \$205,000. 52 year old accused with no record.

Held: 14 months jail.

Deterrence and denunciation paramount: **Penner (D.C.)** (2005) 387 AR 340. Aggravating factors included: commercial nature of operation, attempt to conceal operation by electrical by-pass, greed being the only motivating factor, accused was the owner / operator. Conditional sentence would be inconsistent with the fundamental principles of sentencing. Authorities reviewed.

W. Dewitt - Defence Counsel

**SENTENCE - SEXUAL
ASSAULT - CHILD - 9 YEARS**

R. v. R.S.M. - Jan. 15, 2007 ABPC 24 per Shriar, PCJ:

Accused pled guilty to offences including sexual touching and sexual assault. Victim was accused's biological daughter who was 11 to 13 years old at the relevant times. Multiple acts including fellatio, cunnilingus, vaginal and anal intercourse. Victim frequently protested and sometimes physically resisted. During the assaults the father often called his daughter "little bitch" or "whore". 35 year old accused with no criminal record.

Held: 9 years jail.

Aggravating factors included: breach of trust, persistent and repetitive acts, threats of force, threats that he would kill himself if his daughter disclosed the crimes, and lasting psychological injury.

P. Brunnen - Defence Counsel

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