



THE UPDATE

Issue #14 April 6, 2007

APPEAL - REASONS - W.(D.) - NEW TRIAL ORDERED

R. v. McGrandle - Feb. 1, 2007
ABQB 62 per Veit, J:

Appeal from impaired driving conviction. Arresting officer noted a variety of potential symptoms of impairment, including a flushed face and a slurring of speech. Accused testified that he had been a boxer and was nick-named "Mumbles", and that he was a welder and that his face was sometimes flushed as a result of employment. Trial judge reviewed the accused's evidence, but never stated whether she accepted it.

Held: Appeal allowed, new trial.

Trial judge committed a palpable error in not stating whether or not she accepted the accused's evidence, or whether his evidence was capable of raising a doubt. "Her failure to give reasons which dealt with such findings prejudiced the accused on his appeal". As per *W.(D.)*, where the accused testifies, the analysis of the trial evidence should begin with the accused's testimony.

B. McGlahan - Defence Counsel

APPEAL - UNREASONABLE VERDICT - MANSLAUGHTER

R. v. Cardinal - Feb. 9, 2007 ABCA
43 per Fruman, Costigan, Watson,
JA - T. Judge: Burrows, J:

Appeal from manslaughter conviction. Jury trial. Accused and deceased were related, and they became involved in a fist fight after an evening of drinking. The Crown's case depended upon the jury finding that the fight ended with a stomp on the head that caused death.

Held: Appeal dismissed.

Fact finding by jury not unreasonable. Trial judge properly explained to the jury the defence position that the stomp on the head had not been proven beyond a reasonable doubt, and a doubt as to proof that the accused's actions significantly contributed to the death: *Nette* [2001] 3 SCR 488. Self-defence also properly explained to the jury. "We cannot say that the 'bulk of judicial experience' commands us to intervene".

P. Parker - Defence Counsel

IMPAIRED DRIVING - SCREENING TEST - "FORTHWITH"

R. v. Ranieri - Feb. 6, 2007 ABPC
50 per Ogle, PCJ:

Impaired driving trial. Issue as to whether forthwith requirement re: both screening device demand and test satisfied. After formulating his suspicion, police officer instructed accused to move his vehicle, and then to walk to the police vehicle, prior to the screening demand being read. 6 minute delay. Accused's vehicle initially stopped in what the officer determined was an unsafe area of roadway.

Held: Demand and sample forthwith.

Sood [2005] AJ 1660 and *Muirhead* [2006] AJ 854, distinguished. The officer was alone with the accused and had valid safety concerns. The dangerous location of where the vehicle initially stopped constituted "exigent circumstances" justifying a delay in the reading of the demand. As per *Woods* (2005) 197 CCC (3d) 353, "the issue is ... not strictly one of computing the number of minutes".

I. Savage - Defence Counsel

**PRELIMINARY INQUIRY -
SCOPE - SELF DEFENCE**

R. v. L.M. - Feb. 2, 2007 ABPC 39 per Easton, PCJ:

Preliminary inquiry for four youths charged with manslaughter.

Altercation between the youths and an adult on a City of Edmonton bus. Considerable evidence that the deceased may have started the altercation, that he was impaired, and that the physicality between the parties stopped as soon as the deceased "let go" of one of the young people. Death caused by a basal subarachnoid haemorrhage. Issues of self-defence and defence of another raised.

Held: Committal to stand trial.

Preliminary inquiry judge not entitled to weigh the evidence heard. Further, it is improper to discharge an accused merely because a conviction at trial is unlikely. Assessing the issue of self-defence would require a prohibited weighing of evidence on the issue of whether or not the force used was excessive or only as much as necessary.

**E. O'Neill, L. Trahan, K. Teskey,
L. Stevens** - Defence Counsel

**SENTENCE - DRUGS -
COCAINE TRAFFICKING -
CONDITIONAL SENTENCE**

R. v. Bowen - Feb. 8, 2007 ABCA 40 per Fraser, CJA, Belzil, Read, JA - T. Judge: Jacques, PCJ:

Defence appeal from 18 month jail sentence imposed following accused's guilty plea to trafficking in cocaine. 1 gram sale to undercover RCMP officer. Accused had no record, limited mental abilities and a favourable PSR. "The judge considered the fact that Bowen would sell drugs when his own family had been decimated by drugs as a significant aggravating factor.

Held: Appeal allowed, 14 month CSO imposed.

"In our view, the sentencing judge wrongly considered the presence of drug addiction in the appellant's family as an aggravating factor". Denunciation and deterrence could have properly been achieved through imposition of a conditional sentence.

D. Hatch - Defence Counsel

**SENTENCE - SEXUAL
ASSAULT - PROBATION**

R. v. Mohammadi - Feb. 7, 2007 ABPC 43 per Lamoureux, PCJ:

Accused convicted following trial of sexual assault. Complainant was a nurse who was treating a member of the accused's family. Accused hugged the complainant, kissed her on the neck, attempted to kiss her on the lips, and grabbed her left breast. No criminal record. Victim Impact Statement spoke of psychological harm caused.

Held: 1 day in jail, 12 months probation.

Aggravating factors included: the assault took place at the complainant's workplace, where she was in a vulnerable position, and the effect of the crime upon the complainant. Terms of probation included sex offender counselling and community service work. SOIRA request by Crown denied. *Aberdeen* [2005] AJ 1062 followed. Given the facts of the case, "an order requiring him to register as a sex offender would be a grossly disproportionate punishment".

D. Hadley - Defence Counsel

Dawson Stevens & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780) 424-9058 Fax: (780) 425-0172

All updates can be found at: www.dsscrimlaw.com

**By clicking on the heading of any of the cases in THE UPDATE,
the reader will immediately be linked to the full text of the case.**