



THE UPDATE

Issue #15 April 13, 2007

APPEAL - REASONS - W.(D.) - COMPETING EVIDENCE

R. v. Minoose - Feb. 20, 2007
ABCA 54 per Cote, Fruman,
Costigan, JA - T Judge: Philp, PCJ:

Conviction appeal on charge of break, enter and commit assault. Credibility contest between accused and complainant. Issue as to whether trial judge erred in applying the direction for assessing credibility as set out in *W.(D.)*.

Held: Appeal allowed, new trial.

“In our view, the trial judge erred in law in his analytical approach to the issue of credibility. He condensed the analysis into a choice between the evidence of the complainant and the evidence of the appellant. In doing so, he failed to consider whether the whole of the evidence, including the complainant’s prior inconsistent statements, was sufficient to raise a reasonable doubt as to the guilt of the appellant”.

D. Hatch - Defence Counsel

CHARTER - NOTICE - TRUST CONDITIONS - PROCEDURE

R. v. Wiebe - Feb. 9, 2007 ABPC 47
per Meagher, PCJ:

Impaired driving trial. Defence filed a Charter Notice that contained trust conditions restricting its use by the Crown. Trust conditions involved a prohibition from the Crown discussing the Notice with the police witnesses. Issue as to whether Notice valid.

Held: Charter Notice invalid.

Implicit in *Dwernychuk* is the requirement that the defence provide some limited disclosure of evidence to be relied upon in support of a Charter motion. Given that the Notice is designed to permit the Crown and Court to prepare for the Charter application, trust conditions on the use of a Charter Notice would defeat the very purpose of the Notice. “Therefore trust conditions are not appropriate on a Charter Notice”. Authorities reviewed.

I. McKay - Defence Counsel

DANGEROUS DRIVING - SPEED - TEST IN HUNDAL

R. v. Richardson - Feb. 28, 2007
ABCA 68 per Conrad, McFadyen,
Berger, JA - T Judge: Belzil, J:

Appeal from conviction on charge of dangerous driving causing death. Accused was driving a corvette that began to swerve from side to side upon rapid acceleration to a speed of 60-80 km/hr. Vehicle mounted the sidewalk and struck a pedestrian. Expert evidence called that if the vehicle traction control mechanism had been operating properly, the accident would not have occurred. Trial judge found that the act of rapid acceleration, given the high performance nature of the vehicle, constituted a marked departure.

Held: Appeal dismissed.

Test in *Hundal* properly applied. Accused’s evidence that he had accelerated in this fashion before was of little relevance. “The fact that a dangerous act has not resulted in harm on other occasions is not evidence that the dangerous activity is actually safe”.

B. Beresh - Defence Counsel

**IMPAIRED DRIVING - 10(B) -
CHARTER ADVICE - WAIVER**

R. v. Schadeck - Feb. 15, 2007
ABPC 52 per Anderson, PCJ:

Impaired driving trial. Alleged 10(b) breach. Charter warning read to accused, who stated "I don't know" when asked if he wanted to call counsel. The phone was offered to the accused, who continued to express confusion about his options. The officer then explained the options by saying: "to contact a lawyer or get free legal advice". Waiver than read and accused said "yes" to waiving his rights.

Held: 10(b) breach, Certificate excluded.

Officer's advice "to contact a lawyer or get free legal advice" was confusing and in error. To imply that the legal advice to be received may or may not be free is contrary to the spirit of *Brydges*. "A mechanistic recitation of s. 10(b) rights from a card, even if repeated many times, does not mean that even persons experienced in the law readily understand what is being recited". As per *Small* (1998), 123 CCC (3d) 560, and *Shaw* (2001), 288 AR 87, accused's initial response "I don't know", found to be an implicit invocation of 10(b) rights.

B. Aloneissi - Defence Counsel

**JURIES - CROWN CLOSING
ADDRESS - MOTIVE TO LIE**

R. v. Prasad - Feb. 13, 2007 ABCA
51 per Cote, Paperny, Slatter, JA - t
Judge: Johnstone, J:

Appeal from conviction on unstated charge(s). Jury trial. "The defence complains of four statements by Crown counsel in her closing address. Each asked the jury to consider whether the complainant had a motive to lie".

Held: Appeal dismissed.

Case law clearly forbids cross-examination of the accused on the topic of the complainant's motive to lie. However, whether or not the rules about cross-examination apply to counsel's arguments, did not arise on the facts of the present case.

From the time of the opening statement of the defence to the end of the trial, the defence throughout was that the complainant was lying and inventing the whole allegation. "We see no unfairness in [the Crown's] remarks ... And indeed they were almost necessary in the context of the defence argument".

M. Bloos - Defence Counsel

**SENTENCE - MANSLAUGHTER
- 10 YEARS JAIL**

R. v. Commanda - Feb. 13, 2007
ABPC 51 per Bascom, PCJ:

Accused pled guilty to manslaughter and offering an indignity to human remains. Accused and deceased were best friends, who after a night of drinking became involved in a knife fight over two girls. Stabbing death. Accused was defending himself, but his actions were excessive. After the killing, the accused dismembered his friend's body, and the remains were thrown in various garbage dumpsters around the city. 23 year old accused with a criminal record including a conviction for assault with a weapon. 10 year (less time in custody) joint submission.

Held: 10 years jail.

Facts fell within the final and most serious category as set out in *Laberge* 165 AR 375. High degree of moral culpability.

N. O'Brien - Defence Counsel

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