



THE UPDATE

Issue #18 May 4, 2007

BAIL - BAIL PENDING APPEAL - THEFT OF \$87,340

R. v. Siik - Mar. 23, 2007 ABCA
106 per Ritter, JA:

Application for leave to appeal sentence and for bail pending appeal. Accused (who had a prior record) pled guilty to a breach of trust theft of \$87,340 from a charity. 1 year jail sentence. Accused suffered from a number of serious medical conditions.

Held: Leave to appeal, and bail granted.

“The third proposed ground of appeal is that the sentencing judge considered himself bound to impose jail ... based on *Bracegirdle* (2004) ABCA 252. The sentencing judge appears to have read that decision as stating that jail is required in all theft cases that involve a substantial breach of trust. However, as this court stated in *John* (1995), 162 AR 238, general sentencing rules are always subject to exceptional circumstances. One such circumstance specifically identified in *John* is where a convicted person suffers from ‘grave illness’”.

B. Aloneissi - Defence Counsel

FLIGHT FROM POLICE - 249.1(1) CC - MENS REA

R. v. Kulchisky - Mar. 27, 2007
ABCA 110 per Hunt, Berger,
Watson, JA - T. Judge: Horrocks,
PCJ:

Appeal from conviction on charges including dangerous driving and flight from police. The accused “took off with the door open and the officer in very close proximity” and then was involved in a “deliberate collision” with the police car.

Held: Appeal dismissed.

“The Appellant submits, relying on *Roberts* 2005 ABCA 11, that deliberate illegal evasion of the police is a condition precedent for conviction. To evade, in our view, equates with an attempt to elude or get away from. The motive for evasion, assuming the absence of a reasonable excuse, is of no moment. If the intent is ‘to get away’, say, to avoid an argument with the pursuing police officer and to seek out another, the trial judge will have to evaluate whether, in the light of all the evidence, that amounts to a reasonable excuse”.

C. Davison - Defence Counsel

IMPAIRED DRIVING - CARE OR CONTROL - TEST

R. v. Bromba - Mar. 22, 2007 ABPC
87 per LeGrandeur, PCJ:

Care or control trial. Accused found asleep in the driver’s seat of a running tractor trailer. 18 beer cans found in the vehicle. Accused testified that his sole intention was to sleep, that he would not be driving until the next day, and that the engine was running in order to have air conditioning. Impairment established.

Held: Acquittal entered.

As per *Ogrodnick* [2006] AJ No. 340: “To ground a conviction, the inquiry into the risk of changing one’s mind must establish a concrete and tangible risk of deliberately setting the vehicle in motion. It is trivial to say that ‘anything can happen’ and ‘everything is a risk’. Convictions based upon trivial speculation offend the notion of justice”. Crown unable to establish a tangible risk of the accused changing his mind and deciding to set the vehicle in motion while still impaired.

T. Hembroff - Defence Counsel

PROBATION - BREACH - PROOF - MENS REA

R. v. Eby - Mar. 19, 2007 ABPC
81 per Allen, PCJ:

Trial on charges of breach of probation. Accused, who was described as “simple”, pled guilty on his own to a number of offences and received 24 months jail and 15 months probation. Accused testified that he didn’t know the judge had added probation to the sentence, and that although he would have signed the probation order while in jail, he signed lots of “official papers” in jail and never read any of them.

Held: Acquittal.

Reasonable person standard having no application. Crown required to prove a deliberate failure to abide by the order. Proof of subjective mens rea required. Further, the accused was found to have had a reasonable excuse. **Proudlock** standard applying to the phrase “without reasonable excuse”. Authorities reviewed.

M. Sparks - Defence Counsel

SENTENCE - PRINCIPLE - REASONS FOR SENTENCE

R. v. Tran - Mar. 29, 2007 ABCA
116 per Cote, Marshall, Action, JA -
T. Judge: Wheatley, PCJ:

Defence appeal from unstated jail sentence imposed for production of marihuana. Accused had sought a conditional sentence. Issue regarding adequacy of trial judge’s reasons for sentence (i.e. reasons for not imposing a conditional sentence).

Held: Appeal dismissed.

“A sentencing judge is not required to write a textbook on sentencing, nor even draft a full checklist of topics to consider when sentencing convicted persons. Reasons for decision may be confined to the live issues or factors in that particular case. And when a judge gives oral reasons, there is no legal requirement that they be clearly segregated, or that they commence only after counsel have both finished speaking”. Adequate reasons given, and Court satisfied that sentencing judge weighed all of the relevant factors.

SENTENCE - SEXUAL ASSAULT - “POSITION OF TRUST” - MEANING

R. v. Cook - Mar. 20, 2007 ABPC 86
per Allen, PCJ:

Accused pled guilty to two charges of sexual assault. Issue as to whether accused was in a position of trust or authority in relation to either victim. Accused was the head of a ministry associated with a church through which he met both victims.

Held: Accused not in a position of trust.

As per **Audet** (1996), 106 CCC (3d) 481 (SCC), “trust” means “confidence in or reliance on some quality or attribute of a person or thing”. Accused’s status as a minister was similar to being a teacher. “In my view the general rule set out in **Audet** is applicable to anyone who occupies a position of priest, pastor, or minister where the victim is a young person in the congregation.” However, in present case accused was not the pastor at the victim’s congregation. Authorities reviewed.

S. Fix - Defence Counsel

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