



THE UPDATE

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EVIDENCE - CREDIBILITY - RECASTING WITNESS

R. v. A.R.F. - February 22, 2007
ABCA 64 per Ritter, Martin,
Nation, JA - T. Judge: Wilkins,
PCJ:

Appeal from sexual assault conviction. Complainant was accused's 14 year old step-daughter. Complainant had also made an allegation of sexual misconduct against her grandfather. After the conviction of her step-father, the complainant swore an affidavit recanting her allegations against her grandfather. She maintained however that she had been assaulted by her father.

Held: Appeal allowed, new trial.

"A judicial assessment of the complainant's credibility in making these allegations against her step-father was entitled to be informed by the fact that she had also made a false complaint of sexual assault against another family member at the same time. The outcome of the trial may well have been different had the trial judge known of these false accusations.

A. Sanders - Defence Counsel

EVIDENCE - *KGB* - STATEMENT - TEST

R. v. Nguyen - March 9, 2007
ABCA 70 per Ritter, Martin,
Nation, JA - T. Judge: Pepler, PCJ:

Conviction appeal on charges including aggravated assault. Complainant recanted at trial. Trial judge admitted for its truth a partially audio recorded statement made by the complainant very soon after the attack, wherein he identified the accused.

Held: Appeal dismissed.

Although statement was not video recorded, nor under oath, in *KGB* the Court stated: "other circumstantial guarantees of reliability may suffice to render such statements substantively admissible". Factors in present case that weighed in favour of admissibility included: statement taken soon after incident, complaint's injuries matches his original version, and matched the details given by his girlfriend in her 911 call.

C. Hooker - Defence Counsel

GUILTY PLEAS - STRIKING OF GUILTY PLEA - FACTORS

R. v. Martin - April 18, 2007 ABPC
145 per Jacques, PCJ:

Application to strike guilty pleas entered in relation to assault related charges. Pleas originally entered with the assistance of duty counsel, who advised the Court that 606(1.1) CC had been complied with. Defence relied upon a psychological report stating that accused suffered from depression, and that the depression "could have influenced his entering a guilty plea".

Held: Application denied.

Gillis [2003] ABQB 713 followed. No evidence that accused did not understand the nature of the charge or that he did not intend to admit guilt. Regarding the psychological report, there was no indication that the accused saw the psychologist after the entry of the plea, or that the plea was ever discussed with her. Onus on accused "may not be heavy" but the "mere possibility" that depression played a role "falls substantially short of what is required".

J. Evans - Defence Counsel

SENTENCE - SEXUAL ASSAULT - NURSE/PATIENT

R. v. West - February 26, 2007
ABCA 67 per O'Brien, McMahon, Hart, JA - T. Judge: DeBow, PCJ:

Appeal from 18 month conditional sentence plus probation imposed following accused's (a registered nurse) guilty plea to sexual assault of a patient. After administering pain relief medication to the patient, the accused fondled her breasts and placed her hand on his penis and ejaculated. No record. Low risk to re-offend.

Held: Appeal allowed, 12 months jail imposed.

Conditional sentence inadequate given breach of trust. Additional aggravating factors included: the patient had been given pain medication that made her sleepy and no other medical staff her on duty. Accused displayed a complete disregard for his professional and moral duties. "His moral culpability was great and little diminished by his subsequent feelings of remorse". Authorities reviewed.

SENTENCE - THEFT FROM EMPLOYER - 2 YEARS JAIL

R. v. Jaikaran - March 23, 2007
ABCA 98 per Fraser, CJA, Nation, Mahoney, JA - T. Judge: DeBow, PCJ:

Crown appeal from 2 years less a day conditional sentence imposed after accused (a bank manager) pleaded guilty to stealing \$633,000 from the bank he managed. Thefts occurred over 5 years. Accused suffered from bipolar disorder and made full restitution.

Held: Appeal allowed, 2 years jail imposed.

Sentencing judge under-emphasized the gravity of the offence and the seriousness of the conduct. "For generations, Canadian courts have said that planned persistent thefts from the criminal's employer require a sentence which will deter any other fiduciary tempted to do the same thing": *McKinnon* 2005 ABCA 8. But for restitution and the mental health issues, "the sentence would have been higher". Authorities reviewed.

B. Beresh - Defence Counsel

SEX OFFENDER REGISTRY - RETROACTIVE APPLICATION

R. v. G.W. - April 18, 2007 ABPC 106 per Creagh, PCJ:

Crown application for order requiring accused to comply with SOIRA. Accused convicted of sexual interference in relation to his two children in 2003, prior to enactment of SOIRA. However, accused still serving his sentence at the time SOIRA came into effect. No prior record.

Held: Application granted.

Effect upon offender not grossly disproportionate to the public interest in protecting society. No evidence of any unusual effect upon offender. As per *Redhead* 2006 ABCA 84, there must be evidence of a grossly disproportionate impact upon the offender. *W.(G.E.)* 2006 ABQB 317 distinguished. Court unable to find that registration would adversely impact upon accused's rehabilitation, family or employment.

K. Moore - Defence Counsel

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

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