



THE UPDATE

Issue #25 June 29, 2007

EVIDENCE - STATEMENTS - VOLUNTARINESS - TEST

R. v. Jimmy John - May 11, 2007 ABPC 125 per McIlhargey, PCJ:

Sexual assault trial. Issue regarding voluntariness of audio taped statements made to police. Accused was interviewed by only one officer, although two other police members had dealt with the accused earlier in the day. Crown called only the interviewing officer in the voir dire.

Held: Voluntariness not proven.

Crown required to produce, or explain the absence of, all police members "who had anything to do [with the accused] at any material time to the statement":

Kacherowski (1977), 7 AR 284 (SCAAD). In the present case, the two officers not called had been involved in the investigation and arrest of the accused. The rule requires that the Crown call "the officers who actually recorded or heard the statement and anyone who spoke to or dealt with the accused prior to the taking of the statement": see- R. Marin "The Admissibility of Statements". Authorities reviewed.

S. Wojcik - Defence Counsel

IMPAIRED DRIVING - 8 & 10 - CHARTER - SCREENING TEST

R. v. Dyer - May 1, 2007 ABPC 116 per Fradsham, PCJ:

Impaired driving trial. Alleged ss. 8 and 10(a) breaches. Accused had a passenger in her vehicle. Upon being stopped, police noted "a strong odour of alcohol coming from the vehicle" and accused admitted that she had been "drinking". No inquiry made by police re: what the drinking consisted of or when. Officer then removed accused from the vehicle, and took her to the police cruiser where a screening demand was made.

Held: Breaches of ss. 8 and 10(a). Certificate excluded.

Absent a screening demand prior to the accused being asked to exit her vehicle, the police must clearly tell the accused that she is under investigative detention for a possible impaired driving offence: *Nelson* (2007) ABPC 30. Absent such advice, s. 10(a) is breached. Regarding s. 8, the officer's suspicion regarding alcohol in the accused's body was not reasonable. As per *Klassen* (2004), 14 MVR (5th) 293 (ABPC), there was no objective basis to test the officer's stated suspicion. Authorities reviewed.

I. Savage - Defence Counsel

SENTENCE - ANIMAL CRUELTY - 90 DAYS JAIL

R. v. Wicker - May 14, 2007 ABPC 129 per Dunnigan, PCJ:

Accused pled guilty to wilfully causing pain to a cat, contrary to s. 446(1) CC. Accused put the cat in scalding hot water in a bath tub. Severe burning was caused and the cat ultimately had to be euthanized. Accused had only a grade 8 education and was the product of a dysfunctional upbringing. Psychiatric assessment labelled accused as a high risk for future violent offending.

Held: 90 days jail plus 2 years probation.

4 months jail would have been a fit sentence but for the guilty plea. "It is apparent from the decisions referred to me by the Crown that sentences for violence to animals have increased over the past 20 years ... They also emphasize that denunciation and deterrence are the primary objectives".

H. Van Harten - Defence Counsel

**SENTENCE - DRUGS -
MARIHUANA POSSESSION**

R. v. Lail - May 7, 2007 ABPC
117 per Brown, PCJ:

Accused pled guilty to possession of marihuana. Possible impaired driving investigation led to a search of the accused's vehicle, where 5.9 grams of marihuana were found. Accused was belligerent with police. 25 year old accused with no record. The accused had previously been the beneficiary of the Alternative Measures Program.

Held: Absolute discharge.

Accused had a university education and worked 75-80 hours a week. Only the prevalence of the offence in the community militated against a discharge. "The authorities supplied ... those are *Burke* (2005) CarswellOnt 1964 (SCJ); *Thistle* [2004] OJ 2599 (CJ); *Schulhauser* (1999), 258 AR 397 (PC) ... *McTaggart* (1990), 108 AR 74 (PC); *Caffrey* 1988 CarswellOnt 2051 (CA) - provide examples of discharges given in cases involving more serious drugs, specifically cocaine, a greater quantity of drug and even after trial".

J. Virk - Defence Counsel

**SENTENCE - ROBBERY - 5
STREET MUGGINGS - CSO**

R. v. Ryan - May 7, 2007 ABPC 139
per Brown, PCJ:

Accused pled guilty to 5 robbery offences – street muggings – wherein small amounts of cash or property were obtained to support a crack cocaine addiction. Robberies were of young people, and on one occasion a knife was produced. 23 year old accused with a criminal record for offences including theft, fraud and breaches. Significant efforts made regarding rehabilitation.

**Held: 2 years less one day
conditional sentence plus 18 months
probation.**

"Given the state of current initiatives that support the fixing of the root problem of addicted offenders by intensive treatment rather than incarceration, Mr. Ryan would be an ideal candidate were he not facing a sentence for a crime of violence. Therefore, to achieve the even application of the law to all, I am of the view that I also ought to consider a sentence that supports Mr. Ryan in addressing his root problem".

A. Iovinelli - Defence Counsel

**SENTENCE - THEFT FROM
EMPLOYER - 90 DAYS JAIL**

R. v. Walker - May 7, 2007 ABPC
120 per Brown, PCJ:

Accused pled guilty to theft from her employer. Over a 4 year period, the accused, while working as an office manager for a small exploration company, stole over \$100,000. Full restitution paid. 42 year old accused with no record. Accused did not have an extensive support network in the community. Personal gain was the motivation.

**Held: 90 days jail plus 2 years
probation.**

But for the payment of full restitution, the appropriate range of sentence would have been 6-12 months in jail. Aggravating factors included: element of planning and deliberation, relatively poor pre-sentence report, the large amount taken, and the personal profit motive. Conditional sentence may well have been appropriate but for the lack of any broad family or community support. Some jail necessary to address denunciation and deterrence. Authorities reviewed.

S. Wojcik - Defence Counsel.

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