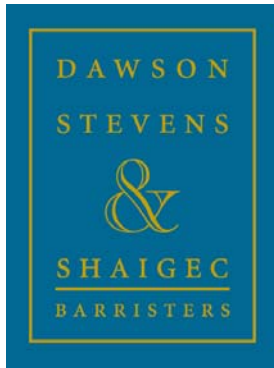

THE UPDATE

Issue #31 August 10, 2007

DRUGS - TRAFFICKING - OFFER TO TRAFFIC -PROOF

R. v. Chehimi - July 3, 2007 ABQB 418 per Thomas, J:

Trial on charge of trafficking in cocaine. Accused agreed over the phone to meet an undercover officer to "hook" her up with "three pieces." When the two met, however, the accused demanded to touch the officer's breasts, or to have her take him to her home, in order to prove that she was "not a cop." When officer declined, accused drove away.

Held: Acquittal entered.

Offence of trafficking is made out where there is an offer to sell and the intention that the offer be taken as genuine: ***Murdock*** 176 CCC (3d) 222 (Ont CA). Brief encounter between accused and undercover operator. Exact words used by accused were not recorded. "There is no clear and unequivocal language from which it can be inferred that he intended to make an offer nor did he actually make an express offer."

P. Moreau - Defence Counsel

GUILTY PLEAS - APPLICATION TO STRIKE - FACTORS

R. v. Campbell - July 5, 2007 ABPC 188 per Johnson, PCJ:

Application to strike guilty pleas in relation to charges including uttering threats and intimidation. Accused pled guilty and sentencing adjourned. Defence counsel then discharged. Basis for application being that accused "did not believe that his lawyer was ready for trial ... was afraid that he was not being represented properly," and was told that if he pled guilty he was more likely to stay out of jail.

Held: Application dismissed.

Burden on accused to show that he "did not appreciate the nature of the charge or did not intend to admit that he was guilty of it ... or he could not in law have been convicted": ***Gillis*** 2003 ABQB 713. Court satisfied that the pleas were voluntary, informed and unequivocal. "I decline to comment on whether the burden would have been greater on the Applicant if sentence had already been passed".

S. Eadie - Defence Counsel

IMPAIRED DRIVING - PROOF OF BREATH SAMPLES - 258 CC

R. v. Smith - July 3, 2007 ABPC 170 per Allen, PCJ:

Impaired driving trial. Issue as to whether the Crown had proven that breath samples were provided. Officer testified that the first sample was provided directly into the Intoxilyzer, but there was no direct evidence regarding the second sample.

Held: Certificate admissible.

As per ***Hruby*** (1980), 4 MVR 192 (Alta CA), the two pre-conditions to admission of the Certificate are: that breath samples were taken , and that the samples were taken pursuant to a lawful demand. The two conditions must be shown without reference to the Certificate. "The officer testified that he saw the accused provide a second sample. This answer is sufficient to comply with the condition in ***Hruby*** that the Crown prove by extraneous evidence that a second sample was taken. ***Hruby*** does not require proof that the officer saw the accused blow directly into the approved instrument."

P. Shipanoff - Defence Counsel

IMPAIRED DRIVING - PROOF OF BREATH SAMPLES - 258

R. v. Richmond - July 5, 2007 ABPC 189 per Tilley, PCJ:

Impaired driving trial. Issue as to whether the Crown had proven that breath samples were provided. The evidence from the officer was that he looked into the Intoxilyzer room and saw that the accused "was providing a sample of his breath."

Held: Certificate admissible.

As per ***Hruby*** (1980), 19 AR 230 (Alta CA), prior to the admission of the Certificate it must be shown that: samples of breath were taken, and that they were taken pursuant to a valid demand. The fact that the samples were taken was proven by inference. ***Smith*** 2007 ABPC 170 considered. "While Judge Allen and I come to the same result, he places weight on the tendering or production of the Certificate at trial ... I would not look at the Certificate itself to prove that samples were taken. How, I ask, does tendering an as yet inadmissible document prove its admissibility?"

K. Haryett - Defence Counsel

SENTENCE - SEXUAL ASSAULT - DISABLED VICTIM - 4 YEARS

R. v. Rusk - June 7, 2007 ABCA 189 per Hunt, McIntyre, Rowbotham, JA - Trial Judge: Hamilton, PCJ:

Appeal from 6 year sentence imposed following guilty plea to sexual assault. Trial judge overruled a joint submission for 3 years. Assault upon a wheel-chair bound complainant who suffered from cerebral palsy. Accused kissed complainant, felt her breasts through her shirt and made suggestive comments. Due to her medical condition, complainant unable to resist or call for help.

Held: Appeal allowed, 4 year sentence imposed.

Trial judge did not err in rejecting joint submission, and followed correct procedure in doing so. Also, no error in the finding that the offence constituted a serious sexual assault. However, "the judge neglected to give any weight to the appellant's guilty plea, which was a key mitigating factor in this case."

K. Molle - Defence Counsel

SENTENCE - SEXUAL ASSAULT - 12 MONTHS JAIL

R. v. Bachewich - June 14, 2007 ABCA 199 per Hunt, McIntrye, Rowbotham, JA, Trial Judge: Romaine, J:

Defence appeal from 12 month jail sentence imposed following conviction for sexual assault. 50 year old accused with no record. 9 year old victim. The victim was a friend of the accused's daughter who was at the accused's home for a sleep over. Victim woke up to find the accused stroking her vagina under her clothing. No digital penetration.

Held: Appeal dismissed.

Accused was *in loco parentis* and assault constituted a serious breach of trust. Accused's lack of remorse was a factor which could properly be taken into account in assessing the accused's suitability for a conditional sentence: ***Ambrose*** 2000 ABCA 264. "There is a considerable range of sentence for sexual assault of a child short of penetration." Given the absence of a guilty plea as a mitigating factor, 12 months found to be well within the appropriate range.

A. Sanders - 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.