



THE UPDATE

Issue #33 August 24, 2007

APPREHENSION OF BIAS - BAIL HEARING - TEST

R. v. Pervez - July 12, 2007 ABQB
477 per Belzil, J:

Defence application for Belzil J. to recuse himself from a bail review application. Accused was an alleged participant in a complex mortgage fraud. Belzil J. (in his capacity as the case management judge) had heard a number of other bail applications of co-accused, and had presided over a sentencing for one of the co-accused. Apprehension of bias alleged.

Held: Application dismissed.

The test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude”: *S(RD)* [1997] SCJ No. 84. Apprehension of bias must be shown to the level of probability. Presumption of integrity and impartiality applying. “Canadian jurisprudence has long accepted that prior dealings with an accused standing alone are not sufficient to raise an apprehension of bias.” Authorities reviewed.

J. Chadi - Defence Counsel

BAIL - BAIL PENDING APPEAL - MURDER - BAIL DENIED

R. v. Karas - July 17, 2007 ABCA
239 per Berger, JA:

Application for bail pending appeal from murder conviction. Arguable merit of appeal conceded by Crown. Main ground of appeal being an alleged miscarriage of justice “occasioned by the jury being provided with irrelevant and prejudicial material.” Primary issue being whether detention necessary in the public interest. Accused originally denied pre-trial release in part on the basis that the crime was “horrific and inexplicable” and that the Crown’s case was strong: *Karas* (2004) ABQB 286.

Held: Application denied.

Onus on accused to justify release on a balance of probabilities: *Rhyason* (2006), 208 CCC (3d) 193. Presumption of innocence no longer operable. “Given the extreme violence evidenced by the stab wounds to the body of the deceased, it is evident that the description of the crime by Burrows, J. as one of a ‘horrific and inexplicable’ nature, is appropriate.”

C. Davison - Defence Counsel

IMPAIRED DRIVING - 254(2) DEMAND - “FORTHWITH”

R. v. Veltri - June 20, 2007 ABPC
164 per Barley, PCJ:

Impaired driving trial. Issue regarding the delayed taking of a screening sample. First officer who dealt with the accused formed the necessary reasonable suspicion for a screening demand @ 3:02 am, but no demand was read. Accused then handed off to a second officer, who formed the suspicion and made the demand @ 3:15 am.

Held: Screening test not forthwith, 10(b) breach, sample excluded.

Although time is of the essence, a screening demand need not in all cases be made “immediately” upon the first observation of alcohol consumption: *Kachmarchyk* 12 MVR (3d) 116 (ABCA). However, given the suspension of the 10(b) right, the screening of the driver must be done in an expedient manner: *Pierman* 92 CCC (3d) 160. “The 13 minute delay between the stopping of the accused and the reading of the section 254(a) demand is therefore unnecessary and not very well explained.”

R. Muenz - Defence Counsel

**SENTENCE - AGGRAVATED
SEXUAL ASSAULT - 8 YEARS**

R. v. J.J.L. - July 12, 2007 ABPC
194 per Allen, PCJ:

Accused pled guilty to aggravated sexual assault. Victim was accused's 2 year old daughter. "The child suffered a sexual assault that caused a hole in the wall between her vagina and rectum ... a pediatric specialist who dealt with sexually abused children described it as one of the more horrific cases she had ever seen." 22 year old accused who was cooperative with police and entered an early guilty plea. No criminal record.

Held: 8 years jail.

Sentence reduced to 6 years and 8 months given pre-trial custody. Given seriousness of offence, aggravating factors far outweighed mitigating factors. "This type of crime shocks the community." Authorities reviewed.

P. Royal - Defence Counsel

**SENTENCE - SEXUAL
TOUCHING - 3 YEARS**

R. v. J.W.T. - July 12, 2007 ABPC
193 per Johnson, PCJ:

Accused pled guilty to sexual interference and touching. Victim was accused's daughter who was two and a half at the time of the offence. Accused masturbated next to victim in bed, had her touch his penis and then pushed his finger into her vagina. 18 year old accused with no record. Assessment showed a low to moderate risk to re-offend.

Held: 3 years jail.

Close relationship between accused and victim made the breach of trust "more egregious." 4 year starting point applicable given the seriousness of the assault. Conditional sentence unavailable given that a penitentiary term of imprisonment was required. Authorities reviewed.

R. Frayne - Defence Counsel

**SEVERANCE - JURISDICTION -
PRELIMINARY INQUIRY**

R. v. To - July 13, 2007 ABPC 192
per Cummings, PCJ:

Accused charged with various drug offences. Application made prior to preliminary inquiry for severance of counts. Issue as to whether non-trial judge having jurisdiction to entertain severance application.

Held: Application dismissed.

"The principles enunciated in *Litchfield* [1993] 4 SCR 333 and *Egoroff* (1999), 237 AR 181, adequately direct me in this application ... No evidence in the preliminary hearing has been heard nor is there agreement of counsel as to salient facts ... it is the trial judge who is in the best position to marshal the appropriate facts and undertake a review of the requirement for severance." Authorities reviewed.

M. Gottlieb - 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.**