



THE UPDATE

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APPEAL - REVIEW OF FACTS - STANDARD OF REVIEW

R. v. Sekhon - July 31, 2007
ABCA 254 per Berger, JA:

Accused acquitted of impaired driving at trial on the basis of necessity. Crown successfully appealed to Queen's Bench. Application for leave to appeal.

Held: Leave to appeal granted.

Leave granted on question of whether summary conviction appeal judge applied the wrong standard of review. "It is arguable that he substituted his own view of the evidence for that of the trial judge ... It is arguable that the summary conviction appeal judge exceeded his appellate jurisdiction by failing to inquire whether the trier of fact could reasonably have reached the conclusion he did on the evidence before him: *Burns* [1994] 1 SCR 656; *Yeves* [1987] 2 S.C.R. 168.

D. Song - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO THE CONTRARY

R. v. Abercrombie - August 14, 2007
ABPC 226 per Ayotte, PCJ:

Impaired driving trial. Evidence to the contrary. Primary issues being: admissibility of screening test failure, weight to be given to Intoxilyzer results, and inter-subject versus intra-subject elimination rates.

Held: Acquittals entered.

As per *Coutts* (1999), 136 CCC (3d) 225 (Ont CA), the fail result on the roadside test may not be taken into account in assessing the credibility of evidence to the contrary. *Beston* (2007), 214 CCC (3d) 508 (Sask CA) not followed. However "relevant, compelling and probative" the Intoxilyzer results may appear, the Court is precluded from relying upon those results in assessing the evidence to the contrary: *Boucher* [2005] 3 SCR 449. Defence expert distinguished between inter-subject and intra-subject elimination rates. Expert testified that a person's elimination rate, once established, will never vary more than 3 mg% per hour either way. "This is novel science." Expert opinion accepted.

T. Dunlap - Defence Counsel

SENTENCE - ARSON - OWN PROPERTY - CSO

R. v. Baumig - July 19, 2007
ABPC 223 per Maher, PCJ:

Accused found guilty of arson to her own property following trial. Approximately \$80,000 damage caused to the matrimonial home. Accused and her husband were in the midst of matrimonial litigation. "I am unable to conclude that revenge was a motivating factor. The motivation may equally have been nothing more than a symbolic rejection of the past."

Held: 15 month conditional sentence, and 9 months probation.

As per *Sandouga* (2002) ABCA 196, "a one year sentence would be at the low end of the sentencing spectrum for arson in retaliation for a private grievance." Conditional sentence appropriate given offender's personal circumstances. "'Safety of the community' refers only to the threat posed by the specific offender": *Proulx* at para. 69.

D. Mercer - Defence Counsel

SENTENCE - THEFT - BREACH OF TRUST - 1 YEAR

R. v. Toews - August 23, 2007
ABPC 235 per Stevens- Guille,
PCJ:

Accused pled guilty to fraud over \$5,000. Accused was a legal assistant who stole \$63,000 from the trust accounts of the lawyer for whom she worked. 39 year old accused with no record. Claimed to have been broke at the time of the thefts and pressed by creditors. Lack of remorse. "She thought [the lawyer] could afford it." No restitution paid.

Held: 1 year jail.

Denunciation and deterrence paramount. As per *Proulx* "where punitive objectives such as denunciation and deterrence are particularly pressing ... incarceration will generally be the preferable sanction." 1 year jail sentence considered to be "at the low end of the scale."

S. Fix - Defence Counsel

SOIRA - RETROACTIVE APPLICATION - 11(i) CHARTER

R. v. Youngpine - July 20, 2007
ABPC 208 per LeGrandeur, PCJ:

Issue as to whether ordering compliance with SOIRA, when the offence committed occurred before enactment of the Registry, offends s. 11(i) of the Charter.

Held: Breach of s. 11(i).

"When one considers all of the factors that inform the impact on the offender of a SOIRA order ... that such an impact is in the nature of a punishment that imposes an extra burden on the offender as compared to that to which the offender would have been exposed to at the time the offence was committed ... A SOIRA order is a punishment within s. 11(i) that is not insignificant or trivial in nature and s. 11(i) thereby prevents the retrospective application of SOIRA." Authorities reviewed.

G. White - Defence Counsel

YOUTHS - ADULT SENTENCE - ONUS ON CROWN - CHARTER

R. v. M.B.W. - July 27, 2007 ABPC
214 per Franklin, PCJ:

Youth pled guilty to first degree murder. Presumptive offence. Crown sought adult sentence as per s. 62 YCJA. Section 72(2) YCJA stating that onus resting with accused to satisfy court that adult sentence ought not to be imposed. Issue regarding constitutional validity of the reverse onus.

Held: Section 72(2) YCJA violates s. 7 and is not saved by s. 1.

Extensive review of case law and YCJA regarding the question of onus. "Although Legislators have a pressing and substantial objective in wanting sentences to be not unduly severe but proportionate to the seriousness of the offence and the most serious crimes to be punished by more serious sanctions this end is not met by the imposition of an onus on the young person."

P. Yuzwenko - Defence Counsel

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