



THE UPDATE

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APPEALS - SERVICE - EXTENSION OF TIME

R. v. Thomas - Dec. 10, 2007
ABCA 397 per Ritter, JA:

Crown sought leave to appeal from a careless driving sentence on the issue of whether or not death being caused ought to be a relevant sentencing factor. It took the Crown 19 days to decide to appeal, and then a further 9 days to file. Service upon the accused could not be accomplished within the 30 day period, as he was away working. Service accomplished one week beyond the deadline.

Held: Leave to extend time denied.

Finley (1995), 174 AR 118 (CA) applied. "In the absence of attempts by the accused to evade service or some other circumstance beyond the Crown's control, it will be a rare day (if ever) that this Court will exercise its discretion to extend the time for service on a Crown appeal."

In person

CHARTER - 8 - ARREST ON PRIVATE PROPERTY

R. v. Weeks - Dec. 12, 2007 ABPC
344 per Barley, PCJ:

Impaired driving trial. Police saw vehicle being driven in a dangerous fashion and then turn off into a farmyard. Police followed accused onto his private property, and observations of impairment were made. Accused told police to get off of his property prior to being arrested.

Held: No breach of s. 8.

Police were not trespassers. "The law is clear that the occupant of a dwelling gives implied license to any member of the public, including a peace officer, on legitimate business to come on to the property. The implied license ends at the door of the dwelling": *Tricker* (1995), 96 CCC (3d) 198 (Ont CA). Although the officer was told to leave the property, he did not become a trespasser as he was required to stay given that he had formed reasonable grounds to arrest. Authorities reviewed.

A. Kay - Defence Counsel

IMPAIRED DRIVING - 10(B) - INFORMATIONAL DUTY

R. v. Marcotte - Dec. 7, 2007
ABPC 338 per Bascom, PCJ:

Impaired driving trial. Upon arrest at a checkstop accused was advised of his 10(b) rights, but stated that he did not understand. Officer then explained the rights in layman's terms, by telling accused that "he had the right to contact a lawyer" and that a reasonable opportunity to do so would be provided.

Held: 10(b) breach, Certificate excluded.

As per *Luong* 2000 ABCA 301: "The informational duty is to inform the detainee of his or right to retain counsel ... and of the existence and availability of legal aid and duty counsel." The onus of proving the informational component of the 10(b) right, inclusive of the availability of legal aid and duty counsel rests with the Crown: *Brydges* [1990] 1 SCR 190.

B. Der - Defence Counsel

JURY CHARGE - SELF DEFENCE - 34(2) CC

R. v. Nakano - Dec. 7, 2007 ABCA 390 per Fraser, CJA; Conrad, Slatter, JA - T. Judge: Nation, J:

Appeal from jury conviction on second degree murder charge. Self-defence advanced at trial. Detailed jury instructions conceded to be correct. However, as part of an initial overview the jury was told that self-defence is available in cases where the force used was “reasonable ... necessary ... proportionate.” Issue as to whether these comments could have left the jury with the incorrect notion that self-defence is unavailable where excessive force is used.”

Held: Appeal dismissed.

Instructions read as a whole were clear that the jury was to assess the accused’s reasonable and subjective belief, and not objective necessity. “There is no danger that the jury would have wrongly imported objective necessity as an additional element of self-defence.”

D. Hatch - Defence Counsel

SENTENCE - ROBBERY - STORE - 1 YEAR JAIL

R. v. Collingwood - Dec. 7, 2007 ABCA 398 per Martin, Hawco, Park, JA - T. Judge: Wilkins, PCJ:

Defence appeal from 2 year jail sentence imposed following guilty plea to robbery of a convenience store. Unique facts. After entering the store three times, the intoxicated accused demanded money and lottery tickets. Accused was then arrested a few feet from the front door of the premises. Full confession and prompt guilty plea. 25 year old accused, very limited record, good work history and family support.

Held: Appeal allowed, sentence reduced to 1 year jail.

Denunciation and deterrence generally govern the sentencing objectives in robbery cases. “However, we find that in the unusual circumstances of this case, they were overemphasized at the cost of rehabilitation.” No weapon or threat of weapon, and minimal violence. Offence was “somewhat inept.”

In person

TRAFFIC SAFETY ACT - REVERSE ONUS - 159(A) TSA

R. v. Dennis - Dec. 11, 2007 ABCA 403 per Costigan, JA:

Application for leave to appeal from conviction pursuant to s. 51(e) TSA – a person who holds a learner’s licence shall not drive unless supervised. Only evidence at trial that the accused held only a learner’s licence was the hearsay evidence that the police officer “ran” the accused’s licence on his computer and “it showed she was a learner driver.”

Held: Leave to appeal granted.

Legislation is recent and there are no binding authorities. Leave granted on two questions: (1) Must the Crown prove that the accused holds a learner’s licence as an element of the offence under s. 51(e) TSA?; (2) Does the reverse onus provision of s. 159(a) TSA apply to an offence under s. 51(e) TSA ?

G. Johnson - Defence Counsel

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