



# THE UPDATE

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## HEARSAY - EYEWITNESS IDENTIFICATION EVIDENCE

*R. v. Fattah* - Dec. 12, 2007 ABCA 400 per Cote, Paperny, O'Brien, JA - T. Judge: Macklin J:

Appeal from second degree murder conviction (jury trial). Issue as to whether trial judge erred in admitting the hearsay statement "there's Joe Smiley." Statement attributed to deceased. Accused known by the name Joe Smiley. Statements made by deceased upon seeing a van being driven (by Joe Smiley) shortly before he was shot.

**Held: Appeal dismissed.**

Hearsay statements found to be reliable with probative value outweighing prejudicial effect: *Khelawon* [2006] 2 SCR 787. Trial judge adequately warned the jury regarding the frailties of eyewitness testimony. Further, "this is not a 'typical' identification case. Rather, Tyler [the recipient of the statements] participated in a 15-minute car chase less than an hour before and had correctly identified the appellant as the driver. He had to determine if the driver was the same person as the shooter ... the danger of eyewitness identification is lessened."

**M. Bloos** - Defence Counsel

## SELF DEFENCE - 34 & 37 CC - NECESSARY ELEMENTS

*R. v. Simon* - Dec. 13, 2007 ABCA 404 per Cote, Paperny, O'Brien, JA - T. Judge: Burrows, J:

Crown appeal from acquittal on various charges including aggravated assault. Victim hit with a bat. No defence evidence called. Trial judge acquitted on the basis of self defence.

**Held: Appeal allowed, new trial.**

Neither the submissions or counsel, nor the reasons of the trial judge, set out whether ss. 34 or 37 CC were relied upon. Only the issue of reasonable force (the fourth component of s. 34(1)) was discussed. Trial judge erred in finding self defence in the absence of an analysis of the application of either ss. 34 or 37 CC. "The failure to consider the specific self-defence provisions of the Code and to determine whether the elements had been established which are needed for the defence, are errors in law alone."

**K. Sockett** - Defence Counsel

## SENTENCE - CRIMINAL FLIGHT CAUSING HARM

*R. v. Kobelka* - Dec. 12, 2007 ABCA 405 per Watson, Belzil, Sulyma, JA - T. Judge: Wheatley, PCJ:

Defence appeal from 10 ½ year sentence imposed in relation to numerous charges including evading police causing bodily harm. 18 year old accused. Lengthy police chase in a stolen vehicle. Very high rates of speed. Accused travelled through a number of red lights and stop signs. Chase ended when accused collided with another vehicle. Female occupant of the vehicle was seriously injured and was pregnant. Baby was born premature with serious brain damage.

**Held: Appeal allowed, sentence reduced to 8 years.**

Sentencing judge failed to address the issue of the totality of the sentence. "This is particularly important when an offender is being sentenced for an offence for which a consecutive sentence is required: *Roberts* 2005 ABCA 11.

**L. Stevens** - Defence Counsel

**SENTENCE - CRIMINAL  
FLIGHT CAUSING HARM**

*R. v. Prentice* - Dec. 13, 2007  
ABCA 414 per Watson, Belzil,  
Sulyma, JA - T. Judge: Day, PCJ:

Defence appeal from 7 year sentence imposed in relation to numerous offences including evading police causing bodily harm. Primary ground of appeal being that sentencing judge failed to individualize the sentencing process.

**Held: Appeal allowed, sentence reduced to 5 years.**

“The learned trial judge was mindful of the general principles cited in *Roberts* 2005 ABCA 11 and *Breton* 2004 ABCA 391, and noted factors that distinguished Mr. Prentice from the offenders in those cases. Specifically, that Breton had entered an early guilty plea and Roberts was a younger offender than Prentice and with a lesser criminal record. However, in our view, the trial judge failed to consider the sentences imposed as a proper consideration of range and proportionality.”

**M. Duckett** - Defence Counsel

**SENTENCE - MURDER -  
PAROLE INELIGIBILITY**

*R. v. Crane* - Dec. 13, 2007 ABCA  
413 per Watson, Belzil, Sulyma, JA -  
T. Judge: Macklin, J:

Defence appeal from 22 year parole ineligibility term imposed following accused’s conviction for second degree murder. Murder of a taxi cab driver. Driver was stabbed seven times. Last entry on accused’s record was a 4 year sentence imposed for aggravated assault. The assault occurred while the accused was in custody awaiting his murder trial.

**Held: Appeal dismissed.**

Accused had 47 prior convictions, 10 of which were assault related. Days after the killing, the accused was heard to saying that he would kill “anyone who rats about the killing.” Denunciation and deterrence paramount. Accused was a dangerous person, and the trial judge did not need expert evidence to come to this conclusion. Aggravated assault while in custody was an aggravating factor, notwithstanding that it occurred after the murder. Authorities reviewed.

**L. Stevens** - Defence Counsel

**SENTENCE - MURDER -  
PAROLE INELIGIBILITY**

*R. v. Diebel* - Dec. 19, 2007 ABCA  
418 per Martin, Kent, Martin JA -  
T. Judge: Clark, J:

Crown appeal from 12 year parole ineligibility term imposed following accused’s conviction for second degree murder. Accused and deceased had been involved in a relationship. Accused killed deceased by striking her in the head with a hammer over 20 times. In a wiretapped conversation after arrest, the accused told his sister that if he was ever again in the same situation he “would probably do it over again.” Accused suffered from a bipolar disorder.

**Held: Appeal allowed, parole ineligibility period increased to 20 years.**

Trial judge erred in treating accused’s illness as a mitigating factor. The bipolar condition was treatable, but the accused had persistently refused treatment. Untreated, the accused represented a significant threat to the safety of others. Accused’s illness, and refusal to accept treatment, created an ongoing danger to others that justified a significant increase in parole ineligibility.

**D. Andrews** - Defence Counsel

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