



THE UPDATE

Issue #25 November 21, 2008

APPEAL - *W.(D)* ANALYSIS - REASONABLE DOUBT

R. v. Soloway - Sept. 29, 2008
ABQB 591 per Shelley, J:

Appeal from convictions on two charges of uttering threats. Accused testified denying the offences. Issue as to whether trial judge properly applied the *W(D)* standard to the accused's evidence.

Held: Appeal dismissed.

The fact that the trial judge accepted much of the accused's testimony regarding events leading up to the offences alleged did not preclude him from rejecting the accused's denial. Trial judge's reasons were adequate and did not reverse the onus. "A trial judge is not obligated to go through chapter and verse of the direct and cross-examination of each witness in order to adequately explain his or her decision on credibility":
Melnychuk 2008 ABCA 189.

L. Trach - Defence Counsel

IMPAIRED DRIVING - 258 CC - RETROSPECTIVE OPERATION

R. v. Lungal - Sept. 30, 2008 ABPC
282 per Johnson, PCJ:

Impaired driving trial. Evidence to the contrary. Alleged offence occurred before July 2, 2008, but the trial started after that date. Issue as to whether the July 2nd amendments to s. 258 CC (Bill C-2) were retrospective.

Held: Amendments to 258 CC not retrospective.

"The amendments to s. 258 under review engage matters of substantive law. They make a significant change to a defence. They define and limit the kind of evidence available to the accused to rebut statutory presumptions. They call for the accused to raise evidence not only addressed to an essential element of the offence, but addressed as well as to the Crown's means of proving the offence. They engage a significant right of the accused – the right to respond to the Crown's case."
Authorities reviewed.

D. DePoe - Defence Counsel

JURIES - MISTRIAL - JUDGE *FUNCTUS* POST VERDICT

R. v. Halcrow - Sept. 24, 2008
ABCA 319 per Hunt, Ritter,
Rowbotham, JA - T. Judge: Park, J:

Manslaughter trial. Crown appeal from trial judge's declaration of a mistrial several months after a jury's guilty verdict had been entered. Prior to the verdict the jury had alerted the court to concerns with respect to the accused's brothers behaviour from the courtroom gallery. When the matter was raised with counsel both parties addressed the issue and urged that the trial continue. After the verdict, but prior to sentencing, the mistrial application was made and granted.

Held: Appeal allowed, matter remitted for sentencing.

A trial judge generally has no jurisdiction to hear a motion for a mistrial once the jury has been discharged. As per *Ferguson* 2006 ABCA 36, "while a trial judge may retain a residual discretion in certain narrow and limited circumstances in which the proper recording of a jury verdict is in doubt, this is not one of such instances."

B. Beresh - Defence Counsel

**MURDER - ELECTION - 473
CC - JUDGE ALONE**

R. v. Choy - Oct. 8, 2008 ABQB 626 per Marceau, J:

Second degree murder trial.

Defence sought Crown consent to re-election to judge alone. Crown refused consent, and declined to provide reasons for refusal.

Defence application to compel Crown to provide reasons, and for an order directing the re-election.

Held: Applications denied.

No evidence of Crown abuse of discretion. Accordingly, Court precluded from compelling the Crown to provide reasons for the exercise of discretion: *Ng* 2003 ABCA 1. Re-election sought on three grounds: pre-trial publicity; the potential of discrimination by a jury against the accused who was Chinese; complexity of the evidence. None of the grounds advanced justified a compelled re-election. Authorities reviewed.

B. Beresh - Defence Counsel

**MURDER - PARTIES - 21 CC -
WILFUL BLINDNESS**

R. v. Briscoe - Sept. 30, 2008 ABCA 327 per Paperny, Martin, Belzil, JA - T. Judge: Burrows, J:

Crown appeal from acquittal on charge of second degree murder. Accused was one of five charged with the rape and murder of a 13 year old girl. Trial judge found that it had not been proven that the accused had actual knowledge that the others in the group had intended to sexually assault and kill the victim.

Held: Appeal allowed, new trial.

Trial judge erred by failing to consider whether the accused was wilfully blind and whether proof of knowledge could be established in this way. "The doctrine of wilful blindness is a means of establishing knowledge, not intent ... Obviously a finding of knowledge, whether 'actual' or by application of the doctrine, will inform, and may lead directly to, a finding of intent." Authorities reviewed.

C. Davison - Defence Counsel

**SENTENCE - DRUGS -
TRAFFICKING - CSO**

R. v. Wilson - Sept. 30, 2008 ABQB 588 per Veit, J:

28 year old aboriginal accused pled guilty to possession of 1 gram of cocaine for the purpose of trafficking. Conditional sentence application.

Held: 2 years less 1 day CSO.

As per *Wells* [2000] 1 SCR 207, the offence was not so "particularly violent and serious" so as to require an aboriginal and non-aboriginal offender to receive the same sentence. "The evidence at the sentencing hearing establishes both that Mr. Wilson's aboriginal background has contributed to the commission of the offence and that the programs and services available in a custodial setting to an aboriginal in Mr. Wilson's situation are not optimal for ensuring that Mr. Wilson re-integrates responsibly into the community."

T. Engel - Defence Counsel

Dawson Stevens Duckett & Shaigec
Suite 300, 9924-106 Street, Edmonton, Alberta, T5K 1C4
Tel: (780) 424-9058 Fax: (780) 425-0172

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