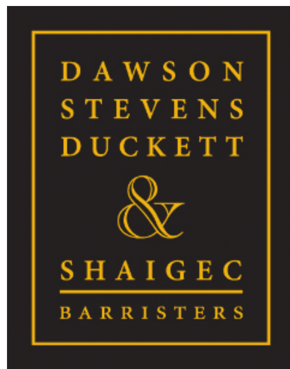


# *THE UPDATE*

**Issue #3 January 23, 2009**

## BAIL - MURDER - STRENGTH OF CROWN CASE -

***R. v. Janvier*** - 2009 ABQB 21 per Bielby, J:

Accused charged with second degree murder of her common-law. 3 stab wounds. 38 year old accused with a substance abuse problem with a number of convictions related to prostitution and failure to appear. Preliminary inquiry delayed by a Crown adjournment. Bail hearing.

**Held: Bail granted**.

Regarding the third ground, "the Crown does not have overwhelming evidence supporting the charges ... Its case relies upon the testimony which may well be subject to a Vetrovec-type warning ... The strength of the Crown's case here falls far below that in the well-known decision of ***R. v. White*** 2006 ABCA 65." Conditions of release included: nighttime house arrest at her parents' residence and weekly reporting to the police.

**K. Teskey** - Defence Counsel

## IMPAIRED DRIVING - 254(2) CC - APPROVED SCREENING TEST

***R. v. Balogh*** - 2009 ABPC 10 per Matchett, PCJ:

Impaired driving trial. Issue regarding whether Crown had proven that the roadside test was conducted with an approved screening device. Arresting officer testified that the approved device used was an "Alco-Sensor 400D." No such device was amongst the approved instruments enumerated in the Criminal Code.

**Held: Conviction entered**.

"Cst. Tabb-Hibbert referred to the device as an 'approved screening device' when he testified about the wording of the demand. More significantly, he replied in the affirmative to a question poised to him by the Crown regarding whether or not he had an approved screening device ... he testified that he obtained a sufficient sample from the device and then explained the meaning of a failed result." ***Reyes*** 2008 ABPC 370 followed. Crown not always required to prove the make and model of the approved instrument.

**E. O'Neill** - Defence Counsel

## SENTENCE - IMPAIRED DRIVING - 12 MONTHS JAIL

***R. v. Hirtle*** - 2009 ABCA 22 per Rowbotham, Hart, Nation, JA - T. Judge: Semenuk, PCJ:

Defence appeal from two 12 month consecutive sentences imposed in relation to charges of impaired driving and drive while disqualified. Blood-alcohol reading of .209 and .218. Accused had 9 previous impaired driving convictions and 3 convictions for drive while disqualified. Crown sought a sentence of 15-18 months.

**Held: Appeal dismissed**.

Sentence not demonstrably unfit. "We do not find that the sentence is arbitrary or unreconcilable when compared with sentences of the same judge or with similarly situated offenders."

**A. Sanders** - Defence Counsel

## SENTENCE - MANSLAUGHTER - 9 YEARS

***R. v. Struthers*** - 2009 ABCA 28 per Rowbotham, Hart, Nation, JA - T. Judge: Park, J:

Defence appeal from 9.5 year sentence imposed following a guilty plea to manslaughter. Accused participated with two others in the torture and killing of another female that they had determined was a "rat." Crown conceded at the sentence hearing that they were unable to prove what act(s) were committed by the accused versus the other two people involved.

**Held: Appeal dismissed**.

Sentencing judge did not err in finding that the accused had a "moral sway" over one of the other participants in the torture. The inference drawn was permissible. Sentence imposed was within the proper ranger for manslaughter offences.

**B. Der** - Defence Counsel

## SENTENCE - PRE-TRIAL HOUSE ARREST CREDIT

***R. v. Clark*** - 2009 ABCA 24 per Rowbotham, Hart, Nation, JA - T. Judge: Erb, J:

Defence appeal from 6 year jail sentence imposed regarding offences including aggravated assault, choking and unlawful confinement. Accused confined and assaulted his girlfriend over a 16 hour period, questioning her about her sexual past. No credit was given for over two months of house arrest bail. While the sentencing judge addressed her mind to the house arrest issue, she declined credit, without reasons.

**Held: Appeal dismissed**.

6 year global sentence fit. "Having regard for the strict, 'jail-like' conditions of the house arrest ... reasons should have been given for the denial of a credit." However, the failure to give reasons did not amount to an error in principle. As per ***Lau*** 2004 ABCA 408, consideration must be given to crediting strict bail conditions, but a judge is not obligated to give credit.

**H. Wolch** - Defence Counsel

## SEXUAL OFFENDER REGISTRY - CHARTER - 7

***R. v. Warren*** - 2008 ABCA 436 per Berger, JA:

Defence application for leave to appeal a trial judge's disposition holding that the SOIRA is a minimal imposition under the liberty of the subject and, accordingly, is not sufficiently significant to warrant protection under s. 7 of the Charter. Issue focussed upon the retrospective scope of the legislation.

**Held: Leave granted**.

"I note that in ***R. v. Redhead*** 2006 ABCA 84 this Court took note of the parallels between DNA orders and SOIRA orders: 'Both are consequences of a conviction; both exist to assist the police in investigation future crimes; and both infringe upon the privacy and liberty rights of the offender.' The precise question of law proffered by the Applicant is whether ss. 490.019 and 490.02(1) of the Criminal Code, given their impugned retroactive application, are contrary to s. 7 of the Charter."

**G. Johnson** - Defence Counsel

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