



# THE UPDATE

Issue #6 May 22, 2009

## APPEAL - REASONS FOR JUDGMENT - SHEPPARD

*R. v. M.R.M.* 2009 ABCA 90 per Cote, McFadyen, Verville, JA - T. Judge: Sisson J:

Appeal from sexual assault conviction. Complainant testified that after an evening of partying she awoke to find the accused having sexual intercourse with her. Accused did not testify. Defence challenged complainant's credibility, but she did not recant. Issue regarding sufficiency of trial judge's brief oral reasons.

### Held: Appeal dismissed.

"The reasoning process which a trial judge must use when some witness testifies and contradicts the complainant on vital points, is not identical to that required in the present uncontradicted case ... A trial judge's reasons, and the *Sheppard* doctrine, are directed to informing the accused why he was convicted, and letting an appeal court know enough to accord meaningful review ... The defence position at this trial required only fairly brief reasons."

D. Knisely - Defence Counsel

## IMPAIRED DRIVING - CARE OR CONTROL - ENGINE RUNNING

*R. v. McCollister* 2009 ABPC 68 per LeGrandeur, PCJ:

Care or control trial. Impaired accused blew 170 mg%. Vehicle had been driven by accused's friend who stopped to briefly meet with his girlfriend. When the friend exited the vehicle, the accused slid over to the driver's seat. Police then arrived. Vehicle was running, but accused had not started it. Accused's evidence rebutted the presumption, issue regarding actual care or control.

### Held: Acquittal entered.

A number of distinct steps would have been required to set the vehicle in motion. No real risk that the vehicle could unintentionally be set in motion. "There does not appear to be any particular standard or test of probability or prospect of future intent that informs this matter, rather as the Alberta Court of Appeal contemplated in *R. v. Ogradnick* the ultimate question is a factual one for the trial judge to decide in the context of Parliament's legislative intention of protecting the public."

A. Larson - Defence Counsel

## IMPAIRED DRIVING - CARE OR CONTROL - ACTUS REUS

*R. v. Nikolic* 2009 ABPC 70 per Malin, PCJ:

Care or control trial. Accused found in a running vehicle. Driver's door was open and accused's feet were dangling out the driver's doorway. Upon police arrival accused seen to attempt to light a cigarette with the vehicle lighter. Accused testified that he started the vehicle only to access the lighter. Presumption rebutted. Issue regarding actual care or control.

### Held: Conviction entered.

"When, in this case, the accused consciously and deliberately sat in the motor vehicle and remained in a conscious state, the accused exercised care of the vehicle. When he consciously and deliberately put the key in the ignition and turned on the motor he exercised control over it ... That he might have to do something more to put it into motion doesn't matter ... He had such care or control of it that he could have driven it."

G. Smith - Defence Counsel

**SENTENCE - ARSON -  
MULTIPLE FIRES**

*R. v. C.P.M. 2009 ABPC 58* per Allen, PCJ:

Accused pleaded guilty to arson. Multiple fires set over two dates. Fires ranged from dumpsters to motor vehicles. Accused was 18 years old at the time and had a significant youth court record. "He has said that setting fires while he is intoxicated amuses him."

**Held: 2.5 years jail.**

Sentence reduced by 18 months given 9 months pre-trial custody time. Aggravating factors included: 13 fires set, substantial damages caused, the reckless fire setting endangered sleeping inhabitants of nearby residences. Wide range of sentences available for arson, depending upon the value of the lost property and the degree of danger to life. Authorities reviewed.

M. Gourlay - Defence Counsel

**SENTENCE - DEFAMATORY  
LIBEL - 15 MONTHS JAIL**

*R. v. Knight 2009 ABCA 86* per McFadyen, Hunt, O'Brien - T. Judge MacLeod, J:

Crown appeal from 15 month conditional sentence imposed following accused's conviction at trial of defamatory libel. Accused had a long history of breaching court orders, as well as prior convictions for uttering threats and harassing phone calls.

**Held: Appeal allowed, 15 month jail sentence imposed.**

In assessing safety of the community, the "community" includes the victim. Current offence committed while accused was on probation and subject to a no contact order. "On this record, it is impossible to conclude that the respondent does not pose a danger when in the community." Case law supported a general range of sentence for defamatory libel of 12-18 months.

D. Bourdon - Defence Counsel

**SENTENCE - SEXUAL  
ASSAULT - CHILD VICTIM**

*R. v. Vautour 2009 ABPC 64* per Daniel, PCJ:

Accused pleaded guilty to sexual assault with a weapon upon a 14 year old boy. Accused grabbed the young boy who was walking alone in some bushes in the late evening. After threatening the boy, he had him remove his pants, performed fellatio upon him, digitally penetrated the boys anus and ejaculated on his buttocks. Record included 2 similar assaults upon young boys in 1991.

**Held: 6.5 years jail.**

Sentence reduced to 5 years given time in custody. Primary mitigating factor was the guilty plea. Psychiatric report placed accused at a high risk for sexual recidivism.

P. Gracia - 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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