



THE UPDATE

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APPEAL - REASONS FOR JUDGMENT - W(D.)

R. v. Savage 2009 ABCA 139 per Berger, Costigan, Watson, JA - T. Judge: Chromka, PCJ:

Conviction appeal. Oath against oath trial. Trial judge stated: "... the main issue is whether or not I accept your testimony ... or whether I accept the complainant's testimony ... I do choose to accept the testimony of the complainant."

Held: Appeal allowed, new trial.

"The trial judge subsequently sets out the three pronged formulation in *R. v. W.(D.)* [1991] 1 SCR 742. Is that sufficient to cure the impugned approach? We think not. The model instructions set out in *W.(D.)* do not require a formalistic incantation ... The reasons here, in our view, betray a casuistic result-driven approach, further exacerbated by the trial judge's comment early in his brief judgment that 'there is nothing in [the complainant's] evidence that would indicate to me that I have to somehow or other reject her testimony.'"

M. Bloos- Defence Counsel

CHARTER - FAIR TRIAL - RIGHT TO BE PRESENT

R. v. Blanchard 2009 ABCA 133 per Picard, Hunt, Costigan, JA - T. Judge: Marceau, J:

Appeal from uttering threats conviction. Accused was unrepresented at trial, having dismissed three lawyers. Accused's inappropriate and disruptive actions during trial caused his removal from the courtroom.

Held: Appeal allowed, new trial.

Although the judge had "no choice" but to remove the accused, at the end of the Crown's case the accused ought to have been brought back into the courtroom and advised of his right to testify, to call witnesses and to present argument. The accused ought to have been allowed the option of further legal advice at the close of the Crown's case. "The appellant was denied the right to full answer and defence and to procedural fairness."

L. Stevens - Defence Counsel

IMPAIRED DRIVING - EVIDENCE TO CONTRARY

R. v. Clark 2009 ABQB 215 per Verville, J:

Accused acquitted at trial on the basis of evidence to the contrary. Crown appeal from Provincial Court findings that the July 2nd Bill C-2 amendments to the Criminal Code were not retrospective.

Held: Appeal allowed, new trial.

"The amendments simply change the mode of advancing a defence ... Whether these amendments effect a significant change or not, the change is not substantive, but procedural and evidentiary ... It is trite that procedural amendments are always unfair in the sense that litigants are treated differently prior to and after their coming into effect. This does not render them substantive, and there is no Charter issue before this Court calling for an adjudication as to the constitutionality of the amendments."

L. Garcia, G. Johnson - Defence Counsel

POLICE POWERS - FEENEY - ENTRY INTO DWELLING

R. v. Ewatski 2009 ABQB 214 per Burrows, J:

Appeal by two police officers convicted of assault. Police attended upon a home to execute arrest warrants. The plan was not to enter the home without consent. Upon arrival, one of the officers (not charged) unexpectedly entered the home, and the other officers followed him in to protect him. The home owner became physical with police and was forcefully restrained. Trial judge found the police to be trespassers.

Held: Appeal allowed, acquitted.

The accused officer's duty to protect another officer did not depend upon the lawfulness of the original entry into the home. A *Feeney* warrant was not required, as the accused officers did not enter the home to arrest, but to protect their partner. The police were not trespassers, and they used reasonable force. The police were acting within their lawful duty to preserve the peace.

K. Macdonald, L. Stevens -
Defence Counsel

PRISONER RIGHTS - TRANSFER OF PRISONERS

R. v. Green 2009 ABQB 233 per Bielby, J:

Habeas corpus application. Prisoner serving a life sentence was transferred from Edmonton to Prince Albert. Transfer was opposed because he believed that he would be double-bunked in Prince Albert, and because the transfer would reduce contact with his family.

Held: Application dismissed.

“The Federal Court of Canada pursuant to s. 18(1) of the Federal Court Act has sole jurisdiction to hear this application which is, essentially, one of certiorari. The inmate-applicant has failed to lead evidence adequate to establish that he has a prima facie or arguable case such as to entitle him to the remedy of habeas corpus which would have given this Court jurisdiction.”

T. Engel - Defence Counsel

SENTENCE - WITHDRAWING OF JOINT SUBMISSION

R. v. R.C.M. 2009 ABPC 130 per Redman, PCJ:

Youth pleaded guilty to sexual assault. Ad hoc prosecutor agreed to a joint submission for a conditional discharge. Sentencing adjourned. At the return date a different prosecutor withdrew the joint submission on the basis that he did not believe that it was an appropriate sentence.

Held: Conditional discharge.

As per *Nixon* 2008 ABPC 20, joint submission ought not to have been withdrawn. “There is no suggestion by the Crown in this case that the ad hoc Crown reached the decision to enter into an agreement based upon some misunderstanding of law or evidence, or that it was based on some defect that would bring the administration of justice into disrepute.” Conditional discharge appropriate in all of the circumstances.

G. White - Defence Counsel

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