



THE UPDATE

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IMPAIRED DRIVING - 8 - 254(2) CC - "FORTHWITH"

R. v. Kerekes 2010 ABPC 197 per Valgardson, PCJ:

Impaired driving trial. Officer who stopped accused and originally formed the suspicion required under 254(2) CC did not have an ASD. He called for a device, which arrived three minutes later. The officer who arrived with the device formed his own suspicion, and made the ASD demand seven minutes after arriving, and 13 minutes after the accused was first stopped. Issue as to whether "forthwith" requirement satisfied.

Held: No s. 8 breach.

Period of delay not excessive. Delay was not sufficient to give rise to a realistic opportunity to consult counsel. "This is not a situation in which it was not known when the ASD would arrive. The ASD was expected within a few minutes of Sgt. Thomson placing his call and it arrived as expected."

K. Haryett - Defence Counsel

IMPAIRED DRIVING - 10(B) - POLICE GIVING ADVICE

R. v. Hill 2010 ABPC 188 per Skene, PCJ:

Impaired driving trial. Accused testified that when placed in the phone room he asked the officer whether or not it would make a difference if he exercised his right to counsel, and that the officer told him that "it wouldn't change the outcome." Officer testified that the accused simply told him that he did not want to contact counsel.

Held: No 10(b) breach.

Court uncertain as to which witness to believe. As per *Kicovic* 2004 ABPC 190, *W(D.)* does not apply to a Charter voir dire. Rather, the court must determine the probabilities of who is telling the truth. Accused's version not proven on a balance of probabilities. As per *Wolbeck* 2010 ABCA 65, court not satisfied that the police actions amounted to "interference" rather than mere "involvement" with the accused's efforts to contact counsel.

B. Der - Defence Counsel

IMPAIRED DRIVING - 254(2) - WORDING OF DEMAND

R. v. Doucette 2010 ABCA 175 per Slatter, JA:

Application for leave to appeal from conviction on charge of refusal of a screening demand. Argument that the wording of the standard 254(2) CC demand was deficient under ss. 7 and 8. Proposed wording included: "...This is a preliminary test to determine the alcohol level in your body. If you pass the test ... you will be free to drive home ... If you fail the test ... you will be arrested ... If you refuse ... you will be charged under the provisions of the Criminal Code. The penalty on conviction is as serious as the penalty for a person convicted of impaired driving and you will lose your driver's licence for a minimum of 1 year."

Held: Leave denied.

Proposed wording not mandated by either the Criminal Code nor the Charter: *Liptak* 2007 ABCA 177.

T. Kantor - Defence Counsel

INCONSISTENT VERDICTS - TEST TO BE APPLIED

R. v. J.J.W. 2010 ABCA 173 per Berger, Costigan, Rowbotham, JA - T. Judge: Filice, PCJ:

13 year old accused convicted of sexually assaulting his 4 year old sister. Acquitted of incest on the basis that the trial judge was unable to conclude “that there was actual penetration either vaginally or anally.” However, on the charge of sexual assault, trial judge found the complainant’s video statement to be “reliable and compelling” that the accused placed his “john” or “gina in her bum”.

Held: Appeal allowed, new trial.

Inconsistent verdicts. “When the evidence on one count is so wound up with the evidence on the other that it is not logically separable, inconsistent verdicts may be held to be unreasonable”: **R. v. Pittiman** [2006] 1 S.C.R. 381.

C. Seto - Defence Counsel

RECOGNIZANCE - BREACH - DE MINIMUS NON CURAT LEX

R. v. Tan 2010 ABPC 163 per Fradsham, PCJ:

Breach of recognizance trial. Breach of curfew, as accused stayed late at work for almost 1 hour to finish a project without first getting the permission of his bail supervisor. Issue as whether the maxim of *de minimus non curat lex* applied.

Held: Conviction entered.

“The first question is: does the concept of *de minimus non curat lex* apply to Canadian criminal law? The answer to date from appellate courts appears to be: maybe.” (See: **Kubassek** (2004), 25 CR (6th) 340 (Ont. CA). However, even if the doctrine applied, the accused’s actions extended beyond *de minimus*. “The fact that the accused in that period of almost one hour was engaged in productive, pro-social activities (such as work) does not transform such violating conduct into a trifle”.

H. Wolch - Defence Counsel

SENTENCE - PARITY - 718.2 - GUIDING PRINCIPLE

R. v. Scott 2010 ABCA 168 per Fraser, CJA, Ritter, Watson, JA - T. Judge: Lamoureux, PCJ:

Defence appeal from 12 month jail sentence followed by probation for accused who pleaded guilty to theft and fraud. Co-accused received a conditional sentence.

Held: Appeal allowed, 15 month CSO imposed.

Parity is a guiding principle of the sentencing law under 718.2(b) CC. Sentencing judge failed to either consider the parity principle, or failed to adequately explain the need for disparity in the sentences. Also, too much emphasis was placed upon the accused’s inability to pay restitution. “There is no straight line between the failure to make restitution and imprisonment.”

R. McCall - Defence Counsel

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