



THE UPDATE

Issue #17 July 2, 2010

CHARTER - 10 - DETENTION - IMPAIRED DRIVING - 258(1)(G) - REASONABLE BELIEF - PROOF OF TWO SAMPLES

R. v. Tran 2010 ABCA 211 per McFadyen, Berger, Ritter, JA - T. Judge: Yamauchi, J:

Crown appeal from acquittal on drug charges. Drugs excluded under 24(2). Vehicle stop. Accused questioned by police and ultimately consented to a search. Accused testified that he felt that he was not free to leave, and trial judge found that detention existed.

Held: Appeal allowed, new trial.

Trial judge erred in focussing on the accused's subjective belief that he was detained. The belief must be reasonable. As per *Grant* [2009] 2 S.C.R. 35, an objective test is to be used in assessing detention. "Trial judge erred in law in concluding this court's decision in *Fash* 1999 ABCA 267 required that the police say more than just telling a person that he is free to go. In *Fash*, this court was not providing a mandatory script, but rather indicated the importance of a clear communication to the person that he or she is free to go."

S. Tarrabain - Defence Counsel

R. v. Yan 2010 ABCA 218 per Rowbotham, JA:

Application for leave to appeal from conviction on over .08 charge. Investigating officer presented accused to breath technician, and then later served the Certificate. No evidence that he actually saw accused provide two samples. Issue as to whether an inference could be drawn that "samples were taken" as required by 258 CC.

Held: Leave denied.

The production of the Certificate itself, without reference to its contents, is evidence from which an inference may be drawn that samples were taken. The issue of the use of the Certificate for this limited purpose did not arise on the facts in *Hruby* [1980] AJ No. 584 (CA). However, the Certificate was used in this identical manner in *Pickles* (1973), 11 CCC (2d) 210 (Ont. CA). No error of law demonstrated justifying leave to appeal.

T. Foster - Defence Counsel

SENTENCE - DOMESTIC VIOLENCE - 9 YEARS JAIL

R. v. D.J.D. 2010 ABCA 207 per Paperny, Watson, Rowbotham, JA - T. Judge: Hogan, PCJ:

Crown appeal from global 5 year jail sentence imposed in relation to a series of violent assaults by accused against his wife over a 7 hour period. Convictions included: assault causing, attempted strangling and sexual assault. Amongst other things, the accused handcuffed his wife, beat her, forced her to insert a candle into her vagina, choked her with a belt and took pliers to her teeth trying to pull them out. Accused had a previous (but less serious) related record.

Held: Appeal allowed, 9 year global sentence imposed.

Sentence was demonstrably unfit. "Violent, degrading, humiliating assaults." Protracted assault over several hours. "This was not a single offence." Breach of trust, and the need for denunciation and deterrence paramount.

In person

SENTENCE - DRUGS - CSO - COCAINE TRAFFICKING

R. v. Aden 2010 ABPC 220 per Semenuk, PCJ:

Accused plead guilty to trafficking in cocaine. Sale of \$120 worth of cocaine to an undercover officer. On a second occasion, accused held out what he believed was cocaine for sale, but it was not. 21 year old accused with no record.

Held: 2 years less 1 day CSO.

Aggravating facts including the type of drug, two transactions and that the motive was profit. In mitigation: the amount of the drug was small, positive PSR, youthful offender, early guilty plea. Accused was a “small time street trafficker, whose criminal behaviour can be attributed to a serious lack of judgment.”

K. Sitar - Defence Counsel

SENTENCE - IMPAIRED DRIVING - PROHIBITION

R. v. Irvine 2010 ABCA 212 per Paperny, Watson, Rowbotham, JA - T. Judge: Semenuk, PCJ:

Accused originally plead guilty to two sets of impaired driving offences. 6 month jail sentence. Sentencing judge imposed two 3 year driving prohibitions to run consecutive. Appeal from consecutive nature of the prohibitions. Related record.

Held: Appeal dismissed.

Two separate offences required two separate and consecutive prohibitions. “Indeed, to have directed concurrent prohibitions would result in the appellant having no prohibition for the second conviction, and would violate the spirit of section 259(1)(c). Appeal allowed to the extent that interlock eligibility permitted after two years.

B. Der - Defence Counsel

SENTENCE - SEXUAL ASSAULT - 2 YEARS

R. v. Bushell 2010 ABCA 205 per Paperny, Watson, Rowbotham, JA - T. judge: Norheim, PCJ:

Crown appeal from an 18 month CSO (and refusal to order SOIRA compliance) following accused’s conviction at trial for sexual assault. 29 year old accused performed fellatio upon a drunk and passed out 16 year old victim following a night of drinking.

Held: Appeal allowed, 2 year jail sentence, and SOIRA order.

Trial judge underestimated the gravity of the offence, which was a serious sexual assault. Trial judge erred in treating the assault as less serious on the basis that the victim was asleep. The fact that the victim was asleep in his own room emphasized the seriousness of the assault.

A. Sanders - Defence Counsel

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