



# THE UPDATE

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## AGGRAVATED ASSAULT - INTENT - OBJECTIVE TEST

*R. v. Cador* 2010 ABCA 232 per Berger, Costigan, McDonald, JA - T. Judge: Wenden, PCJ:

Conviction appeal on aggravated assault charge. Accused's current boyfriend administered a severe beating to her previous boyfriend. Accused did not administer any blows, but was present throughout the assault and later admitted that "it wasn't supposed to be that bad."

### **Held: Appeal dismissed.**

The *mens rea* for aggravated assault, including cases of party liability, is the objective foresight of bodily harm: *Cuadra* (1998), 125 CCC (3d) 289. Evidence established that the assault was planned and that the accused was a party to the joint enterprise. "The Appellant did not say 'it wasn't supposed to be bad', an assertion that arguably would be consistent with a shove or a slap ... Her choice of language leads one to reasonably conclude that foreseeability of an assault with 'bad' consequences is made out."

K. Teskey - Defence Counsel

## CROWN COUNSEL - CROSS EXAMINATION OF ACCUSED

*R. v. Sihota* 2010 ABPC 217 per Brown, PCJ:

Uttering threats trial (domestic violence). Credibility contest. Crown counsel cross-examined the accused regarding the details of his prior conviction as set out in his criminal record.

### **Held: Acquittal.**

Cross-examination was improper. Crown counsel is permitted to ask for the name of the crime, the place of conviction and penalty, but are not entitled to cross-examine regarding the details of the offences: *Laurier* (1983) OAC 128. "While prosecution of any case will only be enhanced by a prosecutor having and showing understanding and concern, to engage in partisan advocacy on behalf of a victim is incompatible with the role of the Crown and serves neither the state nor the victim. This trial demonstrates the dangers of the Crown moving into the role of victim's advocate."

B. Popovic - Defence Counsel

## DNA - SEXUAL ASSAULT - PROOF BY DNA EVIDENCE

*R. v. Johnson* 2010 ABCA 230 per Berger, Ritter, Rowbotham, JA - T. Judge: Clackson, J:

Appeal from jury conviction on charges including kidnapping and aggravated sexual assault. 7 year old complainant. Incident occurred in 1995. Accused's arrest and conviction arose from a DNA databank match. "The issues on appeal centre around the question of whether someone can be convicted when the bulk of the evidence implicating that person is DNA evidence".

### **Held: Appeal dismissed.**

"The appellant relied on two English decisions for the proposition that DNA evidence by itself cannot found a conviction: see *R. v. Watters* [2000] EWCA Crim 89 and *R. v. Lashley* [2000] EWJ No. 644 (CA)." Both cases distinguishable. Unchallenged expert DNA evidence established a probability of 1 in 890 billion that the crime scene DNA belonged to the accused.

M. Bloos - Defence Counsel

**IDENTIFICATION EVIDENCE  
- EYEWITNESS - TAINTS**

*R. v. McNaughton* 2010 ABCA 231 per Berger, Costigan, McDonald, JA - T. Judge: Wenden, PCJ:

Conviction appeal on aggravated assault charge. Severe beating of accused's girlfriend's ex-boyfriend. Complainant admitted that when he was first questioned by medical personnel he had no memory of who attacked him, but over time he was able to recover his memory, and was ultimately able to clearly identify the accused as the attacker.

**Held: Appeal dismissed.**

"The reasons demonstrate that the judge was alive to the alleged taints bearing upon the sufficiency and reliability of the testimony of Mr. Esau, inclusive of the notations of the medical personnel ... Those proffered 'weaknesses' do not, on this record, adversely affect the careful and thorough analysis by the trial judge of the factual underpinnings." Ample evidence to support the conclusion that the accused beat the complainant.

M. Bloos - Defence Counsel

**IMPAIRED DRIVING - 8 -  
REASONABLE GROUNDS**

*R. v. Manku* 2010 ABPC 225 per Henderson, PCJ:

Impaired driving trial. Reasonable grounds issue. Accused was travelling at a high rate of speed. Upon speaking to police accused appeared to be dazed, had a "deep stare", had difficulty retrieving documents and had a strong odour of alcohol on his breath. Accused also swayed side to side after being removed from his vehicle.

**Held: No s. 8 breach.**

On the whole of the evidence, reasonable grounds existed on an objective basis. "The police officer is not the trier of fact. He need not demonstrate a *prima facie* case for conviction before pursuing his investigation ... the existence of reasonable grounds does not devolve into a simple mathematical exercise of comparing a list of factors supporting impairment to drive with a list of factors pointing in the opposite direction": *Bellamy* 2009 ABQB 759.

B. Mohan - Defence Counsel

**IMPAIRED DRIVING - "AS  
SOON AS PRACTICABLE"**

*R. v. Demich* 2010 ABPC 230 per Bascom, PCJ:

Impaired driving trial. 22 minutes between the first and second Intoxilyzer samples. "Pursuant to section 258(1)(c)(ii) there is a requirement for an interval of at least 15 minutes between the taking of the first and second sample. This would leave a period of less than seven minutes unexplained." Issue as to whether or not samples taken as soon as practicable.

**Held: Conviction entered.**

"The court must determine whether the period of delay is of such a length that requires an explanation. If the passage of time is appreciable an explanation is required ... I conclude that this unexplained portion of time is not long enough to require an explanation. As noted in *Letford* (2000), 150 CCC (3d) 225 (Ont. CA) 'It is not necessary for the Crown to provide a detailed explanation of every minute the accused is in custody.'"

A. Iovinelli - Defence Counsel

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