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Inadequate ***Vetrovec*** Warnings and Fresh Evidence: SCC

The Supreme Court of Canada agreed with the Saskatchewan Court of Appeal that a new trial was required in *R. v. Hurley*, 2010 SCC 18, due to the inadequacy of the *Vetrovec* warning at the murder trial. The case illustrates the interaction between *Vetrovec* warnings and evidentiary issues. At trial the judge warned the jury of the danger in relying on the testimony of a Crown witness, but failed to add that the witness was a jail house informant. The informant testified that the accused said he had cleaned the room where the murder took place to remove DNA evidence. The accused sought to introduce new evidence of his DNA found at the scene in order to counteract the informant's uncorroborated testimony. The court concluded that "in light of the new evidence, it now seems that this cleaning evidence may not have been as a strong as it may have appeared to be at trial. This, as noted, relates directly and significantly to the jury's assessment of a critical Crown witness." Nuances of the decision are discussed in the following article:

- *Judicial Caution: Vetrovec warnings & the Adduction of New Evidence in R. v. Hurley* by Allison MacIsaac, posted May 19, 2010 on The Court.

Derived Confessions Rules Divide Court: SCC

In *R. v. S.G.T.*, 2010 SCC 20 the Supreme Court sheds light on several thorny evidentiary issues, including the confessions and derived confessions rules, the distinction between an admission and a confession, when a trial judge is obliged to make an independent determination as to the admissibility of an impugned statement, and who should be considered a person in authority under the confessions rule. The majority of the court disagreed with the

Court of Appeal finding that the trial judge erred by failing to conduct a *voir dire*, on his own motion, to determine the admissibility of an e-mail "confession" which played a crucial role in the trial judge's verdict against the accused. Two dissenting judges disagreed, however, on the issue of whether a derived confession must be made to a person in authority to be found inadmissible. These articles elaborate on the facts and implications of the decision:

- *Confessions of a Dubious Mind: R. v. S.G.T.*, by Christine Kellowan, posted May 31, 2010 on The Court;
- *Admissibility of E-Mail Apologies in R. v. S.G.T.*, by Omar Ha-Redeye, posted May 27, 2010 on Slaw.

Sentencing Fundamentally an Individual Exercise: MBCA

Although *stare decisis* is "alive and well in Manitoba and does form part of a proper sentencing analysis," its application must be tempered by the nature of the task of sentencing which is an "inherently discretionary, individual, fact-based endeavour", according to the Court of Appeal in *R. v. Maroti*, 2010 MBCA 54. Given the failure of the sentencing judge to conduct an analysis of how the sentencing principles outlined in the *Code* applied to the facts, the court considers afresh the appropriate sentence for seven armed robberies committed over a ten-day period. The court rejects the Crown suggestion that they develop a roadmap of principles to guide sentencing judges in determining whether to order sentences to be served concurrently or consecutively, holding that this requires a factual assessment and is "exactly the type of decision which is within the special expertise of the trial court and should be afforded considerable deference." The court also comments on the practice of including the reduction for pre-sentence custody in comparing the sentence sought with the sentence granted:

> Describing the sentence in this manner sets up a comparison between apples and oranges. It leads the public to believe that the discrepancy between what the Crown thought appropriate and what the judge actually chose was greater than it was....(para.44)
>
> The appropriate sentence for comparison purposes when referring to other cases or referring to arguments advanced by other counsel is the sentence imposed without credit for pre-sentence custody. (para.46)

In the end, despite finding that the sentencing judge made an error in law, the court dismissed the Crown appeal and upheld the original sentence.

Additional Manitoba Cases

These recent criminal cases are noteworthy:

- *R. v. McCowan (K.J.)*, 2010 MBCA 45 - the court engages in the difficult balancing act of reviewing the fitness of a "low end" sentence for a home invasion and aggravated assault. A majority of the court dismissed the Crown appeal, but the dissenting judge would have increased the sentence even taking into account evidence of positive rehabilitation.

- *R. v. Peebles*, 2010 MBCA 47 - considers the relationship between pre-sentence custody and the availability of an intermittent sentence. The court found that the "ninety days or less" requirement for an intermittent sentence means the sentence imposed after taking into account any credit for pre-sentence custody.

- *R. v. T. (C.J.)*, 2010 MBCA 61 - the court dismisses the accused's sentence appeal, finding that the judge's derogatory comments concerning the accused youth were unnecessarily pejorative but, when viewed in context, did not render the hearing unfair.

- *R. v. Blake*, 2010 MBQB 115 - the court analyses the law on unreasonable delay and orders a judicial stay of proceedings with respect to a 77 month old drug prosecution that involved 19 months of unreasonable delay.

- *R. v. W.R.B.*, 2010 MBQB 102 - concerns the application of the *Kineapple* principle where the accused was convicted of both sexual interference (151) and sexual assault (s. 271) for multiple sexual acts against his stepdaughter, but the wording of each count did not differentiate between the charges by specifying which acts were alleged to constitute the offence.

The CSI Effect

A recent Manitoba case, *R. v. Paul (M.)*, 2010 MBCA 51, contains an example of the phenomenon known as the CSI effect, the argument that the portrayal of forensic sciences in the popular media has raised expectations concerning the use of such evidence in criminal courts and elsewhere. The judge in *Paul* notes: "the accused argued on appeal that there was no evidence to place him at the complainant's residence, which was a reference to there being no physical evidence to place the accused at the crime scene - this is the "C.S.I. factor." (para.19) The court goes on to find that while there was no physical evidence of the accused at the scene, the trial judge was entitled to rely on other evidence to support the complainant's credibility.

The CSI effect has arguably influenced juries, criminals, and even forensic training programs, and it is the subject of much scholarly debate. Ken Strutin's guide, Forensic Evidence and the CSI Effect, from LLRX, is a collection of select legal scholarship and media studies that illuminates the extent of the CSI effect from both defence and prosecution perspectives.

Recommended Reading

These articles touch on current issues in criminal law:

- *Reforming search & seizure*, June 4, 2010 *Lawyers Weekly*, concerning what the *Morelli* case has to say about the perils of poor police work and the Supreme Court's hardening attitude to admission of faulty evidence in criminal trials;

- *Interlock program set to begin in August*, May 31, 2010 *Law Times*, concerning Ontario's plan to introduce an ignition interlock program for certain impaired drivers.

Articling in the Criminal Courts

The Criminal Justice section of the Manitoba Bar Association is presenting the program Welcome to the Practice of Criminal Law from 4:00 - 6:30 p.m. on June 10, 2010 at Courtroom 413, Law Courts Building, 408 York Avenue, Winnipeg. The program is designed for students articling in the criminal courts, their principals, and summer students. A panel will address such topics as courtroom navigation and practical tips for success and a meet and greet with judges and criminal lawyers will follow.

Crown Defence Conference

Planning is well underway for the Eighth Annual Crown Defence Conference, which will be held September 16-17, 2010 at the Victoria Inn, Winnipeg. Topics to be addressed include Sexual Tourism and Other War Crimes; Reasonable Suspicion v. Reasonable and Probable Grounds; *Grant* and *Suberu*; and YCJA-KGB Statements. Out-of-town speakers include Professor David Paccioco and Peter Kremer, The Hague. For more information or to register contact Heather Reay at 985-8189.