A SUMMARY OF RECENT JUDGMENTS IN CRIMINAL CAUSES OR MATTERS

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JUDGE WAYNE GORMAN
PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

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CHARTER-SECTION 11(B)

R. v. D.S., 2021 NLSC 157, NOVEMBER 29, 2021.

FACTS: The accused was charged with the offence of sexual assault on March 9, 2019. His trial was scheduled to be completed on December 10, 2021, a delay of thirty-three months. He applied for a stay of proceedings to be entered pursuant to section 11(b) of the *Charter*.

HELD: The application was denied. Justice Burrage concluded that a portion of the delay was caused by the Pandemic and that as a result, the overall delay was not unreasonable (at paragraphs 46 and 47):

> The period of delay from 2 March 2021 to 6 December 2021 is nine months and four days. When this is deducted from the total delay of 33 months and 5 days, we are left with 24 months and 1 day, below the Jordan threshold of 30 months.
>
> Where the net delay is less than 30 months the onus shifts to the defence to establish that the delay is nonetheless unreasonable. However, stays below the presumptive ceiling will only be granted in the clearest of cases (*Jordan*, at para. 101). In this instance the defence has not met this onus and I would not regard the delay as unreasonable.

PROCEEDING IN THE ABSENCE OF THE ACCUSED-MISCONDUCT-SECTION 650(2)(A) OF THE CRIMINAL CODE

R. v. JAMES, 2021 BCCA 453, FEBRUARY 6, 2021.

FACTS: The accused was sentenced to a period of ten years of imprisonment. The sentencing judge proceeded in the absence of the accused after the accused refused to come out of his cell and otherwise misbehaved. The accused appealed from sentence.

HELD: The appeal was dismissed. The Court of Appeal indicated that the "principal issues on appeal relate to the fact that the appellant was not present during part of his sentencing hearing. In so proceeding, the judge relied on s. 650(2)(a) of the *Criminal Code*".

That section states:

> The court may
>
> > (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible.

In dismissing the appeal, the Court of Appeal concluded that the sentencing judge was entitled to rely upon section 650(2)(a) and to proceed in the absence of the accused because of his behavior (at paragraph 12):

> Taking all of the circumstances into account, I am satisfied the judge was entitled to rely on s. 650(2)(a). The order was rooted in Mr. James' behaviour in court, and its effect in disrupting proceedings, so that it was not feasible to continue the hearing in his presence. The judge exercised his discretion about how to proceed in difficult and trying circumstances. No reversible error in the exercise of that discretion has been demonstrated. The judge had to weigh competing interests, including those of Mr. James, but also the safety of prison staff and the interest in the timely resolution of the sentencing proceedings, which had already been delayed several months by Mr. James' conduct.

SENTENCING-CHILD PROSTITUTION-INDIGENOUS CHILDREN-SECTION 286.1(2), CRIMINAL CODE

R. v. ALCORN, 2021 MBCA 101, DECEMBER 9, 2021

FACTS: The accused was convicted of the offence of purchasing the sexual services of a child (child prostitution). The accused had sexual intercourse with a sixteen-year-old Indigenous child in exchange for a bottle of rum. The accused had no prior convictions. He was sentenced to a period of fifteen months of imprisonment. The Crown appealed from sentence.

HELD: The Manitoba Court of Appeal increased the sentence imposed to one of five years of imprisonment. In doing so, the Court indicated that "[i]n order to better legally protect children, it is necessary to turn a new page from the past and embark on a fresh sentencing approach which focusses on greater offender accountability through increased sentences" (at paragraph 1).

The Court of Appeal suggested that the Supreme Court's comments in ***R. v. Friesen*** "about equality are of particular importance to section 286.1(2) given, as mentioned previously, that the offence is typically both a 'racialized' crime (at para 70) and a

crime that 'undermines gender equality' (at para 68) because such behaviour disproportionally sexually victimizes vulnerable Indigenous girls and the offenders are typically non-Indigenous adult men like the accused. Accordingly, sentencing judges should be mindful of their obligations under sections 718.01 and 718.04 of the *Code*" (at paragraph 37).

The Court of Appeal held that "[c]hild prostitution is a paradigm of serious wrongdoing. Like other sexual offences, child prostitution is a universally accepted wrong. There is no reasonable debate against the law taking a hard paternalistic approach to prohibit child prostitution. Such behaviour offends core societal values as to harm, autonomy, culpability and, because the victims are primarily of one race and one gender, equality. The harmful consequences—physical, psychological and societal—that flow from child prostitution are justification to treat it as severely as other sexual offences of violence or exploitation" (at paragraph 42).

Conclusion:

In concluding that a period of five years of imprisonment was appropriate, the Manitoba Court of Appeal described the accused's moral blameworthiness as being "significant" (at paragraphs 72 to 75):

> I am also satisfied that the accused's moral blameworthiness for the offence is significant (see *M (CA)* at para 80). His risk-taking was intentional (*ibid*). His actions were not impulsive and he had time to change his mind, particularly given that it was manifestly obvious that D.R. was in distress before sexual relations commenced. As was said in *Friesen*, "the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable" (at para 90).
>
> The consequential harm caused by the accused is disturbing. Any reasonable adult would know that perpetuating D.R.'s cycle of destruction was harmful to her best interests. It is trite, but "a wrongdoer must take his victim as he finds him" (*R v Nette*, 2001 SCC 78 at para 79). While the accused played no role in bringing D.R. into the child sex industry, his deliberate, selfish actions helped keep her there.
>
> Finally, the normative conduct of the accused is serious. Making the reasoned choice to take advantage of a vulnerable child in obvious distress, for personal sexual gratification, constitutes egregious sexual exploitation (see *Parranto* at para 70).

A sentence must speak out against the offence, but punish no more than is necessary (see *R v Nasogaluak*, 2010 SCC 6 at para 42). Here, the accused's high moral culpability provides little reason to temper punishment, given the gravity of the offence and the circumstances of its commission.

CHARTER-SECTION 11(B)

R. v. LAI, 2021 SCC 52, DECEMBER 8, 2021.

FACTS: The accused was convicted of the offence of sexual assault. On appeal, he argued that the trial judge erred in not entering a stay of proceedings based on unreasonable delay pursuant to section 11(b) of the *Charter*. The appeal was dismissed (2011 BCCA 105, Butler JA, dissenting).

A majority of the Court of Appeal held that though the trial judge erred in concluding that the accused's decision to re-elect a trial in the Supreme Court was an exceptional circumstance, the overall delay was justified by the parties' reasonable reliance on the law as it existed pre-*Jordan*.

The accused appealed to the Supreme Court of Canada. The appeal was dismissed. In a brief oral decision, the Court stated:

> MOLDAVER J. — *R. v. Cody*, 2017 SCC 31, [2017] 1 S.C.R. 659, at para. 32, states as follows:
>
> > Defence conduct encompasses both substance and procedure — the decision to take a step, *as well as the manner in which it is conducted*, may attract scrutiny. To determine whether defence action is legitimately taken to respond to the charges, the circumstances surrounding the action or conduct may therefore be considered. [Emphasis in original.]
>
> In this case, the appellant, Mr. Lai, had the statutory right to re-elect when he did — but he waited 15 months to re-elect after his trial dates were set in Provincial Court. This was despite being informed by Crown counsel that he could preserve his trial dates by re-electing earlier. Nonetheless, he waited 7 months after that warning to exercise his right to re-elect. This conduct had the direct result of losing the trial dates that were set in Provincial Court and causing an additional delay of 13 months.
>
> The trial judge rejected Mr. Lai's explanation regarding the re-election. Based on the trial judge's own findings and conclusions, the re-election was not done

legitimately to respond to the charges. To that extent, the trial judge erred in not characterizing the delay as defence delay and deducting it as such.

For these reasons, a majority of the Court would dismiss the appeal.

Justice Côté is dissenting. She would have allowed the appeal substantially for the reasons of Butler J.A.

SENTENCE-BREAK & ENTRY, CONSPIRACY TO COMMIT THE OFFENCE OF BREAK AND ENTRY, DISGUISED WITH INTENT, POSSESSION OF STOLEN GOODS, POSSESSION OF HOUSE BREAKING INSTRUMENTS, AND MISCHIEF

R. v. MURPHY, 2021 NLSC 170, DECEMBER 15, 2021.

FACTS: The accused was convicted of the offences of break and entry, conspiracy to commit the offence of break and entry, disguised with intent, possession of stolen goods, possession of house breaking instruments and mischief. The circumstances were described, in part, in the following manner:

> On Sunday, January 13, 2020, at 1:40 a.m., a report was received by the Royal Canadian Mounted Police (RCMP) of a multiple alarm at JJ Billiards and Lounge, on Main Street in Burin, Newfoundland and Labrador. An RCMP officer who responded to the scene confirmed there had been a break and enter at the premises.
>
> A winter snowstorm was in progress that night and so a second RCMP officer who was on the way to the location from the Marystown detachment decided to stop any vehicle he saw traveling from the direction of Burin. The first vehicle he encountered was being driven by Shane Edmond Murphy (the "Offender"), and Anthony Cyril Farrell ("Farrell") was in the front passenger seat. The officer stopped the vehicle at 1:55 a.m. and when he saw Farrell, who was known to the police to be a burglar, and a large pry bar and a set of wire cutters in plain view on the back seat, the latter covered with ice on the blade, he concluded he had grounds to arrest both men for the break and enter at JJ Billiards and Lounge. During a search incident to arrest, Farrell was found in possession of $4,360.00 in twenty dollar bills.

The accused was thirty-five years of age. He had no prior convictions.

HELD: Justice O'Flaherty imposed a period of twelve months of incarceration, followed by twelve months of probation.

"BARE DENAILS" AND THE APPLICATION OF W.(D.)

R. v. VAN DEVENTER, 2021 SKCA 163, DECEMBER 15, 2021.

FACTS: The accused was convicted of the offence of sexual assault. In convicting the accused, the trial judge indicated that she accepted the evidence of the complainant [M.S.] as being "reliable" and then said: "The necessary corollary of this conclusion is that I do not believe and I reject Mr. Van Deventer's denial. Further, in the context of the totality of the evidence, particularly that of [M.S.], I am not left in reasonable doubt by Mr. Van Deventer's denial".

The accused appealed form conviction, arguing that "the trial judge erred by shifting the burden of proof to him, by negatively assessing his credibility solely as a consequence of her positive assessment of the complainant's credibility and reliability".

HELD: The appeal was allowed and a new trial ordered.

The Saskatchewan Court of Appeal indicated that a trial judge "can reject the accused's evidence on the basis that the complainant's evidence is accepted to the extent that it leaves no room for reasonable doubt" (at paragraphs 24 and 25):

> When an accused's evidence contains a bare denial of the allegations, a trial judge should consider this denial in the context of the evidence of the complainant and, indeed, the evidence as a whole. As long as the assessment of the entirety of the evidence follows a discernable pathway through the *W.(D.)* analysis, a trial judge is permitted to examine the credibility of a complainant in their assessment of the accused's bare denial. An accused's testimony should not be assessed in isolation at the first stage of the *W.(D.)* test. In order to properly assess the accused's denial, a trial judge must be permitted to consider the credibility and reliability of the allegations against the accused. In my view, it would be difficult to determine the credibility of a bare denial without also considering the entirety of the evidence. The evidence of the complainant provides the basis for an accused's denial, so considering one without the other could often be a pointless exercise.

> A finding of credibility and reliability regarding a complainant's testimony about the alleged conduct can be the reason for rejecting the testimony of an accused, when considered in the context of the entirety of the evidence. As long as a trial judge is mindful of the burden of proof and the principles from *W.(D.)*, they can reject the accused's evidence on the basis that the complainant's evidence is accepted to the extent that it leaves no room for reasonable doubt. However, this does not address the issue of whether a finding of credibility and reliability for a complainant leads to the *necessary corollary* that a trial judge must disbelieve the accused.

However, the Court of Appeal concluded that a new trial was required because the trial judge "fell into error by determining that she was required to reject Mr. Van Deventer's bare denial once she found M.S. to be credible and reliable in relation to the alleged sexual activity" (at paragraph 29).

SECTION 8 OF THE CHARTER AND THE OBTAINING OF BLOOD FROM COOPERATIVE HOSPITAL STAFF

R. v. ROBERT, 2021 MBPC 64, DECEMBER 16, 2021.

FACTS: The accused was charged with impaired operation of a motor vehicle causing bodily harm. After a collision, the accused was taken to a hospital. The trial judge indicated that at the hospital, "blood samples were taken from Robert for medical purposes. Later that same day, Winnipeg Police Service Constable Sorokowski (Sorokowski) learned of the existence of the blood samples from a hospital lab technician. The technician told Sorokowski he would place a hold on the samples so they would be available if the police obtained a warrant for their seizure. Sorokowski applied for, and was granted, a search warrant for Robert's blood samples and medical records" (at paragraph 2).

The accused argued that "his right to be free from unreasonable search and seizure, pursuant to s. 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), was violated when the lab technician disclosed his private medical information without his consent and acted as an agent of the state by holding the samples until a search warrant was obtained. He also argues the information used to support the issuance of the search warrant was insufficient to establish reasonable grounds for the officer's belief an offence had been committed" (at paragraph 3).

HELD: The application was dismissed.

Did Sorokowski Unlawfully Search and Seize Private Medical Information When he Spoke to the Lab Technician?

Judge Cawley held that "[b]alancing all of these factors leads to the conclusion any subjective expectation of privacy held by Robert was not objectively reasonable. The fact blood samples existed was 'neutral medical information' that did not engage a reasonable expectation of privacy…*Charter* protection under s. 8 is limited to reasonable expectations of privacy because the law recognizes there may be circumstances where '…the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement'…In my view, the limited inquiry made by Sorokowski at the hospital appropriately balances Robert's privacy interests with society's interest in effective law enforcement. The interview with the lab technician was not a "search" for *Charter* purposes. Section 8 was not violated" (at paragraphs 26 and 27).

Was Section 8 Violated When the Lab Technician Agreed To Hold the Blood Samples for the Police Until they Obtained a Warrant?

Judge Cawley noted that "[w]hile there may be circumstances where hospital staff are considered agents of the state, for example when a doctor takes a blood sample at the request of the police (*Dersch* at para 20), there is no evidence in this case of any such demand or direction. Sorokowski did not ask the hospital staff to take a sample of Robert's blood. He did not ask about test results or request they hold the sample for him until he returned with a warrant" (at paragraph 30).

Judge Cawley concluded that "[e]ven if Sorokowski asked the lab technician to hold the samples until he obtained a warrant, that does not turn the lab technician into an agent of the state or violate the *Charter*…While non-compliance with existing hospital policy may be relevant to the analysis, Robert has not proffered any evidence to suggest the lab technician held the samples in violation of an existing policy. Based on the evidence before this Court, the common law and s. 22(2)(k.1) of *PHIA* [*Personal Health Information Act*] entitled the lab technician to disclose the fact a blood sample had been taken from Robert. Sorokowski's limited inquiry about the existence of blood samples and the holding of the samples for a reasonable amount of time, until a warrant was obtained, was lawful. Section 8 was not violated" (at paragraphs 31 and 32).

PRIOR SEXUAL ACTIVITY-SECTION 276 OF THE *CRIMINAL CODE*:

R. v. Sanclemente, 2021 ONCA 906, December 20, 2021, at paragraphs 49 to 59:

> The application of s. 276 of the *Criminal Code* is governed by recent and well-settled precedent. An exegesis is not required. A brief discussion will suffice.
>
> First, s. 276 enacts a regime governing the reception of evidence of extrinsic sexual activity by the complainant in proceedings in respect of listed offences. The regime has two components. Rules of admissibility. And procedural requirements to be met when evidence of the complainant's extrinsic sexual activity is offered for admission: *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 64; *R. v. R.V.*, 2019 SCC 41, 378 C.C.C. (3d) 193, at paras. 2, 36, 44. The procedural requirements included by reference in s. 276(2) have been amended since the appellant's trial. These reasons refer to and apply the provisions in force at trial, as do the precedents on which reliance is placed.
>
> The evidentiary rule enacted by s. 276(1) is exclusionary in nature. The rule is one of inadmissibility engaged when its three components coalesce:
>
> i. proceedings in respect of a listed offence;
>
> ii. a species of evidence, evidence of extrinsic sexual activity by the complainant; and
>
> iii. a specific purpose for which the evidence is tendered for admission.
>
> The rule is unremitting in its exclusionary effect: *Barton*, at paras. 60, 80; *R.V.*, at paras. 2, 44; *R. v. Goldfinch*, 2019 SCC 38, 380 C.C.C. (3d) 1, at paras. 40, 43, 90.
>
> Section 276(2) is primarily, but not exclusively exclusionary. It does permit the admission of evidence of the complainant's extrinsic sexual activity provided the evidence proposed for admission satisfies the conditions precedent imposed by the subsection: *Barton*, at para. 61; *R.V.*, at paras. 2, 45; *Goldfinch*, at para. 40. To engage the inclusionary exception, the evidence must be of specific instances of sexual activity relevant to an issue at trial. It must not be adduced to support an inference prohibited by the exclusionary rule of s. 276(1) and have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

In determining whether the evidence will be received, the trial judge must consider the factors in s. 276(3): *Barton*, at para. 63; *Goldfinch*, at para. 50.

Second, the language "the complainant has engaged in sexual activity", which appears in both ss. 276(1) and (2), designates the nature of the evidence which may be exceptionally admitted. But, as s. 276(2)(c) clarifies, it must be evidence "of specific instances of sexual activity". Neither the term "specific instances" nor the term "sexual activity" are defined in or for the purposes of s. 276. However, when read purposively and contextually "specific instances" refers to discrete acts of sexual activity not general reputation. The degree of specificity required depends upon a variety of factors. The circumstances of the case. The nature of the activity. And the use proposed for the evidence: *R.V.*, at paras. 48-49; *Goldfinch*, at para. 53. The section enjoins broad exploratory questioning: *R.V.*, at para. 47.

Third, the requirement of relevance to an issue at trial in s. 276(2)(b).

Evidence is relevant if it has some tendency, as a matter of logic and human experience, to make the proposition of fact for which it is advanced slightly more likely than that proposition would be without that evidence. The standard is not demanding: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 108.

Bare assertions that evidence of a complainant's extrinsic sexual activity is relevant to provide context for other evidence, to amplify the narrative or to impugn the complainant's credibility, fall short of the standard required by s. 276(2)(b): *Goldfinch*, at paras. 5, 40, 51, 95-96, 120, 124.

Evidence of a complainant's extrinsic sexual activity may be relevant to rebut evidence adduced by the Crown: *R.V.*, at paras. 56, 66; *Goldfinch*, at paras. 57, 113. Or to a defence of honest but mistaken belief in communicated consent. However, that belief cannot simply rest upon evidence that the complainant consented at some time in the past. For that would implicate twin myth reasoning: *Goldfinch*, at para. 62. No proposed use of the evidence may invoke twin myth reasoning which is subject to the exclusionary rule of s. 276(1): *Goldfinch*, at paras. 51, 56, 58, 120.

Fourth, an applicant who wishes to introduce evidence of a complainant's extrinsic sexual activity will not succeed simply by showing that the proposed evidence is sufficiently specific and relevant to an issue at trial. The evidence must also have significant probative value that is not substantially outweighed

by the danger of prejudice to the administration of justice considering the factors enumerated in s. 276(3): *R.V.*, at para. 60.

A final point has to do with the reviewability of an order made on an application to admit evidence by exception under s. 276(2). Like other orders relating to the conduct of a trial, including those having to do with the admissibility of evidence, orders made under s. 276(2) may be varied or revoked should there be a material change in circumstances as the trial unfolds: *Barton*, at para. 65; *R.V.*, at para. 74.

EVIDENCE-HEARSAY-PRINCIPLED EXCEPTION-WHERE NECESSITY IS HIGH, IS LESS RELIABILITY REQUIRED?

R. v. FUREY, 2021 NLCA 59, DECEMBER 23, 2021.

FACTS: The accused was convicted of a number of offences, including assault. He appealed from conviction, arguing that "the trial judge erred in admitting, for the truth of its contents, an out-of-court statement given by one of the complainants (Paul Worrall), who subsequently died of unrelated causes". In ruling that the statement was admissible, the trial judge had indicated that "where necessity is high, less reliability is required".

HELD: The appeal was allowed and a new trial ordered.

Admissibility:

A majority of the Court of Appeal noted that the "analysis to determine the admissibility of an out-of-court statement where the declarant is unavailable to testify at the trial begins with a consideration of necessity and reliability" (at paragraph 5).

The majority of the Court of Appeal rejected the proposition that "where there is greater necessity, less reliability is acceptable". The majority concluded that "increased necessity does not have the effect of reducing the threshold of reliability that is required in order to render an out-of-court statement admissible. Reliability is a key component when assessing whether an out-of-court statement by a deceased person is admissible for the truth of its contents. It follows that the trial judge erred insofar as she relied on and applied the erroneous statement of the law" (at paragraph 13).

The Curative Proviso:

The majority held that "the trial judge's error in applying an incorrect principle of law in determining the admissibility of Paul Worrall's statement could not be characterized as harmless or trivial. Further, from the perspective of the appellate court, it cannot be said that the evidence is so overwhelming that the trier of fact would inevitably convict…In the result, I am satisfied that the curative proviso would not apply on the facts of this case" (at paragraphs 25 and 26).

The Dissent:

In a dissenting judgment, Justice Knickle concluded that the trial judge did not err (at paragraph 50):

> Given that there is flexibility to the assessment of reliability, the trial judge did not inappropriately "relax" the reliability assessment in these circumstances. The statements of the trial judge that where necessity criteria is "high, less reliability is required", or that the deficits in reliability were "offset by the high degree of necessity", cannot be taken in isolation from the whole of her decision. When viewed in the context of her decision as a whole, it is clear the impugned references mean no more than the trial judge acknowledging the related and flexible assessment of both criteria as discussed above.

DETENTION OF SEIZED ITEMS, SECTION 490 OF THE *CRIMINAL CODE*

R. v. CHURCHILL, 2021 NLSC 179, DECEMBER 23, 2021.

FACTS: The Crown applied, pursuant to section 490 of the *Criminal Code*, for an order allowing for further pre-charge detention of seized items.

HELD: The application was denied. In dismissing the application, Justice Stack concluded as follows (at paragraphs 84 and 85):

> …Although there is some complexity to the investigation, it does not warrant an extension of time. The police have failed to carry out the investigation

diligently. Furthermore, I find that it is unlikely that the investigation will be completed in the time estimated by the police in any event.

As to section 490(9.1), although the items might be reasonably required for the purposes of section 490(9.1)(a), their continued detention is not in the interests of justice for the reasons the application was dismissed pursuant to section 490(3).