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CRIMINAL TRIAL HANDBOOK

Salhany

Release No. 2, May 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in October 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the October 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This release features updates to the case law and commentary in the following chapters: 1 (Pre-Trial Review), 3 (Role and Duty of Counsel), 4 (Arraignment and Plea), 5 (Selecting the Jury), 6 (Role of the Judge), 10 (Excluded Evidence), 11 (Order of Proof), 12 (Addresses of Counsel and the Charge to the Jury), 14 (Rendering the Verdict), and 15 (Sentencing).

Highlights

- **Excluded Evidence — Hearsay — Spontaneous Declarations and Res Gestae —** Two masked men burst into a house and shot the victim. The victim immediately identified the shooter as an acquaintance who had been at the house earlier. However, at trial for attempted murder, the victim said he could not identify the shooter due to masking. The trial judge admitted the earlier identification as res gestae, a spontaneous utterance exception. It was held that he had not erred. The statement had been made reasonably contemporaneous to an unusual, overwhelming event and the event must have left the victim under pressure or emotional intensity giving a guarantee of reliability: *R. v. Badger*, 2021 SKCA 118, 2021 CarswellSask 514, 406 C.C.C. (3d) 459 (Sask. C.A.).
- **Rendering the Verdict — By the Judge — Findings of Credibility —** The trial judge convicted the accused of two counts of sexual assault, one of assault and one of criminal harassment, concluding that the accused's version of these events was a product of fantasy or a deliberate fabrication to fit disclosed evidence. It was held that he had erred and the appeal was allowed. The Court said that it is an error in law for a trial judge to discount the credibility of an accused's evidence on the basis that it was tailored to fit Crown disclosure, or evidence or argument heard in court prior to the accused testifying. Drawing the inference that advance notice of the case against the accused has allowed the tailoring of evidence and thus made it suspect, though a natural temptation, is impermissible. It would create a constitutional trap, turning the right to be present at trial under s. 650(1) of the *Code* and the rights to full answer and defence under ss. 7 and 11(d) of the Charter against the accused: *R. v. C.T.*, 2022 ONCA 163, 2022 CarswellOnt 2227 (Ont. C.A.).
- **Rendering the Verdict — By the Judge — Findings of Credibility — Stereotypical Reasoning —** The trial judge, in acquitting the accused of sexual assault, had assessed the complainant's credibility according to his expectations of how she should have reacted to a telephone call she received from her father in the course of the assault. The judge said that her response to her father was "not the response of someone who had just been sexually assaulted and has been kept in the trailer against her wishes". It was held that this stereotypical reasoning had materially affected the judge's acquittal of the accused. The judge had erred in law by relying on rape myths to assess the complainant's credibility: *R. v. Steele*, 2021 ONCA 186, 2021 CarswellOnt 3982, 154 O.R. (3d) 721, 173 W.C.B. (2d) 391, 402 C.C.C. (3d) 331 (Ont. C.A.).
- **Sentencing — Imprisonment — Dangerous and Long Term Offenders — Dangerous Offenders —** The unique circumstances of each Indigenous offender must be considered in every case before a sentence is imposed, including the imposition of an indeterminate

sentence. When Indigenous offenders are sentenced under s. 753(4.1) of the *Code*, any consideration of treatment necessarily includes *Gladue* factors and culturally specific programming. If such programming can be shown to reduce an offender's risk to a manageable level, an offender should not be declared a dangerous offender, and the imposition of an indeterminate sentence would not be appropriate. It is not enough for a sentencing judge to say that an offender does not recognize their Indigeneity without engaging fully with the available programming for Indigenous offenders to determine a program's potential impact on treatability: *R. v. Ballantyne*, 2022 SKCA 13, 2022 CarswellSask 32 (Sask. C.A.).

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