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CRIMINAL PRACTICE MANUAL
A Practical Guide to Handling Criminal Cases
Release No. 6, June 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in July 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 July 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 manual will assist the criminal law practitioner, whether defence counsel, Crown counsel, judge or law enforcement officer, with a quick understanding and approach to frequently encountered problems. Topics covered include statutory interpretation, investigation, rights and powers; the trial process — from investigation to trial; evidence, legislative compliance with the Constitution, and appeals.

This release features valuable updates to the case law and commentary in Chapter 1 (Commission of Alleged Offence), Chapter 2 (Investigation), Chapter 3 (The Trial Process — From Investigation to Trial), and Chapter 4 (Evidence).

Case Law Highlights

- **Commission of the Alleged Offence — The Scope of Criminal Liability — How Can a Person be Criminally Responsible? — Aiding: Abetting — Section 21(1)(c) — Abetting:** Whether the accused was a party, as either aider or abetter, to the co-accused's offences for assisting the co-accused by obtaining a handgun and for providing words of encouragement to the co-accused in advance of the shooting. Court considered the law of abetting and found that any act, gesture or words spoken before or during an offence, which have the effect of encouraging the principal will constitute the *actus reus* of abetting. This conduct will establish criminal liability where it is accompanied by the requisite *mens rea* of intent and knowledge. Although abetting can be established both by actions or words, the appeal concerned abetting through the use of words alone. The general principle gleaned from the quoted cases was that, there is no threshold for what types of words might constitute abetting; it is the *context and circumstances* of the discussion that is most important. As such, the analysis will be highly fact specific. The analysis in all cases must be on whether the words or acts amounted to encouragement. When examining words as the basis of establishing abetting, there does not appear to be a threshold of what type of words will constitute encouragement. The context of the situation is most significant for determining liability. A wide range of words may establish liability. As a result, the question of whether the *actus reus* of abetting is established should not be limited to an assessment of the words alone, but should also include a consideration of the surrounding circumstances, such as the manner in which the words were communicated and the relationship between the speaker and receiver. This may include any actions accompanying the words, the tone and vernacular of the words, the literal or figurative meaning of the words and other indications of what the speaker meant to convey.

For example, a parent who implores a child not to take illegal street drugs, but if they do they should carry the life-saving, opioid-overdose medication Narcan, should not be charged with abetting possession of a controlled substance: *R. v. Ouellette*, 2022 ABCA 40, 2022 CarswellAlta 354 (Alta. C.A.).

- **Investigation: Rights and Powers — Powers of the State — Power of Search or Seizure — Attacking a Search or Seizure on the Basis of its Execution: Bringing the Section 8 Challenge; Other Challenges to Searches — The Section 8 Challenge: Attacking a Search or Seizure on the Basis of Its Execution:** There were insufficient grounds to authorize a nighttime search of the accused's residence, and the judicial justice could not have engaged in the balancing process required to assess the reasonableness of the nighttime search. The fact the residence was known to be occupied was not a factor favouring a nighttime search. The only relevant factor in the ITO was the fact there was an ongoing attempt to sell the necklace. However, the evidence was that the necklace had been listed for sale online for days without success thus quelling the urgency. The warrant was found to be invalid. Despite its invalidity, the Court found in balancing the seriousness of the state conduct, the seriousness of the infringement of *Charter* rights, and the impact upon society's interest in adjudication, it was the exclusion of the evidence, rather than its admission, that would bring the administration of justice into disrepute: *R. v. Carstairs*, 2022 BCCA 69, 2022 CarswellBC 436 (B.C.C.A.).
- **The Trial Process — From Investigation to Trial — The Trial — Voir Dire: Evidence; Verdict; Motions — Voir Dire:** Trial judge erred in not holding a *voir dire* to determine the voluntariness of the accused's statement to the police. Although defence counsel waived a *voir dire* on voluntariness, the Court found the waiver was not valid, and there were sufficient red flags with respect to voluntariness, including the accused's epileptic seizure prior to giving his statement, his lack of memory, and his belief that he had no choice and would be detained if he did not give a statement, that the judge should have declared a *voir dire*: *R. v. S.C.C.*, 2022 YKCA 2, 2022 CarswellYukon 6 (Yuk. C.A.).
- **Evidence — Character Evidence — Similar Fact Evidence — General Principles:** Rather than determining whether evidence of the prior assault had probative value, the trial judge moved directly to consideration of whether its assumed probative value outweighed its prejudicial effect. There was no indication that the trial judge asked a preliminary question of whether evidence of a prior attack amounted to evidence going to planning or deliberation of killing the deceased. Aggressiveness and animosity demonstrated by the accused toward the second assault were not probative of plan-

ning and deliberation of killing the deceased, and the trial judge erred by ascribing any probative value to the impugned evidence: *R. v. Whitehead*, 2022 SKCA 19, 2022 CarswellSask 53 (Sask. C.A.).

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