CITATION:	*Hales v Richard Neilson* [2002] NTMC 018
PARTIES	PETER WILLIAM HALES
	v
	RICHARD NEILSON
TITLE OF COURT:	CSJ
JURISDICTION:	Traffic Act
FILE NO(s):	20112142
DELIVERED ON:	20.05.02
DELIVERED AT:	Darwin
HEARING DATE(s):	13.05.02
DECISION OF:	D TRIGG SM

CATCHWORDS:

Traffic Act: section 23(2)
Australian Road Rule 304(1)
Words and Phrases: "safe and efficient regulation of traffic"

REPRESENTATION:

Counsel:

Complainant:	Ms McNamee
Defendant:	Mr Rowbottom

Judgment category classification:	C
Judgment ID number:	[2002] NTMC 018
Number of paragraphs:	34

IN THE COURT OF SUMMARY JURISTICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20112142

BETWEEN:

PETER WILLIAM HALES
Complainant

AND:

RICHARD NEILSON
Defendant

REASONS FOR DECISION

(Delivered 20 May 2002)

Mr D TRIGG SM:

1. On the thirteenth day of May 2002 the defendant pleaded not guilty to charges 1 and 2 on complaint. These charges were as follows:

> *On the ninth day of August 2001 at Batchelor Northern Territory of Australia*
>
> 1. Drove a motor vehicle namely Honda CRV NT 603-154, on a public street, namely Stuart Highway, whilst under the influence of intoxicating liquor or drug or psychotropic substance to such an extent as to be incapable of having proper control of that motor vehicle;
>
> Contrary to s 19(1) of the *Traffic Act.*
>
> *And further on the ninth day of August 2001 at Batchelor in the Northern Territory of Australia*

2. Drove a vehicle namely Honda CRV NT 603-154 on a road, namely Stuart Highway and failed to obey a direction, namely pull into an RBT station, given to you for the safe and efficient regulation of traffic, by a police officer;

Contrary to Rule 304 (1) of the Australian Road Rules.

2. The matter proceeded as a hearing before me and at the end of the prosecution case Mr Rowbottom Counsel for the defendant) made a no case submission in relation to each of the two charges.

3. In relation to the Court's role in determining a no case submission the observations of Kitto J in *Zanetti v Hill* (1962) 108 CLR 433 at 442 are succinct and helpful;

> "The question whether there is a case to answer, arising as it does at the end of the prosecutions evidence in chief, is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands – whether, that is to say, there is with respect to every element of the offence some evidence which, if accepted, would prove the element directly or enable its existence to be inferred. That's a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt."

4. In relation to charge 2, Mr Rowbottom submitted that it is s 23(2) of the Traffic Act which gives the police the power to stop a motor vehicle for the purpose of administering a breath test and accordingly the defendant should have been charged under that section and not under rule 304 of the Australian Road Rules. However, in my view s 23 (2) of the *Traffic Act* does not by itself create an offence. Rather, it gives a power to police and in order to ascertain what flows from a breach of that power one needs to look elsewhere. Not every breach of a power necessarily results in an offence being committed. Section 23(2) of the *Traffic Act* is in the following terms:

> "notwithstanding ss (1), a member of the police force may require a person who is driving a motor vehicle on a public street or public place to undergo, at or near the place where the requirement is made, a breath test or breath analysis, or both, and, for the purpose of enabling the member to make such a request that member or any other member may, if necessary, direct that person, by signal or otherwise, to stop the motor vehicle that person is driving"

5. If it were the intention in s 23 to create a specific offence in relation to breaching or ignoring a direction under s 23(2) of the *Traffic Act* then I would expect a subsection within s 23 to clearly state that it is an offence for a person not to obey a direction under s 23(2). However, there is no such provision.

6. Sections 23(1) and (5) of the *Traffic Act* create the right for police to require a person to undergo a breath test and an obligation on that person to comply. However, whereas s 20(1) of the *Traffic Act* makes it an offence for a person to refuse or fail to submit to (or provide a sample of breath sufficient for the completion of) a breath analysis, no corresponding offence is created in the Act for refusing or failing to submit to a breath test. On the contrary, the consequences of such a failure are to be found in s 23(7)(b) which enables a police officer to arrest any person who refuses or fails to submit to (or provide a sample of breath sufficient for the completion of) a breath test, and the purpose of that arrest is to detain the person for the purpose of carrying out a breath analysis.

7. Accordingly, it is a two-stage process. The consequences of refusing or failing to provide a breath test is that a person may be arrested for the purpose of a breath analysis and a refusal or failure to provide a breath analysis results in an offence being committed.

8. What are the consequences which flow from a person who refuses or fails to comply with a direction under s 23(2)?

9. Under the former Traffic Regulations (which were repealed by Regulation no. 37 of 1999 with effect from 1 December 1999) I consider that the situation was fairly clear. By a combination of the repealed regulations 4(1) and 146 it was a regulatory offence for a person to fail to obey a signal, whether given by hand, a signalling device or a combination of both, or the reasonable oral instructions, of a member of the police force.

10. Regulation 146 of the repealed Traffic Regulations has been carried forward into the present Traffic Regulations in regulation 92. However, regulation 4 (1) has been repealed and not reproduced into the current regulations. Pursuant to regulation 71 of the current Traffic Regulations the Australian Road Rules are made as regulations under the Act and are a law of the Territory. The road rule on which the prosecutions seek to rely is road rule 304 (1), which states as follows;

> "a person must obey any reasonable direction for the safe and efficient regulation of traffic given to the person by a police officer or authorised person, whether or not the person may contravene another provision of the Australian road rules by obeying the direction.
>
> Offence Provision."

11. It is clear that this rule is far narrower than the previous regulation 4(1). Firstly the direction by a police officer must be "reasonable" and secondly the direction must be "for the safe and efficient regulation of traffic". I am not sure why it was considered necessary to place limitations on the ability of police to direct traffic, but that is what has been done.

12. In the instant case the alleged failure in charge 2 is expressed as "namely pull into an RBT station". The expression "RBT Station" presumably is intended to mean a Random Breath Testing station. The expression and the abbreviation is not something which has any legislative or regulatory fiat. It is an expression which appears to have grown up in general police parlance.

Whether it is an expression which by usage has become notorious may be debatable.

13. There is nothing within s 23(2) of the *Traffic Act* which authorises a police officer to direct a person to pull into an RBT station. That section is quite specific. It authorises a police officer to require a person who is driving a motor vehicle to undergo a breath test or breath analysis or both, and for the purpose of enabling the member to make such a request that member may, if necessary, direct that person, by signal or otherwise to stop the motor vehicle that person is driving.

14. It is clear from the prosecution case that the police officers involved in this instance on the ninth of August 2001 were desirous and intending to direct the defendant to stop his motor vehicle for the purpose of conducting a breath test upon him to ascertain whether he might be driving over the legal blood alcohol limit. However, nowhere in charge 2 does the word "stop" appear.

15. In the case of *Martin v Shakespeare* (1920) SALR 257 the court considered a by-law in the following terms;

> "the driver or a vehicle or the rider of a horse, motorcycle or bicycle in or upon any street shall obey a member of the police force holding up his hand or otherwise giving an order or direction, stop so long or proceed in such a manner in direction as such member of the police force shall deem necessary to allow a free space between any vehicles, or for cross traffic, of for any other necessary purpose."

16. In relation to that provision Poole J said at page 260;

> "It is not necessarily an offence to fail to stop on a police officer holding up his hand. It may be an offence to stop. Whether it is an offence, depends, amongst other things on whether the hand is held up as an order or direction to stop, or an order or direction to proceed, or for some other purpose. That the hand should be held up as an order or a direction to stop is a necessary ingredient of the offence. That allegation being absent from both the information and conviction it follows that neither disclose any offence."

17. In my view, the wording of the charge falls short of what the prosecution would be required to prove. There was not in fact any "RBT Station" in operation in the area at the time, as that expression might be understood. There were two police vehicles with their blue flashing lights operating parked off to the left-hand side of the inbound lane of the Stuart Highway near the Batchelor turn-off. There were three police officers standing in the middle of the Stuart Highway in the right hand turning lane for the Batchelor turn-off. There were no orange cones set up to direct vehicles into a particular area. There was no mobile breath testing unit in attendance. The police officers were stopping motor vehicles proceeding in either direction of travel. There were no signs in place to indicate that the police officers were conducting random breath testing. There was no designated place for the defendant or any other vehicle to pull into, or to stop at or near.

18. There was nothing at the scene, or in the actions of the police officers on this night which would have made it clear that the police wanted the defendant to stop for the purpose of undergoing a breath test.

19. A direction to pull into an RBT station (even if one did exist at the scene, and it did not at this location) is not on it's face necessarily a direction in accordance with s 23(2) of the Act.

20. Accordingly, in my view, the charge as worded fails to disclose an offence. In my view, the charge should have said words to the effect "namely to stop the said motor vehicle for the purpose of the defendant undergoing a breath test or breath analysis". It was specifically for that purpose, and in reliance on that power that the police officers were proceeding on this night. There was no evidence to suggest that they had any other motive. Specifically there was no evidence to suggest that there was any other reason connected to the "safe and efficient regulation of traffic".

21. In relation to Rule 304(1), in my view, any direction by a police officer made specifically under s 23(2) of the *Traffic Act* that a person stop for the

purpose of administering a breath test or breath analysis would be a reasonable direction. It is however more problematical whether any such direction is "for the safe and efficient regulation of traffic". Clearly it is desirable for the safe regulation of traffic that drivers who are intoxicated are taken off the public roads. But the law requires that the direction be both for the safe regulation of traffic and the efficient regulation of traffic. It would be arguable that it was not for the efficient regulation of traffic to direct cars off the roadway at random. It may in fact have the opposite effect. The majority of persons subjected to breath tests have no alcohol on their breath and are committing no offence. There was nothing to suggest in the evidence that any of the previous 30 to 40 drivers that had been stopped this night were committing any offence.

22. The word "efficient" is defined in the Concise Oxford Dictionary of Current English (8th edition) to mean "productive with minimum waste or effort".

23. On the evidence before me I would not be satisfied that on this particular night, and in this particular location, a direction to "pull into a RBT station" could be for the safe and efficient regulation of traffic. The area had an open speed limit. It was 10pm at night. The three police officers were wearing vests with the luminous word "police" printed on it. They each had police issue torches with an orange cone over the beam. All three torches were turned on, but only two were being waved. It would not have been clear to a driver approaching the police as to what was going on.

24. But having said that, on the evidence before me I would have found a case to answer if the defendant had been charged with driving without due care. However, he has not been so charged. I can only deal with the charges as laid, and in that regard I do not find a case to answer in relation to charge 2.

25. It is not necessarily free from doubt that rule 304(1) makes it an offence for a person to refuse or fail to obey a direction under s 23(2) of the *Traffic Act*. It may be that with the repeal of regulation 4(1) of the previous Traffic

Regulations it is no longer an offence and that the only remedy available to police is to pursue, apprehend and arrest (for the purposes of breath analysis) a person who refuses or fails to stop.

26. In my view, if it is intended to be an offence for a person to refuse or fail to comply with a direction or signal under s 23(2) of the *Traffic Act* then that should be made clear either by a specific amendment to add in a subsection to s 23 creating such an offence, or by re-installing a regulation in line with 4(1) of the repealed regulations.

27. I now turn to consider the no case submission in relation to charge 1. In relation to a charge under s 19 (1) of the *Traffic Act* the prosecution must prove beyond all reasonable doubt:

    1. that the defendant drove a motor vehicle;

    2. on a public street;

    3. whilst under the influence of intoxicating liquor; and

    4. that he was influenced by such intoxicating liquor to such an extent as to be incapable of having proper control of that motor vehicle.

28. In relation to these elements Douglas Brown in his book Traffic Offences and Accidents (Third Edition) in paragraph 9.8 notes:

> "it is sufficient for the prosecution to prove that as a result of the consumption of liquor the mental or physical faculties of the driver are so affected as to be no longer in a normal condition *(Noonan v Elson; Ex Parte Elson* (1950) SRQ 215*).*
>
> The question whether a person is under the influence of intoxicating liquor is a pure question of fact. If it is found that a person is under the influence of liquor and that person is driving a motor vehicle, the offence is committed *(Grayson v Crawley; Ex Parte Crawley* (1965) QdR 315). The only test is whether the person driving is, in fact, under the influence of intoxicating liquor *(Molloy v McDonald*

(1939) 56 WN (NSW) 159). In the jurisdictions which require the degree of influence to be measured by the capacity to exercise proper control, there may be evidence to show that a driver is under the influence but there may not be sufficient evidence to show that he was so much under the influence as to be incapable of exercising effective control *(Burrows v Hanlan (1930) SASR 54; Pulleine v Button* (1948) SASR 1 at 8*).*

In *Hunter v Fitzgerald* (1951) SASR 126 it was observed that the driving of a motor vehicle upon the public highway is an occupation that calls for a high degree of concentration. Unless the driver is able to give his undivided attention to his driving and to exercise the requisite degree of care and skill, he is a menace to society. This is what the legislature has in mind when it refers to "effective control". For that purpose the driver is required to be in full possession of his faculties. He has to keep alert, and look out. He has to judge speed and distance. A man whose speech is slurred by the drinks he has taken is not likely to be alert, or as capable of keeping a lookout as a sober man would be."

29. In paragraph 9.10 Douglas Brown goes on to note:

"The offence requires an assessment to be made of a driver's general condition due to alcohol and whether that condition justifies a conclusion that his driving will in all probability be affected to such an extent as to be incapable of having proper control of the motor vehicle. The assessment of the driver can seldom be made while the driver is actually inside a moving vehicle at the steering wheel. He may be observed driving from outside the vehicle. That driving may depart from general norm. But it is not until the vehicle has stopped and a witness has an opportunity to observe the driver at close quarters that an assessment can be made of his condition.

In many instances the evidence would be circumstantial. There may be direct evidence of having taken a number of drinks. The precise amount of liquor consumed may be known or there may be a reliable approximation. There may have been erratic driving. There may be evidence of the driver's physical reaction and behaviour when the vehicle stops. There may be evidence of his breath smelling strongly of alcohol. His speech may be slurred. He may have undue difficulty understanding what is said to him. He may be aggressive. There may be evidence of alcohol having been consumed in the vehicle, for example, empty beer cans on the front seat or floor. There may be evidence of extreme dilation of the pupils of his eyes. There may be signs of tremors, of a flushed countenance and of confusion.

> In each case the prosecution needs to prove not only that the driver has consumed liquor but also that the affect of the consumption has disturbed the action of a driver's mental or physical faculties so that they are no longer in their normal condition. If a driver drinks some liquor but not enough to affect his faculties to this extent, that driver if he drives does not commit the offence. Evidence of the smell of liquor on the breath is merely one factor, namely the consumption; there must in addition be sensible signs that he has been affected by liquor, for example, as manifested by the drivers physical appearance, actions, conduct, speech or behaviour *(Noonan v Elson* (1950) SRQ 215 at 226). It is recognised that there are indicia, being certain abnormalities of behaviour and certain physical signs which evidence when a person who has ingested alcohol has become influenced by it. If there is accepted evidence of such manifestation of these indicia the court is entitled to conclude, in the absence of evidence of the contrary, that the indicia are the effects of alcohol and that the driver, no matter what may be his tolerance to alcohol, is under it's influence *(O'Connor v Shaw (1958)* QdR 384 at 386).
>
> In a prosecution for driving under the influence there does not have to be unanimity between prosecution witnesses as to all the indicia of being under the influence if liquor. Contradictions and inconsistencies in the evidence of prosecution witnesses are for the courts evaluation upon it's journey to a decision whether or not the evidence establishes the charge beyond a reasonable doubt. There is no burden on the prosecution in every case to prove what is the normal condition of the driver *(*Grayson v Crawley (1965) QdR 315)."

30. The first prosecution witness to be called was Raymond Musgrove who was a sergeant of police. He had been a police officer for eighteen years. In his evidence he made the following observations of the defendant both at the scene of the initial apprehension and subsequently:

- He was very unsteady on his feet
- He had to lean against the side of his motor vehicle
- I could smell alcohol on his breath
- He was very untidy and unkempt
- His speech was slurred

- I asked if he had been drinking and the defendant replied that “he had had a few”
- I had to explain three to four times to the defendant how to blow into the breath test
- He was very incoherent in his speech
- As he was sitting he was falling asleep due to his intoxication
- At the scene he leaned on the open drivers door of his motor vehicle
- As he walked towards the rear of his motor vehicle he leaned with his rear on the side of his motor vehicle
- It appears he had to lean on his motor vehicle

31. The next witness to be called was Christopher Cuthbertson. He was a first class constable of police and he had been a police officer for four and a half years. The observations that he made in relation to the defendant were as follows:

- When he got out of his motor vehicle he held the top of the door and staggered out
- He puled himself out using the top of the door with his left hand
- He let go of the door and then had to steady himself on the side of the motor vehicle by placing his hand on top of the motor vehicle
- Sergeant Musgrove had to instruct him three to fou times how to blow into the breath test
- He was “non compos”
- He didn’t appear to be with it at all

- There was an open esky in the back of the vehicle full of VB stubbies and other alcohol
- There were empties on the floor of the motor vehicle.

32. The final prosecution witness was James O'Brien he was a brevet sergeant. He had been a police officer for seven and a half years. His observations of the defendant were;

- He was a bit unsteady on his feet
- He was stumbling a bit
- I heard him say a few words and his speech seemed a bit slurry
- He was a bit wobbly
- He was not walking in a normal smooth manner
- He had to lean a bit
- He had a bit of a swagger

33. This evidence was in addition to the evidence of the three officers that at the initial scene the defendant appeared to decelerate, put his left hand indicator on but then accelerated requiring the officers to get out of the way. On the evidence before me I find that the defendant does have a case to answer in relation to charge 1. There is evidence which goes to each element of the offence, and in my view, the Defendant could lawfully be convicted on the evidence as it stands.

34. I find no case to answer in relation to charge 2 as framed. It is now too late to amend that charge. Charge 2 is therefore dismissed.

Dated this 20th day of May 2002.

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DAYNOR TRIGG SM
STIPENDIARY MAGISTRATE