CITATION: *Police v Psaras* [2003] NTMC 024

PARTIES:	PETER WILLIAM HALES v CHARLEY PSARAS
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20215026
DELIVERED ON:	28 April 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	24 March, 22 and 24 April 2003
DECISION OF:	JENNY BLOKLAND SM

CATCHWORDS:

TRAFFIC OFFENCES –FAILURE TO SUPPLY SUFFICIENT SAMPLE OF BREATH – REASONABLE GROUNDS FOR FAILING – Traffic Act (NT) ss 19, 20(1), 23. Traffic Regulations (NT) reg 17(b); *Ngugen v Thompson* (1992) 15 MVR 507; *McDermott v Trenerry* [1995] NTSC 29 14 March 1995; Kearney J; *Johnny Ralkurra Marika* (1998) 101 A Crim R 345.
Brown, "Traffic Offences", (1996), Butterworths

REPRESENTATION:

Counsel:

Complainant :	Mr Tim Smith
Defendant:	Ms McClaren

Solicitors:

Complainant :	Office of the Director of Public Prosecutions
Defendant:	A McLaren Barristers & Solicitors

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 024
Number of paragraphs:	25

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

No. 20215026

[2003] NTMC 024

BETWEEN:

PETER WILLIAM HALES
Complainant

AND:

CHARLEY PSARAS
Defendant

REASONS FOR DECISION

(Delivered 28 April 2003)

Jenny Blokland SM:

Introduction

1. This matter concerns the hearing of two counts on complaint arising from events on 7 October 2002. First it is alleged the defendant, Mr Psaras, being a person required to submit to a breath analysis failed to provide a sufficient sample for breath analysis contrary to *s 20 (1) Traffic Act* . Secondly it is alleged he drove his car whilst under the influence of intoxicating liquor to the extent as to be incapable of having proper control of it contrary to *s 19 (1) Traffic Act.* The defendant entered pleas of not guilty to both counts and a plea of guilty to one count of driving a vehicle that was in an unsafe condition contrary to *regulation 17 (b) Traffic Regulations*

Summary of the Evidence.

2. Like most *Traffic Act* matters the prosecution case relies solely on evidence from police officers. The defendant gave evidence on his own behalf and also called Ms Christine Cloake, his passenger at the time. Constable Smith and Constable Ming, at that time stationed at Adelaide River gave evidence that as a result of information supplied by a member of the public to

Adelaide River Police Station they *went mobile.* Constable Smith gave evidence that on the Stuart Highway he saw a white Holden Rodeo Ute (subsequently proven to be the defendant's vehicle) swerving over to the left-hand side of the road and back to the middle of the road. He watched the vehicle or followed it for 200 – 400 metres while it was travelling north. Constable Ming activated the lights and sirens and the defendant pulled over.

3. Constable Smith said police then administered a roadside breath test that gave a positive reading and arrested the defendant. When the defendant got out of his car he appeared unsteady on his feet, he smelt of liquor and his eyes were *glazy*. Observations were made about the defendant's vehicle that was deemed by police to be unsafe to drive. At the Adelaide River station police officers administered a breath analysis resulting in a failure to supply a sufficient sample for analysis. Police offered the defendant a second attempt that also failed. During the second attempt the defendant told police he was suffering from the flu. The relevant analysis certificates are before the court as *exhibits 1* and *2*. Although I have not been able to access the decision myself in the time available since hearing the evidence in this matter, I note that Mr Brown in *Traffic Offences,* (1996) Butterworths, at 167 cites *Nguyen v Thompson* (1992) *15 MVR 507 (NT)* as standing for the proposition that the final sample given or declined when there is more than one attempt is the relevant sample forming the basis of the charge. Hence, the second attempt is the relevant attempt in this matter.

4. Constable Smith told the court that he observed the defendant throughout the procedure and he appeared to be attempting to comply with the testing procedures. Constable Smith also said police explained the procedure to him. That is also evident from the certificates.

5. Constable Smith was questioned in cross-examination on why he did not take the name and details from the member of the public who directed police to the defendant's vehicle. He apparently did not think it important to make such a record but conceded it may be important in some cases. He agreed he

did not make a note in his statement on how long he was following the defendant's car. He denied a suggestion that police had tested the defendant twice by the side of the road. He denied that police had cursed the equipment. He agreed he did not record the result of the roadside test. He explained it is not general practise to do so and such a record is not admissible in any event. He did not agree the defendant told him he was taking tablets for the flu. Constable Smith thought the defendant's English was *fine*. He agreed all of the questions on the *Traffic Regulation Form* were complied with. He denied suggestions from Ms McLaren who appeared for the defendant that the questions could not have been put properly to the defendant on the two occasions due to the short time involved in the administering the test a second time. He agreed the defendant had animals in his car, namely birds and a puppy. He agreed with a proposition that suffering from the flu can give a person red eyes.

6. Constable Ming's evidence was at odds with Constable Smith's in that he told the court he observed the vehicle for two kilometres driving erratically and that those observations were made from 50 metres behind the defendant's vehicle. He expressly said that the measurement of 200 – 400 metres was not correct. He did describe the same type of swerving. He said he conducted the test at the roadside with the defendant still seated in the motor vehicle. In his initial conversation with the defendant he ascertained the defendant had drunk six beers. In relation to whether there was a second test given at the side of the road, Constable Ming denied there were two tests given at the side of the road. He was unable to tell the court the reading from the roadside breath test. He said he didn't recall an alleged tapping of the breath test instrument on the side of his leg.

7. The defendant, who was born in Greece in 1961 and migrated to Australia in 1975 at the age of 14 years has little education and the court was told he can barely read or write in English or in Greek. Neither his command of Greek nor that of English is at a high level. Ms McLaren explained that given his dual linguistic disabilities she had not arranged an interpreter for him in these proceedings. The defendant gave evidence in English. Having heard

from him I believe his English is at a basic but quite acceptable level enabling him to access the court to defend himself and to communicate his position effectively. I accept however that he is someone who may have difficulty with certain concepts and it may take him longer to digest the significance of legal processes. In my view police dealt with him in a manner appropriate to all of the circumstances.

8. The defendant had been working at Timber Creek just prior to the events giving rise to these charges. He told the court he had packed up his gear to come to Darwin to see his solicitor Ms McLaren. He had birds in cages in the car and a young five- week old puppy. Also in the car was his passenger Ms Christine Cloake. He said he was *pretty crook* with the flu and had taken some Panadol for his headaches. He said he had consumed less than six beers; by the time of his apprehension he had driven from Timber Creek at a speed of around 90-100 km/h. He gave evidence he had learnt about how much to drink and over what time to be able to be safely on the road from previous drink driver education programs.

9. He said when police apprehended him he told them he had consumed less than six beers. He said he thought his last beer was consumed 20 minutes before his apprehension; he had about four medium beers altogether on the day; he spotted police behind him but not for long; he pulled over when he saw the lights activated. He gave evidence of where each beer had been consumed and told the court he had the carton inside the car so that the puppy could lie on something cool. (The car was not air-conditioned). He said he blew once in the roadside breath testing instrument and then he noted one of the police officers shaking the instrument and he was then asked to blow again and he complied. He said that back at the police station he blew as he would *normally* do and that he *blew with all my might*. He said he told police he had the flu and that he had taken drugs for that. He says he knew he was tired in his legs but was all right once he was walking. (The evidence indicated he stumbled as he got out of the car).

10. The court adjourned after the defendant's evidence to see if Ms Cloake could be contacted. Mr Smith who prosecuted the matter advised the court the prosecution had also been trying to locate her.

11. When the hearing resumed on 22 April, Ms Cloake had returned to Darwin from Cairns and was called by the defendant. She gave quite detailed evidence supportive of most of the matters raised in evidence by the defendant. She confirmed the contents of the car, including the birds, the puppy and the beer carton; she was very firm that the defendant had only had 3-4 beers on the trip; that she had made the trip with the defendant from Timber Creek; that the defendant had flu; that his symptoms included temperature and swelling and that he had taken Solaprin and Panadol for relief. She said the defendant was not drunk but rather sick. She said his eyes were red and blood shot. She confirmed the defendant had two breath tests by the roadside and that one police officer appeared to tap the testing instrument on his leg.

Findings of Fact

12. The significant disparity in the police evidence concerning the distances they surveyed the defendant's vehicle from makes it difficult to accept the observations concerning the defendant's driving beyond reasonable doubt. The person who gave information to police about the defendant's driving was not called. It is understood their details were not taken nor provided to the Prosecutor. I accept there was some swerving observed by police entitling them, indeed I believe they were acting in the good interests of the public to stop the defendant, but the disparity in fundamentals in the police evidence does not allow me to find any further problems with the defendant's driving beyond reasonable doubt.

13. I am conscious that the defendant may have a motive to give evidence in a way to lessen his culpability, however, even if that is the case, I must state that I was very impressed with Ms Cloake as a witness. She gave detailed evidence about all of the circumstances as she perceived them. She appeared honest and no-nonsense and I note that the prosecution had also considered

calling her as a witness but were unable to contact her for the first part of the proceedings.

14. I find police did administer two road side breath tests, one while the defendant was in the car and one when he was asked to get out of the car. I base this finding on Ms Cloake's evidence. I have no idea why anyone would make this up. I cannot attribute a bad motive to her giving this evidence. In saying this, I do not say police are not attempting to tell the truth but for them, these matters are much more routine and the police evidence does not dissuade me from my conclusion that the defendant and Ms Cloake are correct.

15. I do find, however, based on the police evidence that a positive result to the road side breath test was obtained by police. Police did not record the reading because it was not admissible. I simply note that in other cases before this court, when relevant to the legality of later police processes concerning alleged drink drivers, a record of the roadside reading may be produced. (Ms McLaren reminded me of a decision of *23 October 2002,* of *Police v Werrer*, where police retained a note of the roadside reading.) I agree the roadside reading is not admissible under the *Traffic Act*, however, if police processes are challenged, it may be material that assists the prosecution to be able to produce the result of the test. Since hearing the bulk of this matter my researches reveal that in *McDermott v Trennery* [1995] NTSC 29*, 14 March 1995, Kearney J* , involving an appeal concerning the same section of the *Traffic Act*, the roadside reading was produced. In any event, in this case, in my view nothing turns on whether one or two tests were carried out. I certainly accept police obtained an indication in this case of a positive reading.

16. I find the defendant exhibited certain of the indicia consistent with observations of intoxication, however, I find that the indicia in this case was in a large part due to the defendant suffering from flu and its symptoms. I note here the evidence of the defendant, Ms Cloake and of police who

confirm that at the second breath analysis at the police station the defendant told them he was suffering from flu.

17. I find the police explained the process of the breath analysis procedure to the defendant but there may have been some misunderstandings on the part of the defendant on some details. Overall however, I find the defendant knew what was required of him. I find the defendant did attempt in good faith to comply with the direction to blow, but that he failed to supply a sufficient sample. The police evidence is consistent with the defendant's claim to making genuine attempts.

Discussion and Conclusions

18. The prosecution must prove the defendant was a person *required under this Act to submit to a breath analysis*. This condition has been proven. The source of the power to require a person to submit is *s 23(1) Traffic Act*: *(Johnny Ralkurra Marika* (1998) (101) ....*A Crim Rep 345),* in particular, in this case, *s 23(1)(a) [if the member has reasonable cause to suspect that the person] .has committed an offence against section 19.* Police noted the swerving. On apprehension some of the indicia for intoxication were present. There was a roadside test indicating the presence of alcohol. Even if there was some irregularity with the test as alleged by the defence, there is, in my view, even without the positive road side test, more than enough evidence to justify the requirement that Mr Psaras submit.

19. The defence case concedes that Mr Psaras *failed to provide, in accordance with the directions of the person carrying out the breath analysis, a sample of breath sufficient for the completion of the breath analysis.:(s 20(1)(b) Traffic Act).* The defence relies on *s 20(2) Traffic Act*: *It is a defence to a prosecution for an offence against subsection (1) if the defendant satisfies the court that it would have been detrimental to the defendant's medical condition at the time when required so to do for the defendant to have submitted to a breath analysis or that the defendant had other reasonable grounds for refusing or failing to submit to a breath analysis.*

20. Justice Kearney analysed this provision in *McDermott v Trennery (supra).* There His Honour considered arguments that due to the ambiguity in the way *s 20(2)* is drafted, it may not have application to *s 20(1)(b) fail to supply sufficient breath* as opposed to *s 20(1)(a) fail or refuse to submit* (at all to the test). His Honour concluded *(para 8)* that the defence is available in the circumstances of *s 20(1)(b)* and consequentially I conclude it is available in these proceedings. Further, as *Brown* points out, (paras 10.30 and 10.50), the terms *refuse or fail* do not create two separate offences, but rather represent an offence of non-compliance represented in either an express refusal or an inferred refusal or failure.

21. The defendant's case is *not* suggesting that providing a sample of his breath would have been *detrimental* to his asserted medical condition. It is easier to conceive that part of *s 20(2)* to be applicable to the person who expressly refuses to submit because of fears of medical detriment but it is also available to answer this form of alleged non-compliance. Here the defendant asserts that having the flu was the basis of his failure to be able to supply a sufficient sample, not, that his condition would be affected to the detriment.

22. The question therefore becomes whether *the defendant had other reasonable grounds for refusing or failing to submit to a breath analysis.* The defendant bears the onus on the balance of probabilities that he did have such *reasonable grounds.* The evidence from police is that he appeared to be attempting to comply; during the second attempt he told police he had the flu; the defendant's evidence is essentially that he could not blow harder because of flu symptoms and although not present at the time of the analysis, Ms Cloake confirmed the defendant was suffering from flu on the trip from Timber Creek and that he was taking simple medication. Nothing in the evidence indicates the defendant was being half hearted in his attempts. The competing proposition is that the defendant's explanation is not credible or that he is lying to escape detection and its consequences. There is no medical evidence. In *McDermott v Trennery (supra)* Kearney J at *para 18* said that as a *practical matter* to establish a defence under *s 20(2)* a current medical opinion would ordinarily be expected. The weight then

given to such an opinion is up to the trier of fact. I do not understand His Honour's comment to make the provision of medical evidence a formal or mandatory requirement before the defence can be raised successfully. In *McDermott v Trennery* His Honour was dealing with an appellant who suffered from a variety of conditions of a more medically technical nature. I am left with lay descriptions in this case, however in my view the symptoms of a particular flu or a cold are capable of description by an ordinary person who is suffering them. Although I think it is preferable to have medical evidence, here all of the evidence points one way and I am satisfied with the defendant's explanation.

23. I note the collection of cases footnoted in *Brown (at 10.52)* as some indication of the sorts of circumstances that courts have entertained concerning situations such as this one: *Clifford v Topie (1987) 6 MVR 408 it was held that a driver who suffers from asthma bears the onus of establishing that he has a reason of a "substantial character" for refusing; DPP v Kimersley* [1993] *RTR 105 (fear of contracting HIV capable of being reasonable excuse); De Freitas v DPP [1993] RTR 98 (genuinely held phobia of contracting HIV from mouthpiece of breathalyser capable of being reasonable excuse in rare cases); DPP v Pearman [1992] RTR 407 (nervousness capable of being reason for being unable to provide specimen and became reasonable excuse).*

24. In relation to the charge of *driving under the influence of intoxicating liquor……. to such an extent as to be incapable of having proper control of the motor vehicle* contrary to *s 19 Traffic Act*, the evidence of the manner of driving is not clear given some disparities in the evidence. I accept there was swerving observed by police officers. Ms Cloake was very clear on the level of the defendant's drinking (3-4 cans over a significant period) and her evidence concerning the defendant's illness. I find myself unable to find that charge proven beyond reasonable doubt. It cannot be shown beyond reasonable doubt that the defendant was *incapable* of having proper control, nor can it be shown that any problem driving was due to him being *under the influence* as that phrase is understood in this section.

25. I therefore dismiss both charges and will hear any sentencing submissions on the remaining charge.

Dated this 28th Day of April 2003

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JENNY BLOKLAND
STIPENDIARY MAGISTRATE