

CITATION: *Robert Rolund Burgoyne v Ray Daniels* [2004] NTMC 027

PARTIES: ROBERT ROLAND BURGOYNE

v

RAY DANIELS

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction - Alice Springs

FILE NO(s): 20320260

DELIVERED ON: 17 February 2004

DELIVERED AT: Alice Springs

HEARING DATE(s): 11/12 February 2004

JUDGMENT OF: M Little

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecutor: K Winzar
Defendant: S O'Connell

Solicitors:

Prosecutor: Police Prosecutions
Defendant: CAALAS

Judgment category classification:

Judgment ID number: 027

Number of paragraphs: 38

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20320260

BETWEEN:

ROBERT ROLAND BURGOYNE
Police

AND:

RAY DANIELS
Defendant

REASONS FOR JUDGMENT

(Delivered 17 February 2004)

Ms M LITTLE SM:

1. In this case the defendant is charged with drive disqualified and drink driving, exceed .08, namely .213, from the 29th of September 2003. The driving was alleged to have happened at 3am on Wills Terrace in Alice Springs. I remind myself that prosecutions bear the onus of proving each element of the charges beyond reasonable doubt.
2. The issues in dispute are of small compass yet of crucial importance to this case. The issue is whether the person who was breathalysed at the side of the road and at the Watch House at 3.39am later that evening was the same person who was driving the vehicle. I will largely limit the evidence summary to that crucial issue.
3. The first witness called was Constable Kellow. His evidence was that at approximately 3am he saw a vehicle travelling very slowly, south along the Stuart Highway. The vehicle was a white Lite Ace Ute. As his vehicle was travelling in the opposite direction he could see inside the cab and he noticed four males inside the vehicle. He said the driver had a baseball cap on. He said the person next to the driver was a male who was bare chested. He did a u-turn and travelled behind the vehicle. He could see the backs of four people through the window of the Ute.

He noticed that the driver had a cap on, then there was a bare chested person and two people with t-shirts on seated next.

4. The police stopped the Ute. Constable Kellow stopped the police vehicle and walked to the right side of the Ute. He said his partner (McKinney) went to the left side of the Ute. He noticed Senior Constable Bourke arrive as well. As he approached the Ute, he noticed the driver climbing over the bare chested man to his left. He said as he started to approach the Ute he noticed the driver starting to shift positions. At one stage the driver was sitting in the lap of the man to his left. He said the driver had a cap and a t-shirt on. As he got to the door of the car he saw the driver was on the lap of the man next to him. He said the driver carried on moving over. He opened the driver's side door and looked inside. He noticed there were blankets inside and one person was left in the car (the bare chested man). The bare chested man was still in the same position, being half way seated on the bench area. He said all the others were on the footpath. He went around to the front of the car towards the foot path area. Senior Constable Bourke was there and he said the two passengers were with his partner, Constable McKinney.
5. He said the driver was wandering around. His partner grabbed the driver and told him he was to be tested for alcohol. The person then indicated that he was not driving and not to do him (I take this to mean the BA). The BA was done and then he was arrested. Constable Kellow did not speak to the driver at that stage. Particulars were taken of others and some information checks done.
6. There is no dispute that the person who was arrested was Ray Daniels, the defendant in this matter. Constable Kellow said that in BA room at the Watch House, the man said he was not the driver. The arrested man also said that they will be doing paperwork for the rest of their careers and that they would hear from his lawyer.
7. Constable Kellow could not identify the defendant on the day in Court. Computer checks revealed that Ray Daniels was disqualified and finger print checks confirmed the person arrested was Ray Daniels. He said that the names of some other people in the car were Peter Jones and 'someone' Sandover.

8. In cross-examination he agreed that the name of the person he had written down in his notebook was Peter Skinner. He said that contact had been made with Harts Range Police in an attempt to find these other people. He agreed that he did not make a note in his notebook about the fact that the driver was wearing a cap. His statement was made one month after the incident. He said it was a black cap. He said the cab of the Ute was illuminated by headlights from his vehicle and there was good street lighting. He said the first two passengers got out straight away and then he saw the driver begin to climb over the person to his left. He said at one stage he was right by the driver's window when he saw that happening. He said the person he identified as the driver was wearing a t-shirt and a baseball cap.
9. He said that it was not possible that one of the first two out of the car was the driver. He said it was not possible that the person changed caps with one of the other occupants. He said the person was still wearing a cap as he was climbing over the person next to him. He heard the person deny he was the driver when he was told he was to have a blood alcohol test and when he was in the van he heard the man say words to the effect that "you've got the wrong person, it was not me". He remembered distinctly that the bare chested person was directly to the left of the driver.
10. Senior Constable McKinney was called next. She said that she noticed the driver was a male Aboriginal person wearing a dark baseball cap. The police vehicle was following that vehicle. She noticed approximately three to four heads in the cab of the vehicle. They all appeared to be of Aboriginal decent. As she approached the passengers side of the vehicle two people came out as the door opened; they stumbled out. The third person came out and she nominated that person as the defendant wearing a baseball cap. There was one person left inside. That person had no shirt on and appeared quite intoxicated.
11. She said the person who had a cap on was a male Aboriginal person and he had a dark top on. She identified that person as the defendant in Court today. When she asked that person what his name was he said "Ray", she said "Ray who?" he said "Ray Daniels". When she told him she would require him submit to a breath test, he said he was not the driver and became aggressive. She said she was able to

identify the person that she spoke to as the defendant, as she remembered what he looked like and also she had had dealings with him before.

12. She made observations about him on the side of the road and they included observations with respect to alcohol. She said that he was speaking incoherently at times although she was clear that he denied being the driver. She said she spoke to one of the other people who had been in the car, Peter Jones, and she had had dealing with him before. She said Constable Kellow went to the driver's side of the vehicle and that no one got out of the driver's side of the vehicle.
13. In cross-examination she said that the persons were squashed into the cab of the Ute and they appeared intoxicated. They stumbled out of the vehicle. She said the passengers came out quite quickly. She agreed that it was possible that the driver changed caps. She said the third person was out of the vehicle almost at the same time. The time the people took coming out of the vehicle was a total of seven to ten seconds. She said it was four seconds between the first two people coming out and the third person coming out of the vehicle.
14. She said she was half way between the police car and the other vehicle when the first two came out. She estimated that she was approximately ten metres away from the other vehicle. She said it was then a few seconds later when the driver came out. She said she was only a couple of foot steps away from him (that is the person she said was the driver) when she saw him get out of the vehicle. At that time Kellow was not in her vision and she thinks that he was going to the driver's side of the car.
15. Senior Constable Bourke was then called. He pulled over on the opposite side of Wills Terrace and could see inside the Ute. He saw a male person crawling over several passengers. He said all persons were male and he noticed that the driver was wearing a peaked cap. He said that the driver was crawling over passengers towards the passenger side of the vehicle. He crossed over Wills Terrace. He said he knew one of the passengers, namely Peter Jones, from earlier dealings and also a Mr Moneymoon. He spoke to Mr Moneymoon. He heard the person who was being subjected to the alcohol test denying he was the driver.

16. Under cross-examination he said his vehicle was across from the defendant's vehicle and he could see in the window. He said the Ute was eight to ten metres away – that is the width of Wills Terrace away. He said he saw both other police officers heading to the foot path side of the van. He was not sure who got out first but he assumed one of the people who got out first was the driver. He noticed the cap of the driver. He said he could not say whether it was the same person who was wearing the cap as he saw in the vehicle. As he crossed the road he did look away from the scene. He didn't see any of the police officers at the door of the driver's side of the vehicle.
17. Exhibits P1 and P2 were the BA print out and the motor vehicle registries certificate. P1 proves the BA reading was .213% at 3.39am that is approximately 30 minutes after the driving. P2 proves Ray Daniels was disqualified from driving as at the 29th of September 2003. As stated earlier I do not propose making any further comments about these issues.
18. That was then the close of the prosecution's case and the defendant, Ray Daniels, gave sworn evidence. He said that he was at Hoppy's camp when they got into the car. He said he was in the car as well as Willy, Peter and Simon. He said he had been drinking Jim Beam and he agreed he had got drunk. He asked his Aunty for the keys to the car and he said Simon drove the car. He said there was a discussion as to who was going to drive and Simon said that he would drive. The defendant described the vehicle as a little truck.
19. He said they were going to Hidden Valley to get some blankets. When Simon saw the coppers Simon got nervous. The defendant said he (that is the defendant) was full drunk and that Willy was drunk as well. He said that Simon gave him the cap and said "you hold it for me". He said that he told the police that Simon had been driving. He said he was not allowed to drive because he was disqualified and that he had told the others that before they left Hoppy's Camp.
20. Under cross-examination he said that Simon was also known as Simon Sandover. He said Peter Skinner was not in the car that night. He agreed Willy may have given a wrong name. He said that beer and Jim Beam had been drunk. I am not sure if he had agreed if he had drunk any beer or not but certainly he said he had

drunk Jim Beam. He said he had a black checkered jumper on. He said he didn't wear the cap and that he never wore. He said Simon had the cap and that was given to him and he held the cap.

21. When he was being spoken to by the police he said Simon was standing a long, long away. He said the police said to him to shut up. He said he told the police that Simon was driving. He denied he drove the car. He said that he was sitting near to Peter. He said Peter was sitting at the passenger's side door, and he was next to Peter, and Willy, and then Simon was in the driver's side. He said Simon got out first. He said "he jumped out, quick one". He said "Willy got out, then Peter got out then me last". He said they blamed him. He denied he was the driver and once again said it was Simon. He said " Simon give me the cap and said you hold on".
22. In re-examination it was put to him and he agreed that he put the cap on. There was no objection taken to the form of this question or indeed whether or not it was an appropriate question for re-examination. It appeared to me that there was no ambiguity or misunderstanding about the answers that had been given on this point in cross-examination. Nevertheless, there was no objection taken to the question or its form. This is an important issue; the issue of the speed of the change of the hat is obviously an important one in this case. It is my view that the change of the cap must have occurred extremely quickly and it must have happened inside the Ute, if it occurred at all. That was the close of the defence case.
23. As stated above the issue then is whether the person who was arrested was the same person who was in the driver's seat at the time of the driving.
24. I will now summarise the order of the persons getting out of the car as given by the various witnesses. Constable Kellow said that when he looked into the Ute, the two passengers were on the road/footpath, the bare chested man was in the middle and the driver was climbing over the bare chested man moving towards the passenger's side door. He said the driver still had a cap on. In this scenario there is no possibility that the person who had the cap on in the Ute, was sitting anywhere other than in the driver's seat at the time of driving. The person with

the cap on was still climbing over the bare chested man when there were no other people in the vehicle and must have been the same person who was driving.

25. Constable McKinney said two people stumbled out and then a third person with a cap and a dark top on came out. She estimated the time from the first two people coming out (or stumbling out, as she said) and the third person coming out as four seconds. She was able to identify the person with the cap on as the defendant when he was coming out and when he was being questioned. She does not see who was in the driver's seat. What she does see is a person with a cap on, who she knows to be Ray Daniels coming out of the Ute. She sees that person coming out third. She says one person was still inside after the third person came out and that person was bare chested and appeared intoxicated. She could not rule out the possibility that hats were changed at some stage.
26. Senior Constable Bourke says that a person with a cap on was crawling over passengers. He described this person as the driver. He said he was not sure who got out first. He assumed one of the people who got out first was the driver.
27. The defendant said that the people in the car were sitting as follows: Simon was in the driver's seat, Willy was next to him, the defendant (Ray Daniels) was next to Willy and Peter was near the passenger's side door. The defendant gave evidence as to the order of the persons coming out of the car. He said Simon came out first (that is the person who he said was the driver got out first) then Willy, then Peter and then himself, that is the defendant got out last.
28. As to the credibility as the various witnesses I find that Constable Kellow and Constable McKinney were both credible and reliable witnesses. Neither person gave evidence of anything other than they saw. Constable McKinney agreed that she could not rule out the possibility that there was a swapping of the cap. This reinforces my finding as to the honesty and reliability of Constable McKinney as a witness – had she ruled out this possibility her evidence would have had less weight as the evidence was that she was not looking into the cabin of the Ute (in contrast to Constable Kellow). At no stage did they appear to be reconstructing what they saw. They were both sober and were observing what occurred on that occasion.

29. With respect to Senior Constable Bourke, he had come upon the scene at a slightly later time and I take account of his version of accounts to a lesser extent, especially as he was parking his car and crossing the road when he saw movement within the cabin of the Ute. The angle of his viewing the cabin leaves him unable to see as clearly as either Kellow or McKinney. Whilst I do find that his evidence was given honestly, I am of the view that the reliability of his evidence is lessened by him coming upon the incident later than Constables Kellow and McKinney and the angle of the viewing.
30. The defendant frankly admitted that he was full drunk on the night in question and in particular when he was in the car. Exhibit P2 sets out that the defendant had a BA reading of .213% at 3.39am. Accordingly there is ample opportunity for the reliability of his evidence to be questionable.
31. Here I raise the answers to the line of questioning with respect to whether the defendant had put the cap on on that night. It was not until re-examination that evidence, suggestive of the fact that the defendant had put the cap on at all, was given by the defendant. The answers he gave in cross-examination cast real doubt on his evidence in re-examination on this point. Any suggestion that the defendant was holding onto the hat for even a second or two is implausible.
32. His evidence as to the order of the persons getting out of the car is inherently implausible. The defendant's evidence is that Simon, as the driver, had moved over three people and exited the vehicle, prior to any of the others leaving the cab. He then says that Willy, who was next to the driver, climbs over himself and Peter to get out. I reject that version as to the order of the people leaving the Ute. I find that the person with the cap on was the 3rd person out of the Ute. I am left with no doubt that the person next to the driver was the last person out of the Ute (the person who the defendant calls Willy).
33. I also reject the evidence that the defendant told the police that Simon was driving the motor vehicle. I have no doubt whatsoever that the defendant continuously said that he was not the driver. The police frankly gave evidence of the defendant's denials that he was the driving and the immediacy of these denials. There was no evidence that he told the police it was Simon who was driving. It

was not put to any of the police witnesses that the defendant did tell them that Simon was the driver. They had no opportunity to respond to that crucial piece of evidence. Indeed, the thrust of the defence cross examination on the issue of the alternative driver was that the police had not done enough to speak to the others in the car, especially when it was clear that the matter was being set for hearing. Yet it is also the defendant's evidence that the others were possibly giving false names. There is certainly real confusion about the names of the others in the car. It is one thing to deny you have committed an offence. To nominate a particular person as the offender is an entirely different matter, especially if that person is nearby. I have no doubt that he did not nominate Simon as the driver on that night. I reject the idea that the defendant indicated or nominated who the driver was. This casts further doubt on the reliability of the defendant's evidence.

34. Constable Kellow was the only police officer who was standing right by the cabin of the vehicle looking inside to see what was happening. Constable McKinney was standing a few metres away and was not able to look inside see any of the persons in the cabin physically come out of the vehicle.
35. I have no doubt whatsoever that Constable Kellow's evidence can be accepted in its entirety. In particular, I find that a person wearing a cap was climbing over the bare chested man and that, at that time, there was no other persons left in the motor vehicle. I also find that this person had moved from the driver's seat. I find that this person only moved towards the passenger's side of the vehicle. I find that this person had not moved from the passenger's seat towards the driver's seat, onto the bare chested man, and then back towards the passenger's side to exit the vehicle by the passenger's side door. That is a scenario which the defendant would have me accept if I am to accept his version that he was not the driver and that the person he nominated as Simon had left the vehicle first. I find that there was a movement towards the passenger's side of the vehicle at all times and there was no such backwards and forward movement.
36. I have no doubt that Constable McKinney's evidence can be accepted in its entirety. Constable McKinney is able to identify the defendant as the person who got out of the vehicle wearing the cap. Both Constable McKinney and Constable Kellow have the person with the cap on exiting third. In those circumstances the

changing of the cap must have occurred whilst inside the vehicle, if it happened at all.

37. When I place Constable Kellow and Constable McKinney's evidence together, I am satisfied beyond reasonable doubt that the defendant was the driver of the Ute. I find no break in the continuity of the evidence. I find it proven beyond reasonable doubt that there was no changing of the cap and that the Defendant was wearing the cap at all relevant times. I make this finding based upon the prosecution evidence. Given the inherent unreliability of the defendant's version, the defendant's version does not cast any doubt upon the findings I have made.
38. Accordingly, I find that the defendant is guilty of counts 1 and 2.

Dated this 17th day of February 2004.

M Little
STIPENDIARY MAGISTRATE