

CITATION: *Moore v Hiscocks and Hiscocks* [2006] NTMC 011

PARTIES: DAVID STEPHEN MOORE

v

DAVID CALLUM HISCOCKS AND ANGUS
HISCOCKS

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Justices Act; Criminal Code

FILE NO(s): 20507489 & 20507495

DELIVERED ON: 6 February 2006

DELIVERED AT: Darwin

HEARING DATE(s): 11 January 2006

JUDGMENT OF: Jenny Blokland SM

CATCHWORDS:

Criminal and Dangerous Act – Ordinary Person similarly circumstanced; - Parties to Offences – Common Purpose – *Criminal Code* ss154,8,12,13,29,34.

Sandby v The Queen, unreported, CCA(NT) 19 October 1993.

Stephen Gray, *Criminal Laws of the Northern Territory*, The Federation Press, 2004.

REPRESENTATION:

Counsel:

Prosecutor:

Mr Fisher

Defendants:

Ms Truman for David Hiscocks

Mr Woodcock for Angus Hiscocks

Solicitors:

Prosecutor:

Office of the Director of Prsecutions.

Defendants:

Halfpenny's for David Hiscocks

Alan Woodcock for Angus Hiscocks

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B

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NTMC [2006] 011

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19

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

No. 20507489 & 20507495

BETWEEN:

DAVID STEPHEN MOORE
Informant/Complainant

AND:

**DAVID CALLUM HISCOCKS AND
ANGUS RAY HISCOCKS**
Defendants

REASONS FOR DECISION

(Delivered 6 February 2006)

JENNY BLOKLAND SM:

Introduction

1. The two Defendants in this case, Angus Ray Hiscocks and David Callum Hiscocks are brothers jointly charged on information with one count of *aggravated assault* and one count of *dangerous act* without any circumstance of aggravation. A further count on complaint charges one count of *criminal damage* to the value of \$2,000. The offences are alleged to have occurred on the 29 March 2005. The basis of the Prosecution case is that the alleged victim Clinton Rose was driving his tour bus down Tiger Brennan Drive; that he happened upon the vehicle driven by the Defendant Angus Hiscocks and that David Hiscocks was a passenger in that vehicle. The prosecution alleged that the Hiscocks' vehicle and the tour bus driven by Clinton Rose came into close proximity while both vehicles were driving down Tiger Brennan Drive up to the lights of Dinah Beach road and through to the Woolner lights; that at the point of going past the marina, known

locally as the “duck pond” and while the Hiscocks vehicle was ahead, the passenger (David Hiscocks) leaned out of the window and threw rocks at the bus; that some of those rocks hit Mr Rose’s vehicle. It is alleged that shortly after, David Hiscocks threw a metal spring compressor through the driver’s side of the bus and it smashed the window of the bus. The particulars of the dangerous act alleged are: *Did an act, namely threw a metal spring compressor through the driver’s side window of the moving bus causing the window to smash, that caused serious actual danger to the lives of the public or a member of it in circumstances where an ordinary person similarly circumstanced would have clearly foreseen the danger and not have done that act, contrary to section 154 (1) of the Criminal Code.* The prosecutor characterised the alleged actions of the Defendants as “*classic road rage*”.

2. At the commencement of the hearing, count one, (a differently particularised dangerous act) was withdrawn and count two was withdrawn during the course of the hearing as it became evident that precisely the same facts founded the dangerous act and the alleged assault.

Evidence Called on Behalf of the Prosecution

3. Mr Clinton Rose gave evidence that he was the driver of the tour bus and on the day in question was dropping passengers off after a tour; his last “drop off” was the Plaza Hotel; he described the bus as a late model, “bit over half a million”, six to eight months old and a fifty seater with tinted windows; he said the bus had six gears and its top speed is 98 kilometres per hour. He explained that the speed is governed and he cannot go any faster; he said it was a good bus to drive and it was relaxing to drive. He said the tour that he had taken on that day was a 14 hour day; said he would have been driving for six hours; he said it was a trip to Katherine and back; he said he was driving the bus with the governor. He said the bus was not built for speed and was over 20 tonnes; he said it was a twin axle with eight wheels. He

said he had driven coaches for about five years and drove big ones; at the time he had been with that particular company for five years.

4. He said he was coming down Tiger Brennan Drive and a white ute pulled out on the corner near McMinn street; he said as both vehicles were proceeding to the marina (“the duck pond”), he was probably about two lengths behind the vehicle; he said one of the passengers sat on the window ledge of the vehicle and threw something at him which he thought looked like rocks; he said he could not really see but it just hit the bus and he thought it a bit odd. He said the person then threw what he thought was the second one. He said he backed off then with his driving to at least six or seven car lengths behind so that he could not throw anything as if he did throw anything he would have missed. He said the vehicle then got stuck at a set of lights and his bus over took him and took off; after the lights changed the other vehicle took off again and was in front of the bus again and they ended up at the next set of lights where they were beside each other; he said at the lights at Woolner road both vehicles took off but he said he was only in second gear. He said he had slowed down for the lights and was doing about 20 kilometres an hour at the most; he said he was then at the lights near the Bayview area at Stoddart Rd and Woolner Rd; he said he started going up the hill and the two lanes formed into one after 300 metres; he said the other vehicle crossed back over to his side and slowed down a bit and he flashed his lights simply wanting to indicate that he was wondering what was going on; he said he flashed his lights five or six times; he said he was going up the hill and the other vehicle was probably about three to four car lengths in front and then slowed down; he said because it was dark and there were no cars coming he overtook the other vehicle and started going down the hill picking up speed; he said the other vehicle came up on the inside and Mr Rose then cut across and the other vehicle slowed down, backed off and then came behind him.

5. Mr Rose said he had a gut feeling that the other vehicle might throw another rock so he slowed right down so that if they did throw something it would go past him; he said he was only doing 50 to 60 kilometres an hour at that point and he may have got up to 70 to 80 kilometres an hour on the down hill; on the downhill he said he saw the other vehicle coming on the outside of him and he slowed down in case they threw something; he said the other vehicle was next to him for a few seconds; the next thing that happened was his window was smashed and he could not really see but when he got to the bottom the hill he saw an iron bar sitting beside him and the window shattered; he said the other vehicle was then gone.
6. The iron bar was tendered in evidence. He said at the time the bar was thrown they were beside him and after it was thrown they were overtaking cars and “took off at a hundred miles an hour”. He said at that point the other driver over took at least two or three cars. He said the closest he got to the vehicle was when he was two to three car lengths behind save for when they were at the lights and his bus was beside them. He said it was right at the start of the incident when the passenger threw what appeared to be rocks and it was then that Mr Rose said he backed off. He said after the window was smashed and he found the iron bar on his dashboard, he pulled over and rang police; he then went to the depot which he said was only a five minute drive from that spot. Mr Rose said that when the rocks were first thrown he took a note of the number plate of the vehicle. He said he was not in a hurry that day as everything had gone well on the tour and he had the next day off; he said he’d already had dinner at Adelaide River.
7. In cross examination he agreed that he had *assumed* that the items thrown at him were rocks; he agreed that he said the person appeared to be sitting on the window sill throwing the rocks. It was suggested to him that the person threw the items because he (Mr Rose) had been coming up against the rear of the ute, trying to push it along. Mr Rose responded that the suggestion was a “dead lie”. He denied any suggestion that the person had been waving

at him trying to get his bus to move away. He denied trying to cut the vehicle off at the second set of lights at the duck pond; he denied further suggestions he was trying to push up against the rear of the ute. He reiterated that his vehicle was not built for speed, it is a 20 tonne vehicle with low gears; that he wouldn't conduct himself like that because he would lose his job; he disagreed that he always saw himself as having a right of way; he disagreed he was trying to control the road; he disagreed he manoeuvred the vehicle in such a way as to push it off of the road; he agreed that he had overtaken them after they had slowed and pulled over; he said they didn't actually stop but pulled over; he agreed it was only three or four seconds after that that the iron bar came through the window; he agreed he may have told police there were no other cars on the road at the time but he said he recalled the ute over-taking cars when they sped off. He disagreed he was offended by the ute pulling out in front of him at the start of the incident, saying *"No, because that's just normal. A lot of people want to get in front of buses all the time, they're big and slow, so."* And *"...it happens all the time. I mean, I'm five minutes or a whole ten minutes away from home. From work I was in no hurry, it just happens all the time. So it meant nothing to me."* He disagreed he had put his lights on high beam at the start; he disagreed he had swerved; he agreed he flashed his high beam later to signify he was trying to find out what the problem was – why they had thrown the rocks. He disagreed there was any sense of "winning the race" or "playing a bit of chicken". He did agree that cutting across a vehicle was dangerous; he agreed he could have "stirred them up" by high beaming them. In re-examination he further qualified his answer concerning whether what he had done was dangerous saying he believed it would be more dangerous as he would have been off the road if he did not take the action that he had.

Police Evidence

8. Officers Nancarrow and Hall gave evidence, primarily concerning a records of conversation conducted on 30 March 2005 with the defendant and the exhibiting of the bar that was thrown. Apart from what is contained in the record of conversation, Senior Constable Nancarrow's evidence was that David Hiscocks was forthcoming, cooperative and was generally of assistance. In David Hiscocks record of conversation he told police he was going for a drive with his brother; that at a set of lights where the lanes merge, the bus tried to go past them and his brother who was driving had to give a little more throttle to get ahead; he said the bus started tailgating and at the lights at the Duck Pond he threw a twenty cent piece at it. He said he was hanging out of the window; he said he threw something else at it and the bus was only a metre away from the ute. He said at the Woolner lights the bus went past them again and the bus was so close that his brother had to be up close to the gutter; he said he threw a bar at the bus and heard some noise like heard glass break. He told police he didn't know what the bar was used for but thought it might be a spring compressor; he said his brother was just driving when it happened. He told police he panicked; he didn't see where it landed and he didn't know which part of the bus it would hit; his aim was "Just randomly at the bus".
9. There was also a record of conversation tendered with respect to Angus Hiscocks. In that Record of Conversation Angus Hiscocks told police the bus came up to about a metre and a half or two metres off of his tail gate; he said he was swerving around doing 75/80k's per hour; he said the bus came up and sat halfway beside him at the lights when the lane was merging and that he accelerated to get ahead; he said the bus started flashing its lights; he said that as a result of the buses' driving he hit the curb; he said his brother was making gestures to him; he said he didn't see what his brother was doing; he said he was more focussed on driving; he said his brother did not have his body out of the vehicle; he said he thought the spring compressor

was under the passenger seat and he wasn't sure if his brother grabbed the spring compressor; he said he thought the bus was behaving dangerously and he was a little worried; he said he did not know his brother threw the spring compressor but he knew he threw some coins; he agreed with police that when he was first asked if anyone was in the car he said "no-one"; he said he was shocked; he said he knew about a bar; when asked if he knew about an object being thrown at the bus he did not answer; he said he felt provoked by the manner of driving of the bus; he said he was driving defensively; he agreed it was wrong thing not to tell police about the bar.

Evidence Called in the Defence Case

10. David Hiscocks told the court he was 27 years of age and 26 at the time of the incident and that he was working for a labour hire company. He said his brother was driving the car and he was a passenger; he said he thinks he had one rum to drink but now can't remember. He said he first came upon the bus at the McMinn Street lights and when the lights turned green his brother accelerated and the coach tried to pass them; he said he would have said "what's this dickhead up to" or words to that effect; he said the bus started to flash its lights after their car got past it; he said the bus was two to three feet behind; he said he started to get a *bit nervy* because it was a 20 tonne bus coming at him. He said he felt like this because he thought they might crash or the bus might run into them; he said he gestured at him, probably gave him the finger but he did this with his seatbelt on; he said he did not sit on the sill of the window. He said he was not sure if it was the second or third set of lights but he said the gestures of the bus *were getting more and more pushy*. He said the bus was getting slower, swerving on the road and going to the right and left-hand side. He said he threw a twenty cent piece at the bus, it hit the bus and had *no effect*. He said throughout he couldn't recall any conversation between himself and his brother, saying, *see I was fixated on the bus and me*.

11. He said that at the third set of lights the bus had dropped back 40 metres or so; he said the bus tried to *gun past us again*. He said the bus tried to overtake on the right and *push us up into the gutter*. He said “*Yeah, I lost it by then, I thought I was – we were history more or less*” He said they hit the gutter at the third set of lights. He said *I generally you know feared like I was going to get hurt, so I lost it emotional – like emotional outrage sort of thing*. He said he knew the iron bar was in the car, it was one of his brother’s tools. He said when he threw the bar he was emotional and just wanted the bus to get away from them; he was aiming at the bus; he said he didn’t think it was dangerous at the time, he said : “*my only concern was my self preservation because it was – you know he’s pushed it more than once, and I was genuinely fearful*”, and further he stated “*I am ashamed of what I’ve done, I wish I didn’t do it, but all I’m trying to say is, if I can- they say you going to go guilty, that’s saying I’m accepting everything he’s saying to be true. I said to the police, you know ‘yes I did it’ you know, I did. All I want to say is like I’m taking responsibility for my action, yes I did throw the bar, yes I did throw the coins, but this is why, and its just – and he already said his number one priority is his job, he’s trying to say – he’s not going to go back to the depot and say, what happened to the window, I was road raging some dude and I come off second best – he’s lost his job. It’s just – sorry.*”
12. In cross examination he said that once their vehicle got in front of the bus, the bus started flashing its lights. He said the *bully boy* tactics started then with the bus and agreed with Mr Fisher that it *was on*. He agreed he was agitated and nervous at this stage; he said he made some gestures, some “arm waving”; he said the bus got within two to three feet of their vehicle; he said the bus was swerving to the left and the right of the vehicle; he said his brother was driving at the speed limit which was around 80; he said the bus driver was intimidating him with his *bloody coach*. He said he wasn’t gesturing the whole way, he was in and out of the window. He said when the

bus dropped back it stopped flashing as well; he said that was when the bus got more “pushy” but never got closer than two or three feet behind but was intimidating; he said he was sure it was a twenty cent piece he threw and is not sure what the second object was. He said he wasn’t aiming at the driver and said it was a random throw stating again that he was in an emotional state and *I was genuinely fearful and I reacted and that’s how I reacted*. He also spoke of *self preservation*. He denied there was any talk with his brother. He thought he should have told his brother to stop the car.

13. There was no evidence called in Angus Hiscock’s case.

Discussion of the Evidence

14. I found Mr Rose a sound witness. He was open in his responses to vigorous questioning by both defence counsel without becoming defensive and made appropriate concessions. He did not retract any of his evidence. He acknowledged there were some points he had made assumptions on but these were reasonable assumptions. For example, he assumed the objects thrown were rocks, (they may have been coins). There is no doubt he was stating his honest belief. I accept that he was giving approximations of his distance behind the defendants’ vehicle but I have no reason to doubt his honesty about those beliefs. It may be that the defendant David Hiscocks was not on the window sill when he threw the objects, but equally, from the description he gave in court, he had twisted around and had to be partially out of the window to throw the items. Mr Rose appears to have a reasonable attitude to other road users and for example is accepting of the fact that sometimes other drivers cut in front of buses because they don’t want to be caught behind them. Finally, apart from the fact that Mr Rose comes across as an honest and reasonable person, it would be very bizarre behaviour, (unless the driver was completely reckless or suicidal), that someone just finishing the day’s work is going to start racing, swerving, challenging other vehicles and tailgating in a 20 tonne bus around the city. The version given by David

Hiscocks to the court is bizarre. Even if he thought the bus was encroaching on his space, to respond to the perceived poor or dangerous driving by throwing objects, (in the first instance the coins), is a complete overreaction. It is extreme behaviour - the fact that he responded in such a way in the early stage of the incident when it can hardly be seen to be a life threatening situation reflects on the credibility of his whole case. He has exaggerated the perceived threat at the time and that has continued to magnify the incident in his explanations to police and the Court. I just cannot accept the explanation that he was in fear of his life and responded by throwing objects for reasons of fear, emotion and self preservation. That explanation is so lacking in credibility that it reflects negatively on his description of the events of the evening and in my view the prosecution have negated his description of the events beyond reasonable doubt. Aside from the fact that I am prepared to acknowledge Mr Rose may have been out slightly from time to time with distance estimates, (they are *estimates*), it may not have been stones that were thrown and the defendant may not have been on the window sill, I find the events of the evening as described by Mr Rose to be proven beyond reasonable doubt. The most I would acknowledge that the defendant's could legitimately feel is that there was some irritation by virtue of the flashing of the high beam and from time to time the proximity of the bus to their vehicle, but having heard Mr Rose, he had a legitimate reason for flashing his lights given the initial objects that had been thrown. Angus Hiscock's explanation to police is fairly thin and his conduct with police indicates he was not entirely frank. I largely discount his version of events in the face of the honest and forthright version given by Mr Rose.

15. Even if I am wrong in my conclusion on the facts and if Mr Rose did tailgate, run the defendants off of the road, flash his high beam and behave like a "road rager", in a 20 tonne bus, in the circumstances of this case, in my view the charge of *dangerous act* has been made out. First, the danger

alleged must be “serious” as opposed to “trivial” : *Sandby v The Queen* , *unreported, CCA (NT), 19 October 1993*. The section is not intended to cover “*ordinary incidents of modern life*”, but is intended to cover “*plainly blameworthy conduct*”: (*Sandby v The Queen*). I regard the throwing of a metal bar or tool at a moving vehicle to be clearly dangerous in the terms of the section. It must also be “clearly dangerous” to an *ordinary person similarly circumstanced* and the prosecution must prove that the *ordinary person* would *not have done or made the act*. Accepting as I do that for this test I must put myself in the shoes of the defendant, including the situation he was in as well as any personal attributes that may be relevant, I do not accept that a young man of 26 years, travelling as a passenger who is scared of being run off of the road by a bus would grab a steel bar or tool and throw it at a moving vehicle. Even if the event was as described by the defendant, I would still find the charge proven beyond reasonable doubt. The ordinary person would not start throwing things, they would ask the driver to pull over and the driver would pull over and call police in the face of a road raging bus driver. By throwing a heavy object at the bus, the dangerousness is increased, not diminished. In theory both the excuse of provocation and the justification of self defence are raised. In my view both fail. Even if the acts are found to be provocative, an ordinary person similarly circumstanced would not act in such an extreme way. S34(1)(d) *Criminal Code*.) The raising of self defence would fail as it is not a reasonable response in the circumstances as the person perceives them to be (s29 *Criminal Code*).

16. Angus Hiscocks is charged on the basis of being criminally liable as being part of a joint enterprise (common purpose) or as an aider or accessory. I have come to the conclusion, when looking at the relevant provisions of the *Criminal Code*, that his liability on an accessorial basis has not be proven beyond reasonable doubt. It is not in dispute that he was driving; but under s 8 *Criminal Code* it must be proven that he did *form a common intention to*

prosecute an unlawful purpose. Although I am highly sceptical of his explanation to police, the fact that he knew about throwing a bar after the event is as high as the evidence gets. There is no evidence that he instructed or controlled or encouraged or was even party to his brother throwing the compressor or any other object until after the event. Perhaps he should have pulled over after the coins were thrown. Failure to do that doesn't allow me to infer that he knew the further object would be thrown. He was driving at the time. There is no proof of the agreement to commit the offence. Similarly, under *s 12 Criminal Code*, although by his driving he has for all practical purposes *aided or enabled* the offence to occur, there still needs to be some evidence beyond reasonable doubt that he had knowledge of or assent to the act in order for the appropriate intention or foresight to be found.: (*s 31 Criminal Code*). I see by the questioning that officers engaged in in the record of conversation there was an expectation that Angus Hiscocks would be regarded as an accessory after the fact by virtue of him not reporting David Hiscocks. Prior to the *Criminal Code* such a situation might have attracted the *misprision of felony* laws (had the matter been a *felony*), however *s 13 Criminal Code* dealing with *accessories after the fact* requires specific proof of certain extra elements. A failure to report does not readily come within the scope of the section. Section 13 requires proof of *assistance*, requiring some act of assistance to the person, rather than, I think, a failure to report. Further, the section requires that this be done *in order to enable him to escape prosecution*. It seems to require some purposive conduct with this end in mind.

17. I note Mr Stephen Gray's treatment of the section (footnotes omitted): (Gray, "*Criminal Laws Northern Territory*", (2004) The Federation Press, at 161-162). : "*The accessory after the fact must perform an act that is intended to assist the offender to escape prosecution. This requires positive action or "active acts of assistance". This could include direct concealment or harbouring of the principal offender, altering the engine number and*

repainting a stolen car, disposing of stolen goods, removing or concealing evidence, making a false statement, and helping to remove the victim's body and cleaning the crime scene. If the accessory acted only for some other purpose, for example to protect him or herself or to make personal gain, the crime is not committed. However, if one of the purposes of the act is to assist the principal offender escape, the accessory will be guilty if the other elements of the crime exist. The prosecution must prove that the accessory knew the principal offender had committed "an offence". The accessory must possess this knowledge at the time he or she provides the act of assistance. If the accessory only has a vague suspicion that the principal offender has committed a crime, or only finds out later that a crime has been committed, he or she is not guilty. At common law, the accessory needed to have knowledge of the precise offence that had been committed. This appears also to be the case under s 13 of the Criminal Code. In order to be guilty as an accessory after the fact to "an offence", the accessory must know the principal offender had committed that offence."

18. As mentioned earlier, although in my view this defendant has not been entirely frank with police I am not confident that liability on the basis of being an accessory after the fact as it currently appears in the *Criminal Code (NT)* has been made out. It is difficult to know with any certainty whether by his various questionable statements to police, Angus Hiscocks was attempting to protect himself rather than assisting his brother.
19. I find the charge of *dangerous act* proven against David Hiscocks. As the facts comprising the *dangerous act* are completely identical for the *criminal damage*, I dismiss the *criminal damage* as a conviction on both would amount to a form of double punishment for the same act. I dismiss both charges against Angus Hiscocks.

Dated this 6th day of February 2006.

Jenny Blokland
STIPENDIARY MAGISTRATE