

CITATION: *Kennedy v Bohning* [2007] NTMC 081

PARTIES: GAVIN DEAN KENNEDY

v

THOMAS JOHN BOHNING

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Darwin

FILE NO(s): 20632975

DELIVERED ON: 30 November 2007

DELIVERED AT: Darwin

HEARING DATE(s): 15 October 2007

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – Dangerous Act – Failure to Stop at Railway Crossing
Criminal Code Section 154(1)

REPRESENTATION:

Counsel:

Informant: Ms Hardy
Defendant: Mr Maley

Solicitors:

Informant: ODPP
Defendant: Maleys

Judgment category classification: C
Judgment ID number: [2007] NTMC 081
Number of paragraphs: 18

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

No. 20632975

[2007] NTMC 081

BETWEEN:

GAVIN DEAN KENNEDY
Informant

AND:

THOMAS JOHN BOHNING
Defendant

REASONS FOR DECISION

(Delivered 30 November 2007)

Ms Sue Oliver SM:

1. On 15 October 2007, Thomas John Bohning entered pleas of guilty to counts two, three, four, five, seven and eight laid on complaint. All are traffic offences related to the vehicle he was driving or aspects of his driving on 12 December 2006. Counts six and ten on complaint were withdrawn and dismissed. Mr Bohning pleaded not guilty to counts one and nine. Count one is a charge of doing an act causing serious actual danger, contrary to what was at the relevant time, section 154(1) of the Criminal Code. Count nine is a charge of driving without due care, contrary to regulation 18 of the Traffic Regulations and is an alternative to count one. The parties consented to count one being dealt with summarily pursuant to s 121A of the *Justices Act*. Following the summary hearing I reserved my decision which I now give.

2. All charges arise out of an incident on 12 December 2006 when a road train driven by the defendant, Mr Bohning, collided with the Ghan passenger train at a level crossing at Ban Ban Springs, south of Darwin.
3. The two train drivers on duty at the time of the collision, Mr Alan Anfilow and Mr Richard Warren gave evidence. Mr Anfilow was not the driver on the leg from Katherine and was therefore seated on the right side of the locomotive. Mr Anfilow's evidence principally concerned the lights of the train and the sequence of whistles being blown on the approach to the Ban Ban Springs crossing, together with his account of the actual collision of the Ghan with the road train. In summary, his evidence was that the lights of the train are required to be on high beam whilst on the main line and that they were switched on when the train left Katherine. These are lights at the top of the train and are long range lights. The other lights on the locomotive are ditch lights, which are for two purposes, first they throw a low light for the track and secondly, when the train whistle is blown, they do a high density strobe, flashing on and off. Mr Anfilow checked the working of the lights that morning when the train was stopped in Katherine.
4. Along the line about 480 to 500 metres out from each crossing is a whistle board, which is a white board located on the left hand side of the track with a black letter "W" written on it. The whistle must be blown at this board. On the day in question, the whistle was blown about 20 metres before the board that is about 500 meters from the crossing. He said it would normally be blown for about two to three seconds. The whistle was again blown at about 150 metres from the crossing and then at the crossing. He had looked ahead at the second whistle blow and the line was clear. At the third whistle, Mr Warren yelled to hit the deck, pulling the whistle and hitting the emergency brake simultaneously. Mr Anfilow had been looking down at the time attending to paperwork, so he stood up to see what was happening and looking straight ahead, saw the prime mover go past the windscreen in front of him with the driver looking straight ahead. The driver's side window was

down and he thought the truck was moving quite swiftly. He was thrown to the floor by the collision.

5. Mr Warren, who was the driver of the locomotive at the time, gave evidence consistent with this account. He blew the whistle at the 500 metre mark and at that mark, there was nothing in his view. He blew the whistle again at around 200 metres and again, all was clear. As he continued after the second whistle blow, he noticed the image or outline of a truck coming through the trees to the left, or west side of the train. The truck was moving, “it was on the move, it definitely wasn’t stopped”. He hit the whistle for the third time and applied the emergency brakes of the train in one movement. He knew that a collision was imminent, there was nothing that could be done, it was going to happen and there was no other course but to apply the emergency brakes.
6. A drawing that had been done by Mr Warren a day or a day and a half after the collision was tendered in which Mr Warren has illustrated the position of the road train coming along through the trees and past the “mound of dirt type thing” when he first saw it and hit the brake and the whistle. Through Mr Anfilow, the Hasler Data Logger Analysis Report, which may be conveniently described as the train’s “black box system”, was tendered without objection. That report confirms the recollection of each of the drivers and their approximations of when whistles were blown. It shows that at 500 metres from the collision, the warning was sounded for three seconds, at 200 metres it was sounded for one second and then at 100 metres the warning was sounded for at least two seconds, with the information stopping at the collision point. The train is shown to be travelling at a speed of 102kms per hour from the 600 metre mark, through to the point of collision. At that speed, at the 100 metre mark when the emergency brakes and whistle were activated, the train was around three seconds from collision. The emergency brakes do not effect any immediate decrease in the speed of the train, and again this is confirmed by the “black box” report.

7. Mr Terence Downs was Mr Bohning's employer at the time of this incident and his evidence was that Mr Bohning had been working on the job at Ban Ban Springs for three to four weeks. The job involved carting gravel in a direction which required the crossing of the train line, roughly 15 times each way per day, in other words, crossing around 30 times in total east/west and west/east each day. He said that he had told his drivers that they were definitely to stop at the crossing. He gave evidence that that particular crossing is generally regarded by truck drivers who use it, as a dangerous crossing. The defence tendered a photograph that Mr Downs had taken looking south down the line, showing some dust across the line which in re-examination, Mr Downs said might be a 100 or 200 metres down. If there was no dust, he said the visibility down the line would be the best part of a kilometre.
8. Mr Alan Fisher, a senior transport inspector, inspected the prime mover and two trailers that were involved in the collision. His evidence was that the prime mover and the two trailers together were somewhere in the order of 25 to 30 metres in length, with the prime mover itself being about seven metres in length. His evidence of the damage to the prime mover and the two trailers confirmed what is apparent visually from photographs tendered, that the point of impact of the collision was to the rear of the prime mover.
9. By consent, a statutory declaration of Leonard Alfred Dare was tendered. Mr Dare is a person who also drove trucks on the same work project as the defendant. Mr Dare's evidence confirms that the work on the job involved crossing the railway crossing about 30 times a day and that they were working seven days per week. Of particular relevance is paragraph 19 of his statement, in which he says in relation to the approach to the crossing from the west travelling east, that is the direction in which the defendant's vehicle was travelling when the collision occurred, "you have to stop and peek around the corner of the trees to the right, to see if there are any trains coming north".

10. The final prosecution witness was Constable Mark Casey who was attached to the Northern Traffic Operations Section of the Northern Territory Police Service. Constable Casey's evidence largely concerned the physical aspects of the crash site through the tender of photographs and DVDs of the area. Of significance is his evidence that there was a set of signs at the crossing on a post consisting of a large red "stop" sign, a separate "look for trains" sign and a separate "railway crossing" sign. Although considerably damaged, Exhibit P9 shows the remains of that sign. Constable Casey also gave evidence that from the area of where the stop sign had been situated, trees did not obscure the view looking south down the line and that he would say that you could see over a kilometre easily all the way down the track. Exhibit P12 in particular, a set of three photos taken from the vicinity of the stop sign on the road looking south confirm an unobstructed view down the railway line into the distance.
11. Mr Bohning gave evidence on his own behalf. His evidence may be summarised that he had dropped off a load of gravel and he was driving back towards the railway line to reload. He had stopped at some distance back from the railway line, to close a door on one of the trailers that had come open. He said that he first saw the train just as he was approaching with the nose of the truck on the train line. He said that when he got beyond the trees that obscured the view looking south, he looked both ways down and up the track. He said that he "could see - well only about 30 to 40 metres, I s'pose or a hundred metres there down". He heard only one whistle from the train. He agreed that he would have crossed the line 15, 16 or 17 times each way and that he was aware of the stop sign and the instruction on the sign to look out for trains. He agreed that he had crossed the railway line at least 100 times in the weeks leading up to the collision. In response to the question as to why he did not stop, he said that there were two or three other vehicles coming near him, there was dust there and it took so long to clear and that happened two and three times and that a freight

train going through was travelling at a reasonable pace, but the Ghan came through and travelled at a pace that he didn't think it was travelling at. It is apparent from that response and answers to other questions that he was including there reference to other occasions he had crossed the line and to vehicles that had turned off on another road prior to his approach to the crossing.

12. Under cross-examination he said that he was only about five metres from the train line when he heard the whistle and just about on the stop sign. He saw the train approaching and its lights on. He offered as an explanation for his failure to see the train until the moment that he described, in addition to the explanation that he gave in evidence in chief that it was obscured by dust down the line, that it might have been the case that the rear vision mirror on the outside of the cabin obscured his view. I do not think this explanation is credible. The train was of considerable length and I do not accept that it could have been obscured in its entirety by a rear vision mirror. He agreed that he went through the crossing, even though he said his vision down the line was obscured by dust.
13. Various photographic evidence was also admitted into evidence, of particular interest is the initial footage of DVD 1 of Ex P12. It shows the view on approach to the crossing from west to east. The obstruction of view south by the cutting and trees is obvious, as is the limited distance for a view south down the line. Once the cutting and trees are cleared from the stop line, the view down the line is unobstructed and clear.
14. The dangerous act alleged is that the defendant drove his vehicle, the prime mover and trailers, through a clearly signed railway level crossing at a time when the Ghan passenger train was approaching without stopping to check for the approach of rail traffic. The evidence that the defendant did not stop at the crossing is not contested. However, Mr Maley on behalf of the defendant contends that a failure to stop is not of itself a dangerous act. Ms

Hardy did not dispute that and I agree that a failure to stop at a traffic crossing may not be capable in and of itself to be characterised as a dangerous act. However, what must be considered is all of the circumstances that surround that failure and whether in combination, they give rise to an occasion in which the defendant's failure to stop can be characterised as a dangerous act.

15. In my view, the evidence establishes the following:

- There was a sign posted alert that the crossing was one that required vehicles to stop. The sign carried the "stop" direction and a warning to look for trains. Not all crossings are posted to require all vehicles to stop. The fact of that requirement was an alert to some heightened danger at that crossing. The purpose of the requirement to stop at the crossing was to allow for a full and proper look down the line each way for an approaching train.
- There was very little time, in terms of a vehicle approaching the crossing, in which a driver could obtain a clear view down the track looking south when travelling from west to east across the train line because the view was obscured by a cutting and trees and/or scrub on that approach until a distance of around 15- 20 metres back from the train line.
- The defendant was well aware of the difficulty of that approach because he had crossed the line, on that day alone, on multiple occasions and in the weeks preceding the collision at least 100 times.
- The defendant was aware that he should stop not only because he knew of the warning sign but because he had been given a direction by his employer, as had his fellow employees, that they were required to stop their vehicles at the crossing. The evidence of this direction was not disputed.

- The defendant's primary evidence on his failure to stop was that even though he had looked each way, he had failed to see the Ghan because it was obscured by dust down the line. If he observed dust down the line and it was obscuring his view, in my view, this both heightened the potential danger and the need to stop for proper and careful observation. His evidence was that he "could see well only about 30 – 40 metres or I s'pose 100 metres." Accepting the outer limit of the view he suggested he had, a train travelling at 100 kilometres per hour will cover that distance in a little over three seconds. The train was at around the 100 metre mark when the driver saw the defendant's vehicle coming from behind the cutting. The train should have been visible on the outer limit of the observation he suggested. If however he could see only 30-40 metres his failure to stop for proper observation in fact becomes potentially more dangerous. The defendant was driving a vehicle 25 – 30 metres in length and he was travelling at his estimate at only 10 miles an hour and he needed to have the end of his vehicle clear of the crossing.
- There is apparent, from the evidence and from common knowledge, that there is a fundamental difference between the danger inherent in an ordinary vehicle traffic crossing and that of a rail crossing. Unlike vehicular traffic, a train has no ability to swerve in order to avoid a collision. It is unable, because of its mass, to stop immediately on the application of brakes, even emergency brakes which strip all power from the locomotive. The "black box" shows that the locomotive, even after the force of the impact with the road train, did not stop until a point approximately 500 metres along the track.
- That danger is heightened when the vehicle on approach to the crossing is also one of great size and weight, such as the road train being driven by Mr Bohning. It is common knowledge, at least to regular open road users in the Northern Territory that because of their size and weight, a road train has less ability to take action to swerve and requires a great distance

to slow and stop once the brakes are applied. The defendant has driven road trains for over 30 years. He could not have been unaware of the limitations his vehicle poses with respect to actions that might be taken to avoid collision. Indeed the evidence is clear that when he became aware of the train bearing down on him, he accelerated in an attempt to get across the crossing. It was at that point the only action available to him.

- The evidence of the train drivers and of the defendant is consistent as to what occurred in the seconds preceding collision and a conclusion is able to be drawn from that. The driver, Mr Warren, saw Mr Bohning's road train "on the move" coming through the cutting. His immediate sense of the movement of the vehicle was such that he believed a collision was imminent and unavoidable so that he threw on the emergency brake and simultaneously hit the whistle as a warning and yelled to his co-driver to "hit the decks" in an attempt to save both of them from injury. On hearing that warning the co-driver stood, saw Mr Bohning in the cabin of his vehicle directly in front of the train and the collision occurs almost immediately thereafter with Mr Anfilow being thrown to the floor of the locomotive on impact. Mr Bohning heard only the last whistle of the three that were blown and at that point, was only 5 metres from the track. He only then became aware of the train and accelerated his vehicle. Remembering that the end of the cutting and the trees is such a short distance from the crossing (15-20 metres) the conclusion that must be drawn is that Mr Bohning had no intention on approach to the crossing of stopping his vehicle to undertake a proper observation, nor was he travelling at a speed that would enable him to stop in the event that he did observe a train approaching once he cleared the cutting and trees.

16. Taking into account all of the circumstances that I have outlined, I am satisfied that the failure to stop either at the crossing or at a point for proper observation or at least to be in a position to do so, constituted a dangerous

act. That it was an act that caused serious actual danger to the lives of the persons travelling on the Ghan has not been put in dispute. The train was derailed.

17. I must also be satisfied beyond a reasonable doubt that the dangerous act occurred in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done that act. The relevant characteristics of an ordinary person similarly circumstanced involve the age, experience and level of skill of the defendant. Here, the relevant characteristics would include the experience and understanding of a person driving heavy load vehicles and of the degree of knowledge of the particular approach to the Ban Ban Springs Crossing. The evidence of Mr Bohning's employer Mr Downs and of Mr Dare both go to this issue. Both are persons with experience in driving road trains and other heavy vehicles. Both appreciated the danger of the crossing, Mr Downs so much so that he gave a direction to his employees that they were to stop at the crossing even though no doubt this caused some inconvenience in driving because of the time that is taken in stopping and then putting into motion such a heavy vehicle. Mr Dare, driving a similar vehicle during the same period as the defendant regarded the crossing approach from west to east as dangerous because of the short distance for a check down the track once getting around the trees to the right. He regarded it as requiring stopping to do so.
18. The danger must be "clearly foreseen" that is it must not be too slight, remote, improbable or unlikely (*Sandby* unreported, NTCCA, 19 October 1993 at 19 per Mildren J). That is not the case here – the danger of collision with a train, either a passenger or freight train, was apparent if care was not taken to stop to take a proper lookout or be in a position to stop on approach.
19. Taking into account the circumstances of the crossing that I have mentioned above that would be known to an ordinary person similarly circumstanced

and the evidence of Mr Downs and Mr Dare which goes to that issue, I am satisfied beyond a reasonable doubt that an ordinary person similarly circumstanced, would clearly have foreseen the danger of not stopping and would not have proceeded on the approach to the crossing in the way that the defendant did. I find Mr Bohning guilty of Count 1.

20. That being the case and count 9 being an alternative charge of driving without due care, I find him not guilty of that count.

Dated this 30th day of November 2007.

Sue Oliver
STIPENDIARY MAGISTRATE