

CITATION: *Rigby v McDonald* [2008] NTMC 002

PARTIES: KERRY LEANNE RIGBY

v

CRAIGANDREW MCDONALD

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: Darwin

FILE NO(s): 20708355

DELIVERED ON: 18 February 2008

DELIVERED AT: Darwin

HEARING DATE(s): 13 December 2007

JUDGMENT OF: Ms Melanie Little SM

CATCHWORDS:

Traffic Act – Blood sample taken – Whether requirement made to give sample –
Driving under influence – Whether offence proven. Sections 3, 19, 20, 25 & 26
Traffic Act

REPRESENTATION:

Counsel:

Prosecution: Mr Robertson
Defendant: Ms Truman

Solicitors:

Prosecution: Summary Prosecutions
Defendant: Ms Truman

Judgment category classification: B
Judgment ID number: [2008] NTMC 002
Number of paragraphs: 20

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

No. 20708355

[2008] NTMC 002

BETWEEN:

KERRY RIGBY
Plaintiff

AND:

CRAIGANDREW MCDONALD
Defendant

REASONS FOR DECISION

(Delivered 18 February 2008)

Ms Melanie Little SM:

1. The defendant has been charged on complaint that on 29 October 2006 at Humpty Doo, he drove a motor vehicle, namely a 1988 Ford Falcon Sedan NSW PLO825 on a public street, namely a road at Humpty Doo whilst under the influence of an intoxicating liquor or a drug or a 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* (commonly called DUI). He is also charged that on 29 October 2006 at Humpty Doo, he drove that same vehicle on the same road whilst having a concentration of alcohol in his blood equal to 80 milligrams or more of alcohol per 100 millilitres of blood, namely 286 milligrams of alcohol pursuant to s 19(2) of the *Traffic Act*.
2. The defendant pleaded not guilty and a hearing was conducted. This is now the decision in the matter. The delay in delivering the decision relates to the unavailability of the defendant.

3. Prosecution bears the onus of proving each and every of the elements of the offence and if they do not do so, the defendant is entitled to be found not guilty. There are some issues of commonality as between Counts 1 and 2.
4. The first witness was Detective Senior Constable Michael Korenstra. On 29 October 2006 he was off duty and at home at Humpty Doo. Exhibit P1 is a hand drawn map of the area showing the road at Humpty Doo and the driveway going into his house property. He has drawn where he located a motor vehicle which had crashed into his gate. Exhibit P2 is a second hand drawn map by the witness which shows the motor vehicle and gate area. It also has a stick drawing of a person with the head adjacent to the front passenger door and the legs over the console area into the driver's side area. This was the witness' evidence as to the location of the defendant when he had first seen the defendant.
5. He was eating dinner and at about 8.30pm he heard a loud noise at the front of his property, like an explosion. He got his torch and ran towards the sound. His two dogs ran with him. After running approximately 20 metres he could see a shape in his driveway. It took seven to eight seconds to run that 20 metres. He could then see his gate post down and he could see a dark shape and heard an engine running. He could then see a car shape. He concluded that there had been a motor vehicle accident and ran towards the car. He shone his torch over the car area. The car had destroyed his gate post and slammed into a culvert. The engine was still running and he could see the defendant inside. There were no other people in the car. It was a blue Ford Sedan with a NSW number plate. He was watching the vehicle the whole time. After the first 20 metres, he ran another 80 metres to the motor vehicle. He estimated that it took 12 seconds to run that 80 metres. A photograph of a motor vehicle was shown to him and he identified that as the vehicle. The vehicle is shown in the photograph to have the driver's side door open. The witness deposed that all doors to the vehicle were shut as he approached. He did not see anyone exit the vehicle as he approached.

The photograph became MFI P3 and was tendered later in the hearing. The vehicle was against the culvert and the engine was roaring. The doors were closed and only one person was seen in the car. He had taken approximately 20 seconds to get to the vehicle. During that time, he did not see anyone leave the vehicle. Once he had reached the 20 metre point, he had a 180 degree view as he was looking towards the vehicle. The dogs ran in front of him and towards the accident scene. He then directed the dogs to stay inside the yard. As he got closer to the vehicle, he then had a 270 degree view. At the vehicle, he shone his torch in and the defendant was slumped up against the passenger side door with his head by the passenger side. His head and shoulders were on the passenger door and his arms sprawled out. His legs were over the centre console between both sides. One leg was near the accelerator pedal and one was by the gear shift. The witness turned off the car and asked the defendant how he was. He could see bleeding to the man's face. The man was initially incoherent but conscious. The man was mumbling and he looked injured. The witness thought he may have been concussed. He said to the man that he was a Police Officer and said he would get an ambulance. The inside of the vehicle stunk of beer and there were many cans and bottles strewn around. The person did not complain of any injuries. When the witness had said he was a Police Officer, the person had replied "I'm fucked aren't I". The witness asked the person where he had been and he said he had been to a pub. Other people pulled up and he asked for the Police and ambulance to be contacted. Several Police arrived as well as an ambulance and the fire service. The car had extensive front end and passenger side damage. The car was un-driveable. The gate was disintegrated and the culvert cracked. It was his view that the impact had first hit the gate. The gate post was totally destroyed and the fence was destroyed. He has seen the defendant numerous times since. Some weeks after the incident, the defendant came and talked to the witness. He offered to repair the gate and fence and apologised for destroying his property. The defendant had said he had been at the pub and was drinking a lot and then he

had smoked a joint. He had said he had crashed on the way home and apologised and asked if he could fix it. The defendant arranged for repairs of the gate. The culvert has never been repaired. The gate has now been repaired. The defendant had come and made the offer.

6. In cross-examination he said this conversation occurred a week to ten days after the accident. The defendant came to him and said he had been involved in the accident. The conversation occurred at his house. He agreed this has never been put into his statutory declaration. He is a Police Officer of ten years experience and knows the importance of such information. He agreed that he had stated that he had met the man numerous times with respect to repairing the gate and fence and found him to be an honest person. This was the first time that he had spoken of the conversation that had occurred. He agreed that the man appeared injured and was bleeding from the head. The witness said he was worried about the possibility of a neck injury, so that was why he had not moved the man. In Exhibit P1, he had shown where the trees were on his property and around his property. He agreed that in his statutory declaration he had not used the word “incoherent” but rather had used the word “dazed” to describe the defendant when he first spoke with him. It was put to the witness that the conversation with the defendant some week to ten days after the accident did now occur. This was refuted.
7. The next witness was Constable Roslyn Hancock. On 29 October 2006, she was on evening shift and tasked to a motor vehicle accident at Humpty Doo. She saw a blue Ford in the culvert and there was concrete from the fence scattered on the ground. There was damage to the front of the vehicle. The car was facing towards the concrete fence which it had knocked down. She was also shown MFI P3 and identified the scene, including the vehicle and the fence. She saw a male sitting on the passenger side of the vehicle with his back next to the passenger door and his legs towards the steering wheel. She saw blood around the head of the person. From looking at the photos,

she was able to recall that the vehicle had bucket seats. There was some sort of gap between the seats, but she could not recall if there was a console or not. She could not recall how the man's legs were situated. He had blood around his head. She asked if he was okay and he said he had a sore back. He said his name was Craigandrew McDonald and she identified the defendant in Court. She asked where he was going and he said he was going home to Jefferies Road. He said he had been drinking at the pub. He appeared to be intoxicated. He said his address was 55 Jefferies Road. She asked why he had been driving after drinking and he said "I'm alright". Emergency Services arrived and the man was taken to the Royal Darwin Hospital. Sometime later she went to 55 Jefferies Road to advise the defendant of the blood test results. As it transpired he was away, but contact was made with him. In cross-examination she agreed that there was an injury to his head. She could not recall where the injury was. She did not give any treatment to the defendant.

8. Exhibit P4 was the Form 3 and Form 5 test results with respect to Count 2. The statutory declaration of Officer Timothy Baird 18 July 2007 became Exhibit P5. Officer Baird says that at approximately 8.30pm, he attended a single vehicle crash at Humpty Doo. He saw a blue Ford with NSW plates that had crashed into a besser block entry way and the car and brickwork was extensively damaged. The driver of the vehicle was a male, he was at the location and appeared to be intoxicated.
9. Sergeant Pusterla gave evidence next. He attended a motor vehicle accident and identified the vehicle from MFI P3. The vehicle registration was NSW PLO825. The vehicle had hit a fence outside a residence at Humpty Doo. His evidence was that there was extensive damage to the front end of the vehicle. There was a male person inside and he identified the defendant. The person had his back slumped towards the passenger side and his legs towards the centre of the vehicle. The man had no shirt on and blood around his face. His legs were towards the centre of the console. He was neither

laying nor sitting completely. The car was very untidy and had beer cans and food scattered around it. The defendant had sustained injuries and required attention. He did not know how extensive those injuries were. The defendant was intoxicated and he noticed this from his speech. He reassured the man that aid was on its way and he asked if anyone else was in the car. He could not recall what the man said. In cross-examination, he said that he could recall blood around the face area.

10. The next witness was Peter Jones from St John Ambulance. On 29 October 2006 he went to a single vehicle motor accident at 8.30pm at Humpty Doo. He identified MFI P3 as a photograph taken by him at the scene. He arrived at 8.52pm and found the patient in the driver's seat with a cervical collar fitted. He asked the person how he was feeling and what had caused the accident and general questions. The person said he had been at the Humpty Doo Hotel drinking and said he had no recollection of the accident. He assessed the person for injuries and found abrasions and lacerations to his face and a bruise on the left hip. He identified the area of the bruising to the hip as the top of the hip bone on the left side, slightly towards the front. There were abrasions to the forehead, the left cheek and the left knee and a sore to the top lip. He viewed inside the car and there was a seat belt buckle at the area of the left hip area where the bruise was. That was the only thing he could think of as leading to the bruise. In cross-examination, he agreed that he had been told the man had been found in the passenger seat of the vehicle. He agreed that at the side door at hip level on the passenger side, there was an arm rest. That was the close of the prosecution case. MFI P3 was objected to on the basis that it was not relevant to any aspect of the prosecution case. Prosecution argued that the photo showed the interior of the car, the make up of the seats, the impact with the gate and the damage caused to the vehicle. It was submitted that the photograph showed the impact. I ruled that the photograph was admissible and it became Exhibit P3. The photograph was taken at night time and shows Police and

Emergency Services on the side of the vehicle. The front end of the vehicle has extensive damage and is rested approximately half a metre off the ground on broken besser block (the broken gate). There is limited view of the inside of the vehicle, but it does show there is a console raised approximately ten centimetres above the seat. It shows two bucket style seats and the car appears somewhat dirty. The side of the gate way which has not been knocked over shows that the besser block gateway is approximately six foot high and quite solid. It has been completely knocked over by the vehicle and the bonnet of the vehicle has been extensively damaged.

11. There was no evidence called by the defendant and then submissions were made.
12. Was the defendant the man found in the motor vehicle? The defendant was identified by each of the prosecution witnesses. None of the witnesses knew the defendant prior to the night. It is necessary to warn myself as to the dangers of identification evidence. I do so and in particular note that it is known that there can be cases of honest but mistaken identity. The circumstances of any identification must be considered. The witnesses had a considerable time with the person in the motor vehicle. It was not a fleeting glance. It was night time. The witness Korenstra had a torch and then there were lights from other emergency vehicles. I find it is proven beyond reasonable doubt that the defendant was the man inside the motor vehicle. Had this vehicle been on a public street prior to it being in the location that it was found? There were numerous witnesses setting out that the location of the vehicle was outside number the residence at Humpty Doo. I find that the road is a public street. I find that the road is immediately adjacent to the driveway into Mr Korenstra's house. It is not possible to tell from the photograph whether any part of the vehicle was actually on the road at the time it stopped following the motor vehicle accident. The engine was found "roaring" at the scene of the accident. It is certainly possible, but I cannot

be satisfied that any part of the vehicle was on the road at the time that it collided with the fence. From P3 I can ascertain that the vehicle was on a footpath, which is within the definition of a public street within the meaning of s 3 of the *Traffic Act*. Nevertheless, the particulars of the charge are that the vehicle was on a “public street, namely (the road)”. I find that it is proven beyond reasonable doubt that immediately prior to the vehicle entering the footpath area and colliding with the gate and fence area of the residence at Humpty Doo, that the vehicle had been on a public street, namely the road at Humpty Doo. The severity of the impact leads to an inescapable conclusion that the motor vehicle was travelling on the road at Humpty Doo immediately prior to the collision.

13. Was the defendant under the influence of intoxicating liquor or a drug?
There is evidence from several witnesses that the defendant was intoxicated. Whilst there was not a great deal of detail as to the fact of intoxication, the evidence was that the defendant was intoxicated. The first witness stated that the man was mumbling. That evidence is equivocal and certainly I do not rely on that on its own or indeed, give it any great weight on the question of whether the defendant was intoxicated. Officer Hancock gave evidence that the person said he had been drinking at the Hotel. Her evidence was that he appeared to be intoxicated. Sergeant Pusterla said that the man appeared intoxicated and he referred to the man’s speech when explaining why he believed the man was intoxicated. The statutory declaration of Timothy Baird said that the driver of the car was a male who was at the location and appeared to be intoxicated. This statutory declaration was tendered by consent. This is further evidence of the intoxicated state of the male who was at the scene. The Ambulance Officer gave evidence as to the man’s injuries and did not suggest that there was any concussion or any other medical explanation for the behaviour noticed by any of the Police witnesses. I find that the defendant was under the influence of intoxicating liquor at the time he was in the motor vehicle.

14. Has it been proven beyond reasonable doubt that the defendant was the driver of the motor vehicle? The defendant was located in the motor vehicle by the owner of the property, Mr Korenstra. The doors of the motor vehicle were closed. There was no other person in the vehicle when he arrived 20 seconds after he heard the sound which he now knows to be the sound of the motor vehicle colliding with his fence. As he was running towards the vehicle, the last approximately 12 seconds of the 20 second run, he was able to see in and around the motor vehicle and did not see any other persons leaving the vehicle. He located the defendant in the vehicle lying across both seats of the vehicle. The defendant's head and shoulders were up against the passenger side door. His legs were over the console area and into the driver's side of the vehicle. He did not move the defendant. Other Police arrived and saw the defendant in the same position, although their evidence is not as clear as to the precise position that the defendant's legs were in. I find that the defendant was found with his upper body in the passenger's side of the vehicle. How far his legs were into the driver's side of the vehicle is less clear, nevertheless I find it is proven that both of his legs were in the driver's side area of the vehicle. At no stage has the defendant ever said that there was someone else in the vehicle. When asked why he was driving after drinking and he said "I'm alright". He did not suggest someone else was driving. He did not enquire after the welfare of any other person at the time that he was located. Photograph P3 demonstrates that there are no trees or shrubs around the immediate vicinity of where the motor vehicle ended up and there is less opportunity for any person who left the vehicle to have been hidden.
15. Mr Korenstra's evidence is that some seven to ten days after the accident, the defendant voluntarily attended at his house and offered to repair the gate and fence and that the defendant admitted responsibility for the damage caused to Mr Korenstra's property. This admission is disputed by the defendant. There is no dispute that the repairs were undertaken. This

conversation was not in the witnesses' original statutory declaration. The witness is a Police Officer of ten year's experience. A lay person may not have realised the importance of such a statement, nevertheless, a Police Officer would have known the importance of this conversation (and this witness has agreed that he was aware of its importance). This does not of itself mean that the conversation did not occur. Officer Korenstra struck me as an impressive witness, who gave a reliable and credible account of all events and was particularly careful in his estimations of distances and timings. He was not acting in the capacity of a Police Officer when he made the statutory declaration. He was a witness and to some extent a complainant (with respect to damage to his property). I find I can accept his evidence in its entirety, including the fact of the conversation between the defendant and himself, some seven to ten days after the motor vehicle accident.

16. The witness Korenstra also gave evidence that upon learning that he was a Police Officer, the defendant had said at the scene "I'm fucked aren't I". It was put to me by Defence that this could mean any number of things, but could not lead to a conclusion that the defendant was suggesting that he was in trouble as the driver of the motor vehicle. There is no evidence before the Court as to whose motor vehicle was involved in the accident at the property. The motor vehicle may or may not have belonged to the defendant. Irrespective of who owns the motor vehicle, if the defendant was a passenger, why would such an exclamation have been made? I decline to find that this comment was made believing that because the man standing near him was a Police Officer that meant he was in need of help. Nevertheless I do not find that the comment is determinative on the question of who was driving the motor vehicle and find little weight if any is attached to it.
17. The position which the defendant was found in could have been reached after the collision. The defendant did not have any injuries of any significance as noted by the St John Ambulance Officer at the scene. In

particular, the defendant had no injuries which would have prevented him from moving to the position he was found in. As it transpired, all injuries were relatively minor. The Police at the scene did not know this and as a precautionary measure, did not move the defendant who complained of a sore neck.

18. When all the evidence is taken into account, I found it is proven beyond reasonable doubt that the defendant was the driver of the motor vehicle.
19. With respect to Count 2, Defence argued that the relevant sections under the *Traffic Act* were not complied with. There is no doubt that the sample of blood was taken as soon as practicable and the certification in P4 (Form 3) sets out that at 21.52pm the defendant entered the Royal Darwin Hospital and the sample was taken at 22.00pm. Further, there is no doubt that the defendant had entered a hospital for examination or treatment of injuries which may have been received in a motor vehicle accident. This was not the case of a sample being taken from a person who was unconscious or apparently incapable of consenting to the giving of a sample. The power under section 26 includes the power for a member of the staff of a hospital who is a medical practitioner or under the direct supervision of a medical practitioner to 'require' a person to give a sample of blood. Failure or refusal to comply with the requirement to give a sample of blood can lead to a charge under s 20(3) of the *Traffic Act*. There is no evidence before the Court that the defendant was 'required' to give a sample of blood by a person with the authority to make such a requirement. There is no evidence before the court capable of proving beyond reasonable doubt that the sample of blood was taken in compliance with s 26 of the *Traffic Act*. Count 2 is not proven beyond reasonable doubt. I record a verdict of not guilty.
20. With respect to Count 1, I find that the defendant was driving a motor vehicle, namely a 1988 Ford Falcon Sedan NSW PLO825 on a public street, namely a road at Humpty Doo whilst under the influence of intoxicating

liquor. The final issue relates to whether he was under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of that motor vehicle. The defendant had been driving along the road at Humpty Doo. He was in control of the vehicle. On the evidence before me, I find that he had no cause to attend at the house at Humpty Doo. Nevertheless, the vehicle deviated from the road to such an extent that his vehicle collided with a solid besser brick block wall and gate area, causing extensive damage to both his vehicle and the gate. There is no evidence of any intervening act which could have caused his vehicle to have ended up in the position as seen in Exhibit P3. For example, no other vehicle is found to have been the cause of the accident. I have found that the defendant was intoxicated. I find he was in control of the vehicle immediately prior to the vehicle colliding with the gate. `The position the car ended up amounts to such a departure from that of a driver who had proper control of the vehicle that I find it proven beyond reasonable doubt that the defendant was under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of that motor vehicle. I find the defendant guilty of Count 1 on the complaint.

Dated this 18th day of February 2008.

Melanie Little
STIPENDIARY MAGISTRATE