

CITATION: *Davis v Thompson* [2008] NTMC 044

PARTIES: STUART AXTELL DAVIS

v

STUART LOYD THOMPSON

TITLE OF COURT: COURT OF SUMMARY JURISDICTION

JURISDICTION: CRIMINAL

FILE NO(s): 20630057

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JUDGMENT OF: Ms Sue Oliver SM

**CATCHWORDS:**

Criminal Law – Dangerous Act – Serious Potential Danger – *Criminal Code* – s 154  
*Sandby v The Queen* (1993) 117 FLR 218

**REPRESENTATION:**

*Counsel:*

Complainant: Ms Nobbs  
Defendant: Mr O'Brien-Hartcher

*Solicitors:*

Complainant: DPP  
Defendant: NAAJA

Judgment category classification: B  
Judgment ID number: [2008] NTMC 044  
Number of paragraphs: 27

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

No. 20630057

[2008] NTMC 044

BETWEEN:

**STUART AXTELL DAVIS**  
Complainant

AND:

**STUART LOYD THOMPSON**  
Defendant

REASONS FOR DECISION

(Delivered 24 June 2008)

Ms Sue Oliver SM:

1. Stuart Loyd Thompson is charged with two offences. Count 1 alleges an offence contrary to s 154 of the *Criminal Code* (since repealed) in that on 24 November 2006 he did an act that caused serious potential danger to the lives, health and safety of the public or a member of it in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not done the act. The dangerous act was particularised as taking the nozzle from a fuel pump, spraying approximately 2 litres of the fuel on the ground then while standing in the pool, striking a match causing it to ignite and dropping the still flaming match onto the ground. The dangerous act is alleged to have been accompanied by a circumstance of aggravation that at the time of doing the dangerous act, the defendant was intoxicated. Count 2 is a charge of stealing diesel fuel to the value of \$3.35 the property of the Caltex Service Station Karama.

2. The physical actions of the defendant as particularised are not in dispute. What is disputed is whether that amounts to an act giving rise to serious potential danger.
3. In the early hours of Friday 24<sup>th</sup> November 2006 at the Caltex Service Station at Karama, the defendant took a pump from one of the bowsers and sprayed fuel from the bowser around on the ground. The fuel in question was diesel. The station attendant, Jana Hopkins, looked up from her counter, saw the defendant spraying the fuel then lighting a match and dropping it. She saw the match flare. She hit the emergency stop button cutting off the supply of fuel to all the bowsers and hit a panic button, she then ran from the station to get him away from the bowsers. Her evidence was that he rushed at her and said that he was going to “kill us all”. She tried to block him away from where he was pouring the fuel and he stood up to her and kept saying “no, I don’t care I’m going to blow us up”.
4. She gave evidence that another young man known to her, Robert Gaston, was present. He is apparently the young man clearly seen on the CCTV footage that was tendered. Mr Gaston is leaning against a petrol bowser until the defendant, is seen to approach, take the pump from the adjacent bowser and begin to spray fuel about including in the direction of Mr Gaston, who not unnaturally moves away. The defendant places the pump back on the bowser. He then disappears from the camera view then some moments later reappears. It is not clear from the footage what actions he then engages, although from one view what might be flaring matches can be seen. It is not contested however that he then lit matches and dropped them in the fuel.
5. A statutory declaration made by Mr Gaston was tendered by consent. Mr Gaston describes a person who he knows as “Stewie”, coming to the station and sitting next to him outside the service station where the lawn mowers are kept. He told him a similar story as the one told to Ms Hopkins, about

the cleaner at Coles. He then "...freaked out. He said don't come near me if you do I'll put the cigarette in the fuel tank of the lawnmower. He stood up and grabbed the handle of the diesel petrol bowser. He started to pour fuel from the bowser, he was waving it in my direction and saying I'm going to blow us all up and kill everyone here. The petrol (sic) stopped coming out of the bowser. He then tried to light it with a match. He tried lighting it about three times."

6. This incident was the third occasion that the defendant had attended the Service Station that evening. Ms Hopkins described his initial visit was to purchase cigarettes and matches at which time she helped him out with some money for that purchase as he did not have enough money on him. On the second occasion he came in carrying a stick. On each of these occasions he had a story about being hosed by guys across the road at the Coles Supermarket who were disguised as cleaners. On each of these occasions she could smell alcohol on him. On the final occasion, immediately before the incident with the fuel bowser, he had spilt alcohol, which he was carrying in a coke bottle, onto the floor in the shop which Ms Hopkins then cleaned up. In the CCTV footage he is carrying a large plastic bottle. It was almost immediately after this while she was dealing with newspapers that she saw him with the fuel nozzle of the bowser.
7. A photo of the bowser indicates that the amount of fuel pumped onto the ground was 2.56 litres at a cost of \$3.35. The photo was tendered in a group of photos taken by Constable Kearney who gave evidence of his involvement subsequent to the event.
8. Ms Hopkins, like Mr Gaston, described more than one match being lit. She saw him light the first match and drop it and said he was lighting another as she ran out of the Service Station. She described seeing two or three matches on the ground. A photograph tendered shows one of the matches on

the ground. Constable Keaney likewise described a number of matches that had been lit in the fuel pool, but couldn't remember how many.

9. At the end of the prosecution case, following a submission from the defence, I ruled that there was a case for the defendant to answer. It was put to me that the prosecution had failed to produce any evidence to show that the act in question caused serious potential danger to the lives, health or safety of a member of the public. It was put that this was not something of which I could take judicial notice. However, the question of whether an act is one which carries serious potential danger is one of fact for a jury. Whether there is potential or actual danger may be inferred from all of the facts of a matter and a jury may draw on common knowledge and experience to reach that conclusion. It is permissible to consider a combination of circumstances in a particular matter to reach that conclusion even if the individual circumstances standing alone are not of themselves matters that would give rise to danger: *Sandby v The Queen* (1993) 117 FLR 218 at 234. There is no onus on the prosecution in every matter to call expert evidence to prove an act is dangerous. The offence of dangerous act pursuant to section 154 of the Criminal Code was one that created criminal responsibility, *inter alia*, for conduct giving rise to great risk. To that extent it relied on the common knowledge of individuals as to whether particular conduct gave rise to a risk of danger and if so, whether it is a risk that an ordinary person similarly circumstanced would not be prepared to take. In my view here there was sufficient evidence to raise a prima facie case. It is a matter of common knowledge and experience that the fuels stored and dispensed at service stations pose a risk of fire. It is common knowledge that naked flames present a hazard near flammable liquids. A jury would be entitled to draw on that common knowledge. Tossing lit matches into a pool of diesel fuel in that setting is an act of which a jury might be satisfied gives rise to danger of the ignition of fuel. The reaction of Ms Hopkins, the station attendant, hitting the emergency stop button to

cease the flow of fuel from all bowsers hitting the panic button immediately on seeing the defendant's actions was evidence upon which a jury might draw the inference of danger arising from the defendant's act.

10. The defendant did not himself give evidence however a report commissioned by the defence from David Edward Gillies, a professional mechanical engineer with extensive experience in the Petrochemical Industry was tendered without objection as to either the content or Mr Gillies' qualifications as an expert in the field of petrochemicals.
11. The report was tendered to show that the act of throwing lit matches into a pool of diesel was not a dangerous one. The defence submitted that the report established that no danger of combustion or explosion arose from throwing a match into a pool of diesel. That other circumstances were required to exist before that act would be likely to cause a danger of combustion or explosion and that factually those circumstances did not exist at the time of the defendant's actions.
12. After discussing the facts that had been given to him (which essentially accord with the prosecution evidence I have discussed<sup>1</sup>) Mr Gillies reaches the following conclusion at page 3 of his report:

“Diesel is a hydrocarbon liquid with a mandatory minimum flashpoint (the temperature at which it evolves flammable gas and is capable of ignition) of 61 degrees Centigrade. This legally classifies it as a combustible fuel. It is therefore not considered particularly dangerous or hazardous at normal ambient temperatures. There would be no expectation that split diesel could be ignited by a match or burning paper taper.

In conditions prevalent at Service Stations, there is no possibility of diesel burning occurring before vapour is produced. Heating from a significant heat source is required to elevate the temperature of the

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<sup>1</sup> Mr Gillies makes an assumption that an operating system existed at the service station that prevents fuel flowing from a pump until the operator pushes a control to unlock it. That system, which is common, did not, on Ms Hopkins' evidence, operate at the Caltex Karama Service Station. Fuel flowed from pumps automatically when the pump was taken from the bowser and the trigger pressed and without the need for the attendant to activate the system.

diesel liquid from ambient to its flashpoint before the generation of flammable vapour begins.

Further, an ignition source is then required to ignite the vapour...

13. Further Mr Gillies discussed the qualities of petrol as a flammable liquid:-

#### 5.2 Petrol as a Dangerous Fuel Source

ULP and PULP (Unleaded Petrol and Premium Unleaded Petrol) are hydrocarbon liquids have vastly different characteristics to diesel. The flashpoint of these products is approximately -43 degrees Centigrade. This means that liquid ULP and PULP, by absorbing heat from the surrounding air, will be at temperatures well above their flashpoint in ambient conditions. The effect will be that the liquids, exposed to air, will continuously generate flammable hydrocarbon gas (this is the reason why a minor spill of petrol on the forecourt floor soon evaporates and dissipates).

Both ULP and PULP are classified as flammable products and require much higher level of controls to render them relatively safe for daily use. Such controls are incorporated in the equipment specification (flameproof electrical wiring and earthed nozzles, for example) and operating procedures (eg. switch off mobile phones and vehicle engine when refuelling), so as to reduce the opportunities for providing an ignition source.

#### 5.3 Hydrocarbon Vapours

Hydrocarbon vapours are heavier than air and hence will tend to flow towards drains or remain in shallow depressions on floors unless distributed by wind or other air movements. Hydrocarbon vapours can form a significant explosive risk as a prelude to combustion. Such explosions can be very destructive.

14. His final assessment is as follows:-

5.4 In this incident, it was considered the biggest risk was of ULP/PULP spilled liquid and/or vapour on the ground. If the refueller of a petrol engined vehicle at the adjacent dispenser 3 or 4 had, shortly before the incident, inadvertently overflowed the vehicle petrol tank, or had spilt petrol whilst transferring the nozzle from and to its park position in the dispenser, sufficient residual petrol liquid and vapour could remain on the forecourt floor to mix with the diesel and create the potential to cause a possible explosion and local fire.

Had another vehicle been refuelling at the ULP/PULP dispensers 3 and 4 during the time Stuart Thompson was committing his alleged dangerous act, the risk of a fire would have been significantly increased. Vapour escaping normally from the filling pipe of the vehicle during the refuelling process could, under the right conditions, have spread towards dispenser 1 and been ignited by the ignition source – the burning match.

15. It is submitted on behalf of the defendant that there was no serious potential danger because the factual circumstances necessary for an explosion to occur did not exist. On Ms Hopkins' evidence, it had been some hours before this incident that a vehicle had re-fuelled with petrol. No opportunity therefore arose for there to be a mixing of petrol and diesel in the way suggested in the report that could give rise to a danger of explosion from the dropping of lit matches into the fuel.
16. The defence submission mistakes the distinction between an act causing serious actual danger and one causing serious potential danger. It is the latter with which the defendant is charged. The report confirms what "an ordinary person similarly circumstanced" would have appreciated, that there exists the potential in throwing lit matches into a pool of diesel at a service station for there to be an explosion if particular circumstances exist (the presence of petrol or vapour to mix and cause ignition). It is not, as the report indicates a mere theoretical possibility. Mr Gillies noted that the physical layout of the service station, where he attended and observed water pooled in the area where the diesel had been sprayed, to be one where petrol could have pooled and then mixed with diesel. If it had, then actual danger would have arisen. That it had not, does not remove the potential for that to have occurred. That is the risk taken in by the defendant's act.
17. Further, the evidence is clear that the defendant intended to use fuel to "blow us up". While the defendant's intention or foresight is not relevant to the dangerous act offence created by s 154, the offence being one that might be described as a form of negligence (though not of the criminal negligence standard), that evidence raises a strong inference that it was not a conscious



act on the part of the defendant to choose the diesel fuel over the petrol. He chose that bowser at random. The risk apparent in this act is that he might just as easily chosen the pump from a petrol bowser. It was perhaps fortuitous that Mr Gaston was leaning against the adjacent petrol pumps, limiting his access to them.

18. Mr Gillies' report gives the following as his final assessment:-

6.1 The likelihood of a fire caused by the dropping of a lit match by Stuart Thompson into a deliberate spillage of approximately 2.6 litres of diesel from Dispenser 1 + 2 units at 05.30 on 24 November 2006 onto the forecourt floor at Caltex Service Station Karama was very slight.

6.2 Only if an inflammable accelerant such as petrol from the adjacent dispenser 3 + 4 had been alternatively or simultaneously used would a fire have been most likely ignited.

6.3 Had the product selected been ULP or PULP from dispenser 3 + 4, it is most probable that a similar quantity would have produced a significant fire, resulting in substantial damage to the Service Station and severe or mortal injuries to Stuart Thompson.

19. The distinction between an act that causes serious potential danger and one which cause serious actual danger may be illustrated by a hypothetical analogy. If a person were to throw a concrete block from the roof of a five story building to the footpath below without looking to see if pedestrians are passing, that act would constitute serious actual danger where persons are present and passing by. If, fortuitously, no one is on the footpath at the time that does not remove the potential for danger to exist. It is blind chance which is the risk that the person takes and it is one that an ordinary person similarly circumstanced would not take.

20. In my view, the circumstances here are similar. The act of taking a nozzle from a fuel pump, spraying approximately 2 ½ litres onto the ground then lighting and dropping a match into it as charged, gave rise to serious

potential danger. The potential lies in both the random choice of fuel and/or the risk of the mix of diesel and petrol. I am satisfied that the circumstances are such that an ordinary person would have clearly foreseen such danger and would not have done the act.

21. Circumstances of aggravation, that is, that at the time of the dangerous act, the defendant was under the influence of an intoxicating substance, namely liquor, are alleged. Ms Hopkins' evidence goes to this question. She said he came in "full of alcohol, had alcohol in his hand and saying some silly stuff ...". She knew the bottle he had contained alcohol because he spilt some and she had to clean it up. She thought it was wine "moselle type". She said that at 1.30am (ie, his first attendance), that he wasn't intoxicated but 'he had a bit of alcohol on his breath'. Her observations as to intoxication were not questioned in cross-examination. Constable Borton gave evidence that when he arrested the defendant around 9.30am (about four hours subsequent to the incident), he thought he may have had some alcohol ... he wasn't overly drunk or he would have been pc'd (the transcript indicates the underlined passage as inaudible – my notes suggest what I have indicated – pc'd being a reference to protective custody). I definitely wouldn't have taken him in as being seriously affected, but there was a smell about him that indicated he may have been drinking.
22. In cross-examination, he agreed that the "usual signs that accompany drunkenness, staggering, bloodshot eyes, and slurred speech" were not present. Constable Borton's observation is however after the event by some four hours.
23. The prosecution does not have to prove any degree of intoxication, but simply that the defendant was under the influence of intoxicating liquor at the time of doing the dangerous act. The intoxication does not have to be related to the performance of the act. The inference to be drawn from Ms Hopkins' observations of him through the evening, of his actions just prior

to the incident, as I have earlier related and spilling the liquor and sitting where she was trying to mop it up, is that his consumption of alcohol affected overall his behaviour, ie he was under its influence. No evidence displaces that inference.

24. I am satisfied beyond a reasonable doubt that at the time of the dangerous act, he was under the influence of an intoxicating substance.
25. I find the defendant guilty of the crime of dangerous act in circumstances of aggravation as charged.
26. It is submitted that I cannot be satisfied beyond a reasonable doubt that the defendant intended to steal the diesel because he was not given the opportunity to pay. The relevant elements of the offence are that the defendant took property and treated it as his own thereby depriving the owner of it. That much is clear from the uncontested evidence – the defendant poured the fuel from the pump onto the ground. He intended to use it to blow up the service station. The owner cannot retrieve the diesel. It is not necessary for the prosecution to show that the defendant was given an opportunity to pay and failed to do so. Section 209 of the Criminal Code defines “steals” as follows:

“‘steals’ means unlawfully appropriates property of another with the intention of depriving that person of it **whether or not at the time of the appropriation the person appropriating the property was willing to pay for it**, but does not include the appropriation of property by a person with the reasonable belief that such property has been lost and the owner thereof cannot be discovered.” (emphasis added)

Providing him an opportunity to pay would only go to the question of his willingness to do so, which is not, by reason of s 209 a relevant consideration.

27. In any event it is an absurdity to suggest that in circumstances where Ms Hopkins was trying to get the defendant out of the station with him uttering threats to blow it up, that she should say “and that will be \$3.35 for the fuel”. I am satisfied beyond a reasonable doubt that the defendant stole fuel to the value of \$3.35 and I find him guilty of that offence.

Dated this 24th day of June 2008.

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**Sue Oliver**  
STIPENDIARY MAGISTRATE