

CITATION: *Rigby v Driver* [2008] NTMC 053

PARTIES: KERRY LEANNE RIGBY

v

STEPHEN JAMES DRIVER

TITLE OF COURT: Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20715198

DELIVERED ON: 22 August 2008

DELIVERED AT: Darwin

HEARING DATE(s): 15 July 2008

JUDGMENT OF: Mr Daynor Trigg SM

**CATCHWORDS:**

- *Traffic Act : s 24*
- Request for blood test following breath analysis
- Obligations of police
- discretion to exclude results of breath analysis

**REPRESENTATION:**

*Counsel:*

Prosecution: Ms Ganzer  
Defendant: Mr Rowbottom

*Solicitors:*

Prosecution: Summary Prosecutions  
Defendant: Withnalls

Judgment category classification: C

Judgment ID number: [2008] NTMC 053

Number of paragraphs: 127

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

No. 20715198

*[2008] NTMC 053*

BETWEEN:

KERRY LEANNE RIGBY  
Plaintiff

AND:

STEPHEN JAMES DRIVER  
Defendant

REASONS FOR DECISION

(Delivered 22 August 2008)

Mr Daynor Trigg SM:

1. The defendant was charged that on 23 May 2007 at Darwin in the Northern Territory of Australia he:-
  - (1) Drove a motor vehicle, namely a Nissan Patrol, NT 645-021, on a public street, namely Tiger Brennan Drive, while having a concentration of alcohol in his blood equal to 80 milligrams or more of alcohol to 100 millilitres of blood, mainly 122 milligrams of alcohol;  
  
Contrary to s 19(2) of the *Traffic Act*.
2. The complaint in relation to that charge was taken out on 21 June 2007, and on the same day a summons was also issued.
3. The matter first came on in Court on 3 September 2007 and at which time it was adjourned. After further adjournments and referral to a contest mention, the matter was set down for a hearing. The hearing commenced before me on 15 July 2008. At the hearing, the prosecution was conducted by Ms Ganzer and the defendant was

represented by Mr Rowbottom. At the commencement of the hearing, the defendant pleaded not guilty to the charge as afore-mentioned.

4. Mr Rowbottom indicated that the defence would be seeking to exclude the various certificates of breath analysis and accordingly, wished a *voire dire* in relation to the admissibility of those certificates. Mr Rowbottom did not contend that the breath analysis was unlawful or irregular. Rather, he contended that events after the breath analysis was completed were such that I should exclude the breath analysis evidence (in the exercise of my discretion) because of unfairness to the defendant. The prosecutor did not oppose a *voire dire*. It was agreed by counsel that I should hear all the evidence in the case and at the conclusion rule on whether the evidence of the breath analysis should be admitted into evidence or not. Accordingly, the evidence in this matter proceeded, in effect, *de bene esse*. Upon completion of the matter and after submissions, I reserved my decision, which I now deliver.
5. The evidence in this matter fell into two categories. There was oral testimony from three witnesses, two being Police Officers and the third being the defendant. In addition, there is objective evidence from two sources, namely the breath analysis instrument and a CD of various closed circuit television (“CCTV”) recordings from different cameras, of events which occurred in the Darwin Police Station on the morning in question. I will deal with the oral evidence first and then look at the objective evidence before making findings of fact.

### **The Evidence of Sean Holmes**

6. Sean Holmes was a Constable of Police who had been in the Police force since September 2006 and on the road since April 2007.

7. On 22 May 2007, Holmes was working evening shift from the Darwin Police Station with First Class Constable Robert Smith (who was the senior Police Officer). At about midnight, Holmes was on patrol in a marked Police van with Smith on Cavenagh Street in the City.
8. Holmes observed a white Nissan Patrol motor vehicle travelling at speed along Knuckey Street. Mr Rowbottom objected to Holmes giving evidence about a possible offence (namely speeding) with which the defendant had not been charged.
9. Holmes said that the registration number of the motor vehicle was NT 645-021.
10. Holmes said that the motor vehicle was swerving over the road within its lane. Again, Mr Rowbottom objected to this evidence coming from Holmes, as it indicated another possible offence (namely driving under the influence of alcohol, to such an extent as to be incapable of maintaining effective control of the motor vehicle), again with which the defendant had not been charged. I consider this and the previous objection from Mr Rowbottom to have been proper objections.
11. Ms Ganzer then attempted to control Holmes in his evidence and then moved him to the apprehension on Tiger Brennan Drive. Holmes said that they apprehended the motor vehicle on Tiger Brennan Drive near the Duck Pond using their lights and sirens. He said that he approached the motor vehicle and noticed there was only one occupant in the motor vehicle, namely being the driver. He said that the driver was staring at him and he motioned to the driver to wind down his window, but the driver was staring at him as if he did not understand.
12. Mr Rowbottom objected for the third time in relation to this evidence. Again, I consider that the objection was well made. The defendant is

charged only with exceeding .08 percent. He is not charged with speeding. He is not charged with driving under the influence of alcohol. If the facts were truly as stated by Holmes, then he may well have been able to be charged with both of these offences. Whilst the inexperience of Holmes might explain the first piece of evidence and perhaps even the second, by the time the objections had been aired in Court in his presence, he should have been well aware of the matters he should limit his evidence to before he gave the third piece of objectionable evidence. I formed the view that Holmes was wishing to paint the defendant in as poor a light as possible in his evidence before the Court. To this extent, his objectivity and reliability as a witness has been somewhat lessened and coloured.

13. Mr Rowbottom then stated, for the benefit of the Court and the witness Holmes, that the defendant admitted that he was driving the motor vehicle in question on the evening, that he was apprehended, that he did a breath test on Tiger Brennan Drive, that he was lawfully arrested for the purpose of a breath analysis and that he was taken to the watch house at the Darwin Police Station for that breath analysis. It was after that, Mr Rowbottom indicated, that matters were in dispute.
14. Holmes returned to his evidence and said that the defendant was the driver of the motor vehicle. The defendant performed a random breath test and was arrested for the purpose of a breath analysis at the Darwin Police Station. Holmes did not tell me who performed the breath test, nor did he inform me who arrested the defendant at the scene. Holmes said that according to his notebook, the defendant was apprehended and arrested at 0020 hours on 23 May 2007.
15. At the Darwin Police Station, Smith performed the breath analysis and Holmes was present. A reading was obtained from the machine (a

matter that I will return to later). Holmes said that the breath analysis was done at 0034 hours. Paperwork was then completed in relation to the breath analysis and this took about 15 minutes.

16. Holmes said that the defendant was then told that he would be charged on summons and a file would be completed.
17. Holmes went on to say that Smith then gave the defendant a copy of the certificate printed from the machine and discussed the matter of a summons. Holmes said that he then asked the defendant if he would like to communicate with anyone about a lift home and the defendant said he would like to speak to his wife. Holmes said that he then gave a phone to the defendant and the defendant rang on the phone and spoke to someone who he said was his wife.
18. Importantly, Holmes said that after this telephone conversation with his wife, the defendant said he was not happy with their reading and he would like to have a blood test carried out on him. Holmes said that he then spoke to Smith in relation to this and Smith then made further enquiries. He said that they were then instructed to drive the defendant to the Royal Darwin Hospital for him to seek his own blood test.
19. Holmes said that they then drove the defendant directly from the Darwin Police Station to the front door of the Royal Darwin Accident & Emergency Department. They let the defendant out of the Police van at the entrance and they left.
20. It became apparent in cross-examination that the defendant had been conveyed to the Royal Darwin Hospital in the rear cage of the Police vehicle. It appeared from file 6 of ExD2 (the downloaded CCTV footage from the Darwin Police station) that the police vehicle used was a four door van. Why the defendant was placed in the rear cage

(rather than in the back seat) was not explained in evidence from Holmes. On Holmes' evidence the defendant was allegedly not in custody when they were conveying him to the hospital.

21. Holmes said that it was his understanding that they had completed all of their requirements, and as the request had been made after all had been done, their only requirement was to enable him to seek his own blood test. It appears that Holmes had not had any request for any blood test before this occasion and this was his first involvement with any such request.
22. In cross-examination, it was suggested to Holmes that the defendant was taken to the Royal Darwin Hospital and arrived there at about 01.20am. Holmes could not recall the exact time they dropped the defendant off.
23. Holmes said that from his memory, Smith spoke to the Watch Commander at the time who he believed was Robert Harrison. This would appear to be correct.
24. It was suggested to Holmes in cross-examination that prior to the breath analysis being performed, the defendant informed Police that he was going to be requesting a blood test. Holmes rejected this suggestion and confirmed that the defendant requested a blood test after the completion of the breath analysis. It was further suggested to Holmes that before the breath analysis was commenced, the defendant said that he would be requesting a blood test and Smith told the defendant that blood often gives a much higher reading and he was actively discouraging the defendant from seeking such a test. Holmes said that that was not correct.
25. It was further suggested to Holmes that after the breath analysis was completed, the defendant again requested a blood test. Holmes said

that this was after he was informed a summons file would be prepared and he was informed in relation to the summons file immediately after the completion of the breath analysis.

26. Holmes said that his main concerns in relation to having the defendant contact someone and in particular, his wife, was to ensure that he didn't attempt to drive his motor vehicle any further. He wanted to release the defendant into the safe custody of another person who was sober. Despite Holmes' early evidence about the defendant's driving over the road and staring at him through a window, Holmes did not believe that the defendant was intoxicated enough for protective custody, nor to be held in custody.
27. It was put to Holmes in cross-examination that at some stage Smith left the breath analysis room and when he returned stated "my boss says we have to drive you to the Hospital". Holmes could not recall those words being spoken.
28. Holmes was asked whether he knew if any medical practitioner was available to see the defendant at the Royal Darwin Hospital at the time they dropped him off and Holmes' answer was that it was not his concern.
29. In re-examination, Holmes was asked what was done and when to release the defendant from custody. Holmes said that he didn't specifically mention to the defendant that he was no longer under arrest. He did refer to the fact that he would be summoned in relation to the matter.

### **The Evidence of Robert Smith**

30. Robert Smith was a First Class Constable in the Northern Territory Police Force. He had been a Police Officer for over eight years.



31. On 22 May 2007, Smith was working night duty with Constable Holmes. At around midnight he observed a white 4WD vehicle at the intersection of Cavenagh Street and Knuckey Street in the City. This vehicle was apprehended on Tiger Brennan Driver for the purpose of a random breath test. The defendant was the driver of the vehicle. A random breath test was conducted and a positive reading was obtained. The defendant was arrested for the purpose of a breath analysis and was conveyed to the watch house at the Darwin Police Station. On arrival at the watch house, the defendant was taken to the breath analysis room. The defendant was informed, and shown, how to conduct a breath analysis.
32. Smith confirmed that he was the person who conducted the breath analysis on the defendant and he completed the breath analysis. Mr Rowbottom indicated that there was no dispute that Smith was an authorised Officer to operate a breath analysis machine.
33. Two pieces of paperwork were submitted to me. The first was a certificate on performance of breath analysis (Form 1 of the Traffic Regulations). This document became Exhibit P1. Exhibit P1 was completed by Smith and signed and dated by him at the time of 0041 hours. Paragraph two of Exhibit P1 stated "before performing the analysis, I satisfied myself that the subject had not consumed any alcohol within the preceding 15 minutes". As noted earlier, the defendant was arrested at 0020 hours and the breath analysis was performed at 0034 hours. Accordingly, this is 14 minutes from the time of arrest. Prior to arrest, clearly the defendant had partaken in a breath test and therefore probably was in the presence of Police for 15 minutes or more. No point was taken by Mr Rowbottom in relation to this issue, even after I pointed out the matter to him. In my view, it would be preferable for Police Officers to not conduct a breath

analysis until at least 15 minutes after a person had been taken into custody for the purpose of a breath analysis.

34. Smith confirmed that part of Exhibit P2 was the operator's book that they used to determine if a person is fit to use the instrument. He said he would have filled it out directly before he did the breath analysis and he would then have completed it after the breath analysis was completed. Part of ExP2 was the printout from the breath analysis machine. Smith confirmed that he would have given a copy of the print out from the breath analysis machine to the defendant pretty much after it was printed out.
35. Smith said that the defendant was then told he would be summoned and he was then asked if he would like to call someone to pick him up and the defendant said that he would. The defendant was taken to the front counter to make a call to his wife and the defendant then said something about a blood test.
36. Smith said he was not sure of his obligations, so he spoke to the Shift Commander who was Harrison. Smith said he was told by Harrison that the defendant could seek it.
37. Smith said that they then offered the defendant a lift and they drove the defendant to the Royal Darwin Hospital to complete the drug test.
38. Smith said that at the Royal Darwin Hospital he pointed to where the defendant could get information in relation to obtaining a blood test at Accident & Emergency. He confirmed that he didn't assist the defendant at the Hospital, he just dropped him off.
39. Smith was asked that at the time the defendant was told that he would be summoned, what did that mean. He said it meant that he would be released from custody. Smith said that he told the defendant that he

would be released from custody, and that is why he could ring someone to pick him up.

40. Smith confirmed in his evidence that the request for a blood test was made at the front counter.
41. In cross-examination, Smith confirmed that the defendant was conveyed to the Royal Darwin Hospital in the back of the cage of the Police vehicle. He said he doesn't always convey people in the cage, but he did on this occasion. He did not explain why.
42. Smith denied that he had got annoyed at the defendant at some stage and told the defendant that he was "taking the mickey" out of him.
43. When it was put to Smith that the defendant had in fact requested a blood test prior to the breath analysis, Smith replied "no, not at all".
44. Smith further denied that he had suggested to the defendant that a blood test often gives a much higher reading and that he tried to discourage him for asking for a blood test.
45. Smith further denied that immediately after the breath analysis, the defendant again asked for a blood test.
46. It was put to Smith that he told the defendant "my boss said we have to drive you to the Hospital". Smith said "no, I asked if he wanted a lift".
47. Smith confirmed that he didn't go into the Royal Darwin Hospital and he didn't check to see if a doctor was available.
48. It was put to Smith specifically that the defendant asked twice for a blood test and it was only after he persisted that he then asked Harrison. Smith denied this and said that the defendant only asked for a blood test after he had spoken to his wife. It was suggested to

Smith that the defendant was in Police custody until he was let out at the Royal Darwin Hospital. Smith disputed that and said he was let out of custody when he was taken to the front counter.

### **Evidence of Steven Driver**

49. The defendant gave sworn evidence. He said that he was the Manager of an air-conditioning company which was his own business. On 22 May 2007 he said he was out in the City and was driving his white Nissan Patrol on Tiger Brennan Drive when he was apprehended for a random breath test.
50. After the random breath test, he was taken to the Darwin Police Station in the cage of a Hilux Police vehicle. He said he had not been to that Police Station before. At the Police Station he exited in the carpark, went through a set of doors, there was a counter on the left and he went to the right to a small glassed in area and he sat in a seat by a breath analysis machine. The defendant said he stayed in that seat while Police Officers did paperwork and a Police Officer (Smith) then did the breath analysis on him.
51. The defendant said that Exhibit P2 were the questions he was asked prior to conducting the breath analysis, although he said there were other conversations as well.
52. The defendant said that when he entered the breath analysis room and sat down, he said that he would also like a blood test. In response, Smith said (off the cuff) that a blood test quite often gave a higher result and he was using other words to discourage him as much as possible. He said that he was told that it may push his reading from a mid range to high range and he could lose his license for quite a while longer.

53. The defendant said that Smith then told him how to use the machine and he gave a sample in accordance with those instructions. Immediately after the breath analysis, the defendant said he asked what other type of test he could do, but this was ignored by Police.
54. The defendant said that when he was brought back to the Police Station, he was under their control. He said it was obvious that he couldn't just walk away and say "see you later". He said that when he was able to go home, he had no idea at that stage.
55. The defendant said that after the breath analysis, and in the breath analysis room, he was then given the ticket (from the machine) and he then asked what was the procedure from there, to which Smith said that he didn't know if he was "taking the mickey" out of him.
56. The defendant said that he then asked for a blood test for a second time and this was a minute or two after he had blown into the breath analysis machine.
57. The defendant then said that after this second request for a blood test, Smith exited the breath analysis room and was away for maybe two minutes whilst Holmes was still sitting in the breath analysis room. The defendant said that Smith came back in and sat down and said "my boss has just said I've got to take you to the Hospital".
58. The defendant then said that he then requested a glass of water which was forthcoming. He then asked to go to the toilet and after being to the toilet, he asked to ring his wife to tell her where he was. In relation to this, the defendant said that Smith told him "this isn't the movies you know, you don't get a free call".
59. The defendant said that Holmes took him to the toilet and then passed him the phone. The defendant said he rang his wife and told her he was going to the hospital for a blood test.

60. The defendant said they then went back upstairs, they went to the Police vehicle, they opened the back of the Police vehicle and he was put into the cage of the Police vehicle.
61. The defendant was then conveyed to the Royal Darwin Hospital in the cage of the Police vehicle. The Police pulled up in front of Accident & Emergency. They opened the cage and the defendant exited. The defendant said the Police Officers then locked the cage and started walking back to their Police vehicle and the defendant asked them if they were going to come in and he was told by Smith "this is no longer a Police matter".
62. The defendant said that the Police then drove off and left him. The defendant said he was confused and shocked by this, as he thought the Police Officers were going to accompany him into the Royal Darwin Hospital. He thought about it and thought that this wasn't correct procedure.
63. The defendant said he walked into Accident & Emergency and it was rather busy. He said he had thought about going home then, but he thought he needed to make every effort. The defendant said that he waited for about 10 minutes at the counter before being served. He then spoke to a lady at the counter and said he required a blood test for DUI. The defendant said this lady told him it was not hospital policy to do blood tests on anyone who turns up, but if he wanted to he could sit down and wait to see a doctor. The defendant sat down.
64. After a short period of time the defendant said he got up again and asked what the waiting period was to see a doctor and was told between four and six hours. The defendant then decided that it was pointless and he asked for a certificate of attendance which he said that this lady then gave him.

65. This certificate of attendance became Exhibit D1. However, on the face of the certificate, it was actually issued by a person called “Robyn” at 12.00pm on 29 May 2007 at Medical Records. The certificate confirmed that the defendant attended the Emergency Department for the period of 1.20am – 1.54am on 23 May 2007. Accordingly, the defendant’s evidence in this regard is not correct as to how and when this document was created.
66. The defendant was asked whether Smith and Holmes had discussed the matter of a summons. The defendant said that in the breath analysis room the Police did say a summons would be issued, he didn’t understand what that meant.
67. The defendant said that when he came out of the breath analysis room and the Police were still resisting his calls for a blood test, Smith said that he would need a sober person to come and take him away, as he would not let him out by himself as he considered that he would be a danger to himself and others. The defendant said that he understood this to mean that he would have to stay there overnight or get a sober person to come and get him.
68. I am not sure how this evidence fits with the defendant’s earlier evidence. It was not the defendant’s evidence that after leaving the breath analysis room, the Police were still resisting his calls for a blood test, on the contrary, from the defendant’s earlier version, he had been told by Smith in the breath analysis room that Smith’s boss had told him he had to drive him to the hospital for a blood test. It is not clear as to how the Police were “resisting” at this time, and I do not find that they were.
69. The evidence about the defendant requiring a sober person to come and get him is consistent with the evidence of Holmes as to why the defendant was told to ring his wife.

70. In cross-examination, the defendant agreed that he had been drinking before he was picked up by Police. He said that he had four glasses of beer, in quick succession, and he believed it might have been full strength. He said that Tuesday night was his Ten Pin Bowling night and he drove to the City on his way home for a few drinks. He said that he had one stubby at the Bowling Alley which would have been XXXX Gold Midstrength.
71. The defendant was asked whether he thought he was safe to drive and not over the limit and the defendant said he was safe to drive the vehicle, but he guessed he might have been right on the edge there. The defendant later agreed that he was not stone cold sober, but he was not incoherent either.
72. The defendant was asked why he would ask for a blood test before a breath analysis was performed. The defendant said he wanted to make it clear to the Police that he wanted a blood test as well as the blow test because he wanted a second opinion. He said he was exercising "his right" to have a second available if necessary, even though at that stage he didn't know what he was going to blow.
73. The defendant says that he doesn't have a regular doctor, as he doesn't often get sick. He had an inkling that the blood test should be done through a Police Officer under supervision, because otherwise anyone could walk in and say they were him and get a blood test.
74. The defendant agreed that he would expect doctors to be at the Royal Darwin Hospital and it was reasonable to expect that a blood test could be proceeded with there. He was asked whether there was anywhere else he may have been able to go at that time of the morning and he said he guessed they could have gone to the Private Hospital.



75. The defendant said that he asked for a blood test, the Police took him to the Royal Darwin Hospital in the back of the cage, he was going nowhere except with them.

### **Objective Evidence Exhibit P2**

76. Part of Exhibit P2 was the drager alcotest 7110 operator's book and the print out from the machine. The print out was, in my view, objective evidence.

77. This print out disclosed as follows:

- The drager alcotest 7110 commenced on 23 May 2007 at 00.30 hours;
- At Darwin watch house;
- Upon Steven James Driver;
- With Holmes being the informant;
- With Smith being the operator;
- And a self test of 0 was initially obtained and correct;
- At 00.34 hours, a breath analysis was conducted on the defendant and a result of 0.122% BAC was recorded;
- After this test, a further self test of 0 was obtained and was correct;
- The print out was then signed and completed by Smith.

78. Pursuant to *section 22 of the Traffic Act* the defendant is deemed to have had not less than 0.122% of alcohol in his blood at the time he was apprehended driving on Tiger Brennan Drive.

## **Objective Evidence Exhibit D2**

79. Exhibit D2 was a computer disk which had downloaded onto it various film images taken from different cameras within the Darwin Police Station on 23 May 2007 and which had been provided in response to a summons to produce documents issued at the request of the defendant. The various different cameras are referred to by different "file" numbers on the exhibit. The objective evidence from the various cameras disclosed the following chronology:

- 0027:00 Defendant, Holmes and Smith are seen to walk past the front counter (file 9)
- 0027:00 Defendant, Holmes and Smith are seen to enter the breath analysis room and take seats in the room, attend to paperwork, undergo breath analysis, etc (file 1)
- 0042:42 Smith gets up and leaves the breath analysis room (file 1)
- 0044:48 Smith approached Harrison at the front counter and talks to him. There is audio, but it is hard to hear, but what can be heard is as follows:
- Smith said "what's the requirement ... to give blood" ...
- Harrison said "to give blood ... arrest him ... if you don't arrest him you have to take him to the Hospital"
- (file 9)
- 0045:26 Smith leaves the front counter area and walks away (file 9)
- 0045:39 Smith returns to the breath analysis room and is standing facing the defendant and talking to him for a minute or so (file 1)
- 0048:51 The defendant, Holmes and Smith all leave the breath analysis room (file 1)

- 0048:50 The defendant, Holmes and Smith come out of the breath analysis room and walk through a door (file 3)
- 0049:09 The defendant, Holmes and Smith disappear off the camera (file 3)
- 0049:47 The defendant and Police approach the front counter (file 8)
- 0049:52 The defendant goes into the public area at the front of the Darwin Police Station to go to the toilet and he is unsupervised by any Police Officer at this stage (file 8)
- 0051:15 The defendant leaves the toilet in the public area and goes to the counter, still remaining in the public area (file 8)
- 0051:22 The defendant is on the telephone standing on the public side of the counter and not accompanied by any Police Officer (file 8)
- 0054:14 The defendant completes his phone call (file 8)
- 0054:41 The defendant is let back into the secure side of the Police Station and then proceeds into the lift with Police Officers (file 8)
- 0055:21 The defendant, Holmes and Smith come out of the lift and walk past the breath analysis room (file 4)
- 0055:40 The defendant, Holmes and Smith disappear out of view of the camera (file 4)
- 0055:47 The defendant, Holmes and Smith come into the carpark and the defendant is placed in the cage of a 4 door Police vehicle (file 6)
- 0057:20 The Police vehicle leaves the carpark area with the defendant in the rear cage (file 6)

80. It is clear and I find that the version of evidence by Holmes and Smith is substantially consistent with each other in the following aspects:

- The defendant did not mention requiring a blood test at any time prior to the breath analysis;
- The defendant did not request a blood test at any time whilst he was in the breath analysis room;
- The first time that the defendant requested or mentioned a blood test was after he had spoken to his wife on the telephone at the front counter.

81. I find that this evidence is not supported by the objective evidence in Exhibit D2. It is clear and I find that Smith left the breath analysis room after the completion of the breath analysis to speak to Harrison about what he would need to do when a blood test had been requested. It follows and I find that the defendant did ask Smith (in the presence of Holmes) for a blood test whilst they were all present in the breath analysis room.
82. Based on the objective evidence provided in Exhibit D2, I prefer the evidence of the defendant and reject the evidence of both Holmes and Smith in this regard. For two witnesses to give similar evidence that is clearly (on the objective evidence) not correct is a concern. An innocent explanation is, in my view, unlikely. I therefore treat the evidence of Holmes and Smith with caution.
83. I make the following findings of fact:
- Prior to the breath analysis, the defendant indicated to Smith that he would want a blood test as well;
  - After the breath analysis was completed (and whilst still in the breath analysis room), the defendant again advised Smith (within the hearing of Holmes) that he wanted a blood test;
  - Smith was annoyed by the defendant's request for a blood test;

- Smith did not know what he was required to do, having received a request for a blood test;
- Smith left the breath analysis room and went and spoke to Harrison to find out what the procedure might be upon a blood test being requested;
- The discussion between Smith and Harrison was brief;
- Harrison told Smith something (which I am unable to decide) about what he should do if the defendant was to be arrested;
- Harrison told Smith that “if you don’t arrest him you have to take him to the hospital”;
- That as a result of speaking to Harrison, Smith believed that if the defendant was not in custody, he had to take the defendant to a hospital;
- It was no part of the evidence of Smith that he understood that conveying the defendant to hospital was to be an offer which the defendant could either accept or reject;
- Accordingly, Smith believed that he had to convey the defendant to hospital in order to complete his obligations, and it therefore follows that Smith did not believe that the defendant had any rights in this regard;
- Smith returned to the breath analysis room and informed the defendant that the matter would be proceeded with by way of a summons (but the effect of this, namely that the defendant was to be released from custody, was never explained to the defendant);
- Smith told the defendant that his boss had told him that he had to take the defendant to the Hospital (but didn’t explain what that meant);
- The defendant believed that the Police would take him to the Royal Darwin Hospital, arrange the blood test and be present during the same;
- Smith and Holmes allowed the defendant to use the toilet in the public area of the Police Station unaccompanied by

either Officer (which clearly is consistent with the defendant no longer being in custody, but the significance of this was not apparent to the defendant);

- Police allowed the defendant to use the phone from the public area of the Police Station and not under the guard of either Police Officer and therefore, not in custody (but the significance of this was not apparent to the defendant);
- The defendant was taken back into the Police Station and put into the rear cage of the Police vehicle rather than in the rear seat;
- The defendant was back under the control of police and was effectively back in their custody;
- The defendant reasonably assumed that he was still in the custody and under the control of Police;
- The defendant was taken to the Royal Darwin Hospital Accident & Emergency Area;
- Outside the Accident & Emergency area of Royal Darwin Hospital, Police opened the cage and let the defendant out of the cage;
- Holmes and Smith then left the defendant at the Hospital without further explanation;
- Neither Holmes nor Smith made any attempt to enter the Accident & Emergency of Royal Darwin Hospital to explain the position to staff, to ascertain the availability of a medical practitioner to take a blood sample, or in any way to assist the defendant;
- The defendant waited at the Accident & Emergency Department of Royal Darwin Hospital for over half an hour to be seen for a blood test;
- At Accident & Emergency, the defendant was advised that he may not get to see a doctor for between four and six hours;
- The defendant decided to leave the Hospital after about half an hour;

- The defendant made no further or other attempt to be examined by a medical practitioner or have a sample of his blood taken.

84. What were the legal requirements of police and the defendant on these facts as at 23 May 2007 (I note the *Traffic Act* has been substantially amended since 1 July 2008, and accordingly I will refer to the Act as it then was).

85. A police officer may administer a “breath test” (under either *section 23(1) or (2) of the Traffic Act*).

86. Then under *section 23(7) of the Traffic Act*:

(7) Where –

(a) it appears to a member of the Police Force from the results of a breath test on a sample of a person's breath that there is present in the person's blood –

(i) any alcohol, where the person is a person referred to in section 19(5), (7) or (9); or

(ii) a concentration of alcohol equal to or exceeding 50 mg of alcohol per 100 mL of blood; or

(b) a person, on being required under this section to submit to a breath test, refuses or fails to –

(i) submit to the breath test; or

(ii) provide, in accordance with the directions of a member of the Police Force carrying out the test, a sample of breath sufficient for the completion of the breath test,

a member of the Police Force may arrest that person without warrant and the member or another member may take that person to a police station or police stations or such other place or places as the member considers desirable and there detain or cause that person to be detained for the purpose of carrying out a breath analysis.

87. Accordingly, the defendant was lawfully arrested for the purposes of undergoing a breath analysis. That analysis was completed at 0034 hours on 23 May 2007.

88. Once the breath analysis has been completed (which may include a reasonable time for the machine to print out the results and for a copy of that result to be handed to the person who gave the sample) then the power to hold the defendant under *section 23(7) of the Traffic Act* has expired.
89. At the completion of the breath analysis (I will not deal with the situation where a person refuses or fails to give a sample of breath) the Officer conducting the breath analysis may either:
- Arrest the person on any relevant charge;
  - take the person into protective custody under section 128 of the Police Administration Act;
  - Release the person and advise that he or she will (or may) be proceeded against by summons; or
  - Release the person without charge.
90. However, *section 24 of the Traffic Act* stated as follows:
- (1) A person who is in custody following that person undergoing a breath analysis or after giving a sample of blood under this Act, may request the person who carried out the breath analysis or who took the blood sample to permit that person to communicate with a medical practitioner for the purpose of requesting the medical practitioner to –
    - (a) examine that Person; and
    - (b) take a sample of that person's blood or arrange for a sample of the person's blood to be taken by another medical practitioner, a registered nurse or a qualified person;
  - (2) A person to whom a request under subsection (1) is made shall make such arrangements as are reasonable in the



circumstances for the person who made the request to communicate with a medical practitioner.

91. Firstly, it is apparent that a person has no right to request a blood test before a breath analysis is undertaken. Any such request is meaningless and of no legal effect.
92. Further, in my view, the defendant's belief as to what the police needed to do was in error. In some cases the police may require a person to supply a sample of blood (*section 25(2)*) as an alternative to requiring a person to submit to a breath analysis. In that case the sample taken is the property of the Commissioner of Police (*section 25(4)*), although approximately half of the sample taken may be made available to the person from whom it was taken (*section 25(5)*).
93. There is no right in the *Traffic Act* for any police officer to require any person to submit to both a breath analysis and a blood test. Further, there is no right for a person who has submitted to a breath analysis to request police to also arrange for him to give a sample of blood. In that regard the defendant was mistaken as to what he thought police would do.
94. Clearly, in my view, the right for a person to make a request (under *ss24(1)*) and the obligation thereafter placed (under *ss24(2)*) on the police officer so requested only arises where the person "is in custody following that person undergoing a breath analysis or after giving a sample of blood under this Act".
95. In my view, the reason for this is that a person who is in custody is not free or able to make his or her own enquiries or arrangements. Accordingly, the obligation to arrange for the person to communicate with a medical practitioner is passed onto the police. But only that obligation. There is no obligation for the police to have to arrange for blood to be taken from the person. It is up to the person to make his

own arrangements. If the medical practitioners that the person speaks to are unwilling or unable to examine the person and take blood from him at that time so be it. As long as the police have done what is “reasonable in the circumstances for the person who made the request to communicate with a medical practitioner” then they have fulfilled their obligations under *section 24(2)*, and there is nothing else that they are required to do.

96. If a person in custody does get examined by a medical practitioner then the results of that examination are a matter between the person and his doctor. The police have no interest in it. The usual doctor patient privileges would apply. The person may choose to call the medical practitioner in a subsequent related case, but he or she may also choose not to. It is a matter for them.
97. If a person (whether in custody or not) does manage to have blood taken from them, then that blood sample is theirs and the police have no right to it at all. It would be up to the person to have the blood tested if he wished to do so. It would be possible evidence but it would be up to the person to prove it (in the normal way) if he or she did seek to introduce any testing results in subsequent proceedings.
98. All costs associated with communicating with the medical practitioner, being examined, giving a sample of blood, and having that blood tested would be the sole responsibility of the person concerned and not the police.
99. It also follows, in my view, that where a person is not in custody following that person undergoing a breath analysis, then *section 24* is not activated at all.
100. The purpose of *section 24* appears to be to give a person (who is not at liberty) a right to seek other evidence that might be able to

challenge a reading from the breath analysis machine, or perhaps explain why a person was unable to provide a sufficient sample of breath. In this regard the emphasis is upon a matter of fairness to the person who underwent the breath analysis.

101. It would, in my view, be a nonsense if a person could request a blood test in the few moments between giving his or her sample of breath and the breath analysis being completed, and a decision being made how to proceed with the matter thereafter, which would then activate *section 24* irrespective of whether the person was to be kept in custody or not.
102. I find that upon completion of a breath analysis if the person who gave the sample of breath:
- Is arrested (whether on a charge related to the breath analysis or not, unless the breath analysis result is such that no charge relating thereto could be laid);
  - Is kept in custody for any period (other than a nominal period in order to have the person immediately charged and bailed); and
  - Who requests to communicate with a medical practitioner to be examined and take a sample of blood; then

the obligations imposed by *section 24(2)* arise and must be complied with.

103. If the defendant had been simply released (after completion of the breath analysis), without conditions or impediment (although he could have been instructed and warned not to attempt to drive) and told that he would be proceeded with by way of summons, then no obligation

under *section 24(2)* would have arisen, even if the request under *section 24(1)* was made just before his release from custody.

104. In the instant case Holmes and Smith appear to have been having an each way bet as to the defendant's liberty status. Either the defendant was under arrest (and if so, for what) after the completion of the breath analysis or he wasn't. On the evidence Smith and Holmes were giving the defendant mixed and inconsistent messages in this regard.
105. On the one hand the defendant was told that he was to be proceeded with by way of summons. In my view, that should have meant that (unless he was to be arrested or held in custody for some other charges or reason) the defendant was free to leave the police station once he had been given the printout from the breath analysis machine and the paperwork was completed. However, on the other hand it is clear (and I find) that the defendant was also told that he would not be allowed to simply walk out of the police station with his property, but would only be released into the custody of a sober adult. Accordingly, Smith and Holmes were still purporting to exercise control over the defendant, but on what lawful basis was not made clear.
106. In cross-examination Holmes agreed that if a person was intoxicated and in his custody he had a duty of care. He went on to say that that was why they suggested that the defendant contact someone to convey him home as "we release people into the safe custody of another person". It follows from this that the defendant was yet to be released from police custody.
107. I can understand that Smith and Holmes did not want the defendant to go back to his motor vehicle and re-commence driving, which is why police often arrest a person after completing a breath analysis, and hold them in the cells until they are later charged and bailed. They

didn't want to do that but they didn't want to let him simply leave either.

108. Further, on the one hand, allowing the defendant to use the toilet and phone in the public section of the police station, and without a police officer in attendance would be consistent with the defendant being at liberty. However, on the other hand, taking the defendant back through the police station and placing him into the rear cage for transport would be consistent with the defendant not being at liberty. If the police were simply offering the defendant a lift, then it should have been put to him as an offer, and one which he was free to accept or reject. I find that it wasn't.
109. In my view, where there is ambiguity as to whether the defendant was in custody or not (as there is in this case) then that ambiguity should be resolved in favour of the result that would be most favourable to the defendant. There should not be ambiguity as to whether a person's liberty is under restraint. Removing a person's liberty is a serious impediment upon a person and should only be done in a clear, unambiguous and lawful way.
110. I therefore find that the defendant was not free to leave under his own terms (and was therefore under the custody or control of Smith and Holmes) until he was let out of the cage of the police van at the accident and emergency department of the Royal Darwin Hospital ("RDH"). What is the consequence of this? It follows, in my view, that *section 24(2)* was activated. Accordingly, what arrangements should Smith have made that were reasonable in the circumstances. It is clear, and I find, that the "arrangement" in question is to enable the person "to communicate with a medical practitioner". The police have no right or obligation to arrange any examination or taking of blood samples themselves.

111. It was sometime shortly before 0044 hours on Wednesday morning when the defendant made his request after completion of the breath analysis. Smith did not phone the RDH at any time to ascertain whether there might have been a medical practitioner who could examine the defendant and take a sample of his blood. On the evidence before me there was not a medical practitioner reasonably available to examine the defendant for at least 4 hours, and maybe considerably longer.
112. In my view, on the facts of this case (and my findings that the defendant was effectively in police custody until he was let out of the cage at the RDH), Smith should have done as follows:
- Shortly after 0044 hours on 23 May 2007 Smith should have asked the defendant to nominate one or more medical practitioners with whom the defendant wished to communicate, and made reasonable efforts to enable any such communication to take place.
113. That was the extent of Smith's obligations. Police have no obligation, in my view, to take a person who is in custody away from the police station. If a medical practitioner is unwilling or unable to attend where the person is being held then that is unfortunate. But, in my view, *section 24* doesn't place an obligation on police to take a person who is in custody to any other place to enable an examination or the taking of blood. They might choose to do so, but in my view they are not obliged to do so. If police did have this obligation then the legislation would have made this clear, as it would severely tax police resources.
114. In deciding that they had to take the defendant out to the RDH police had effectively removed the defendant's right to decide with whom he might wish to communicate. A defendant might have a regular medical practitioner (on the evidence this defendant in fact did not) or even his

spouse or a friend who was a medical practitioner (but there was no evidence to suggest that this was the case for this defendant).

115. I imagine that it would not be usual for a person to walk in off the street and request a blood test. However, there was no evidence as to what would be required. The fact that the defendant was offered the opportunity to wait and see a doctor would indicate that a medical practitioner would be available to see him at some time. Further, once he had seen a doctor and explained his situation a blood test might have been able to be obtained. I have no evidence to indicate to the contrary.
116. This was not a case where the police kept a person in custody and did nothing to comply with their obligations under *section 24(2)*. Rather, what Smith did do was to take the defendant to an area where one might reasonably expect (or hope) to find a medical practitioner. He then released the defendant so that he was free to make his own arrangements. Accordingly, the defendant was then in exactly the same position that he would have been had he simply been released at the Darwin Police station twenty minutes earlier, save that he was no longer in the city.
117. In those circumstances should I exercise the discretion (which I clearly have) to not admit the results of the breath analysis (Exp2) into evidence.
118. In relation to this matter there are, in my view, two competing principles of public policy. Clearly drink driving is very prevalent and far too many people are injured or killed as a consequence thereof. Families are torn apart. The emotional, social and economic cost to the community is immense. Very few people would be lucky enough to say that they have not been affected by a drink driver at some stage in the course of their life. Accordingly, there is a strong public interest

in persons who drink and drive being apprehended and brought before the courts and taken off the roads.

119. On the other hand, the *Traffic Act* has many provisions which are unusual when compared with a citizen's usual rights (which clearly also shows the importance with which the legislature treats the need to apprehend drink drivers). Some of these include:

- The right to compel a person to submit to a breath test (which over-rides the general principle against self incrimination) – *section 23(1)*;
- The right to arrest a person for the purpose of a breath analysis or blood test (which over-rides the general principle against self incrimination) – *section 23(7)*;
- The right to compel a person to submit to a breath analysis (*section 23(8)*) or blood test (*section 25*) - (which over-rides the general principle against self incrimination);
- The immediate suspension of a driver's licence for certain offences (which over-rides the usual presumption of innocence) – *section 20A*;
- The deeming that the results of the breath analysis or blood test (if conducted within time) was the concentration of alcohol for the person at the time of driving even if they consumed alcohol after the event – *section 22*;
- A certificate in the prescribed form is prima facie evidence of the matters stated in it – *section 27*;
- A court shall not receive evidence that a prescribed breath analysis instrument, when it is in good working order and used in accordance with the Regulations relating to its use,



does not give a true and correct assessment of the concentration of alcohol in a person's blood – *section 29(2)*.

120. Accordingly, *section 24* is intended as a safeguard, so that persons can seek to be independently examined by a medical practitioner and give a blood sample, if they wish to do so. If there was credible evidence that a person had consumed no, or very little, alcohol prior to driving such that the reading from a breath analysis machine could not be reconciled with the other evidence then the safeguard offered by *section 24* would be a very important one.
121. However, that is not the state of the evidence in this case. On the defendant's own admissions in cross-examination he had consumed one stubby of mid strength beer prior to driving from the Nightcliff bowling alley into town. Once in town he consumed four glasses of full strength beer in fairly quick time, with the last one being finished just before he was apprehended. That is what he admitted to drinking. He may have understated his consumption, I do not know. However, on that admitted intake, the breath analysis reading of .122% does not appear surprising or inconsistent.
122. It is not challenged or suggested that there was anything untoward in the way the breath analysis was conducted.
123. Accordingly, in the instant case, I find that the public policy in detecting drink drivers is stronger than the need to ensure compliance with *section 24* on the facts in the instant case. The breaches of *section 24* are not, in my view, at the higher end of the scale. They were not deliberate, nor were they intended to prejudice the defendant. Nor do I find that the defendant was in fact prejudiced.
124. If the defendant was unwilling to wait to see a medical practitioner at the RDH he could have gone to the Darwin Private Hospital and tried

his luck there. He could have started ringing numbers in the phone book. He was at liberty. He was free to make whatever choices he wanted. He chose to do nothing. That was his choice.

125. I have no reasonable doubt that just after midnight on 23 May 2007 the defendant was driving his motor vehicle on Knuckey Street and Tiger Brennan Drive with an alcohol content of .122%.

126. I therefore admit ExP1 and ExP2 into evidence in the substantive hearing herein, along with the other evidence that I have heard and referred to above.

127. I will hear from counsel as to whether there is any further matter or evidence to consider before proceeding to finalise this matter. If there was nothing further then I would find the defendant guilty of charge 1 as read.

Dated this 22nd day of August 2008.

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**Daynor Trigg SM**  
STIPENDIARY MAGISTRATE