CITATION: *Police v Paterson* [2009] NTMC 006

PARTIES:	ROBERT KARENA GORDON v DYLAN JAMES PATERSON
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act (NT); Traffic Act (NT)
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JUDGMENT OF:	Jenny Blokland CM

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TRAFFIC OFFENCES – ADMISSIONS – VOLUNTARINESS – DISCRETION

Police Administration Act (NT) s 139(c)
Traffic Regulations (NT) reg 9

The Queen v Emily Jako, Theresa Marshall and Maris Robinson [1999] NTSC, Mildren J
Azar v The Queen (1991) 56 A CrimR 414
R v Smith (1992) 58SR491

REPRESENTATION:

Counsel:

Prosecutor:	Mr Jones / Ms McMahon
Defendant:	Mr Foster / Mr Baker

Solicitors:

Prosecutor:	ODPP (Summary Prosecutions)
Defendant:	Ward Keller

Judgment category classification:	B
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IN THE COURT OF SUMMARY JURISDICTION
AT NHULUNBUY IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20819570

[2009] NTMC 006

BETWEEN:

ROBERT KARENA GORDON
Complainant

AND:

DYLAN JAMES PATERSON
Defendant

REASONS FOR DECISION

(Delivered 3 March 2009)

JENNY BLOKLAND CM:

Introduction

1. Mr Dylan Paterson ("The Defendant") entered pleas of not guilty to one count of driving a motor vehicle while having a concentration of alcohol over the prescribed limit, (namely .272%) contrary to s19(2) *Traffic Act(NT)* and one count of driving a vehicle without wearing a seatbelt contrary to Rule 264 *Australian Road Rules*. The offences were alleged to have occurred on 27 March 2008. The level of alcohol in the Defendant's blood at the time a blood sample was taken at Gove District Hospital is not in dispute. The *Traffic Act (NT)* certificate was admitted without objection (Exhibit P1). The Defendant disputes he was the driver and argues the prosecution cannot exclude beyond reasonable doubt, a reasonable hypothesis consistent with innocence, namely that another person was driving the vehicle at the material time.

2. The prosecutor alleged that after the Defendant finished work for the day of 26 March 2008, he returned to his home and consumed one or two cans of rum and coke. He went to the "Walkabout" bottleshop, noticed one of his friend's cars and decided to enter the public bar of the Walkabout Tavern where he consumed five drinks. He then went to 15 Feldeg Avenue Nhulunbuy and shared a bottle of rum with a friend. It is alleged that shortly after 2:30am he drove a White Toyota Hilux. It is alleged he turned left onto Inala Road through the intersection of Chippis Road where he mounted the kerbing of Chippis Road, drove into a parkland, veered to the right and eventually collided with a tree. It is alleged the Defendant was thrown forward striking the passenger's side windscreen, injuring his forehead and nose. Neighbours called for assistance and police attended. Police noted the Defendant smelt heavily of alcohol. Evidence the Defendant is alleged to have said there were no other occupants in the vehicle and that he had been driving has been the subject of a voir dire. The Defendant was taken to Gove District Hospital by ambulance for treatment and a blood sample resulting in the reading was taken.

Summary of the Evidence

3. Daniel Bartlett gave evidence that essentially confirmed the background prior to the critical events. He was drinking with the Defendant, (although Mr Bartlett did not drink alcohol at that time). He drove the Defendant's vehicle – a "work vehicle" he said, with the Defendant as a passenger to The Walkabout Lodge and they saw Jimmy Pearse's work vehicle. They both spoke to Jimmy Pearse. They were with Jimmy Pearse for a few hours; Mr Bartlett said he had two drinks "max" and the Defendant had 6-8 rum and coke drinks. They went back to Jimmy Pearse's place, via the Defendant's home where they picked up more drinks. Mr Bartlett drove the vehicle into the drive way, parked the vehicle in front of the front door, took the keys out of the ignition and placed the keys under the seat "so that no-one could maybe drive, and possibly keep it away from Dylan…. so that he wouldn't

drink and drive." He said there were five other people at Jimmy Pearse's place. He left around 1:30am to go home across the road. When he left there were six or seven people left at Jimmy Pearse's including the Defendant. Mr Barlett said he didn't take the keys with him as he knew at some point the keys would be needed back at the work place as it was a work vehicle. He said he thought it was necessary to hide the keys; he acknowledged the Defendant had previously nominated him to be a designated driver. He said he did not know the Defendant to be a person who regularly drink drives, describing the Defendant as *responsible* in relation to alcohol and driving. Mr Bartlett said the Defendant's back was to him when he placed the keys under the seat and there was *no way* the Defendant could have known where the keys were. He agreed it was possible that other persons including the six or seven still at the party had access to the vehicle. From his knowledge of the area the vehicle was found about 100 meters from the party. He didn't know the names of any other persons present.

4. Mr David Farlam gave evidence that at about 3.00am he heard a rattling noise that sounded like the tray of a vehicle rattling. There was a large "bang" followed by silence. He got up, went to the bathroom and looked out of the window and could see a white vehicle (it is not in dispute that this is the Defendant's work vehicle) had hit a tree; the vehicle had its head lights on but he couldn't see anyone around the vehicle. It was a matter of seconds, he said, between hearing the rattling, getting out of bed and observing the vehicle. He said the centre of the vehicle hit the tree; the car doors were closed and he was about 40 metres away when he first saw the vehicle. He put some pants on and walked across the road; he shone the light of his torch in through the driver's side window but couldn't see anything in the vehicle; he then went closer and saw a person in the vehicle: (it is common ground this person is the Defendant); the Defendant was lying across the seat of the vehicle, his legs on the driver's side of the vehicle, his body on the seat, his head and shoulders were down the passenger's side of

the vehicle – the body was slightly twisted; his head was jammed up against the passenger side of the vehicle; there was blood on his face and blood dripping on the floor; he was wearing a shirt and no pants.

5. Mr Farlam said the area was well lit by street lights. His house was the closest to the parkland where the events occurred. He described the trees as scattered. He said the radio in the vehicle was still going so he turned that off or down; he banged on the roof of the vehicle and yelled loudly to get a response from the Defendant which wasn't forthcoming; Mr Farlam's wife came across the road and he told her to call an ambulance. There was no-one else around at the time. He couldn't say if the keys were in the ignition, however the engine was not running and the lights were on. He walked around the vehicle checking for fuel leaks. He saw no-one else. The doors were closed. He eventually received a muffled response from the Defendant who lifted himself onto the driver's side of the vehicle and sat upright. When he next asked the Defendant if he was okay he said there was an incoherent response. He asked if there was anyone else in the vehicle, (as there was blood on the dash). He said the blood was mainly on the driver's side and smeared across to the passenger's side. Blood was also on the passenger side floor and the Defendant was still bleeding. He described the Defendant as incoherent at first, then he asked him the question again. Mr Farlam said the Defendant didn't say "no", and didn't say "yes". He said he was left with the impression there was no-one else in the car. Mr Farlam indicated he was asking these questions as he was trying to ascertain if anyone else was injured. Mr Farlam asked him if he wanted anyone called and the Defendant said "no". The Defendant said he wanted to get out of the vehicle but Mr Farlam said "stay in the vehicle until the ambulance arrives, in case you've got some injuries". The Defendant then persisted and got out of the vehicle and stood by the driver's side door, hanging onto the vehicle to hold himself up, still bleeding.

6. Mr Farlam continued to talk to the Defendant while waiting for an ambulance, describing the Defendant's demeanour as "fine", saying he was "sometimes incoherent" but then had "sometimes quite good speech". When police arrived the Defendant said to Mr Farlam "what have you done now?" and Mr Farlam told him an ambulance had been called but police had arrived first. Mr Farlam said the Defendant seemed annoyed police were there.

7. Mr Farlam described good viewing conditions using his torch and still couldn't see anyone in the area. He said he would have only taken two-three minutes pulling his pants on and going downstairs. On whether another person was in the vehicle and could have easily escaped before he came down, Mr Farlam said:

> "Look, I wouldn't know, could possibly, I mean, it just seems strange that when I looked out at the vehicle my immediate impression was there's nobody there. And it was quick enough for me to have thought, well, if someone was there they've gone in an awful big hurry, and when I got to the vehicle I thought, well, this is very strange, there's no-one here, but when I looked inside, there was an occupant in the vehicle".

8. He also said if there was someone else there he would have heard the door shut. He said that given he heard the tray rattling he would expect to hear the door shutting if that had occurred. Mr Farlam told the Court he did not make any assumptions about the Defendant in relation to the consumption of alcohol given he was thinking about the Defendant's safety; he said even though he was "staggery" he didn't assume he was drinking as he may have had injuries; initially he was incoherent – he said he still didn't make assumptions as it could have been due to head injuries, alcohol or other drugs.

9. Mr Farlam had no recollection of the shattered windscreen on the passenger's side. He also said the Defendant didn't have a seatbelt on and he didn't notice the seat belt extended anywhere in the vehicle.

10. Mrs Delia Farlam also gave evidence that she heard the car accident at about 3.00am so she got up and dressed. She said that would have taken two-three minutes. Her husband was faster than she was to attend but he called out to her to call an ambulance, which she did. She saw a body in the vehicle, slumped, with no pants on, with his head on the passenger side and his legs under the steering wheel. Her observations were largely consistent with Mr Farlam's observations. She said the Defendant sat up behind the steering wheel. She said he seemed disorientated but after speaking with him she said he was coherent and spoke clearly. She also confirmed she did not see any other person in the vehicle. She disagreed the area was characterised by trees, bushes, shrubs, cover and undergrowth. She said the trees and shrubs were *sparse*. She disagreed it was conceivable that another person could have been driving the vehicle and fled the scene. She said she would be curious on where this other person would have fitted in the ute as the Defendant "was slumped from the seat across to the passenger side". She said she thought the Defendant would have come to be in that position because of the impact of the tree. She disagreed the Defendant was incoherent, if not "delirious". She did not agree the Defendant was slurring his words.

11. By consent, the accident report completed by Senior Constable Adrian Morris was tendered (Ex P3), as well as photos from the scene (Ex P4). As noted from the evidence of Mr and Mrs Farlam, by the time police arrived, the Defendant was outside of the vehicle. Officer Morris was concerned for the Defendant's welfare given the injury. He thought the Defendant was agitated given some remarks that he described as *offensive* – he said it caused him "to start considering my spacial vicinity between him and myself". A further conversation took place between the Defendant and Senior Constable Morris. This conversation has been the subject of objection on the grounds the Defendant was in custody at the time of the conversation and no caution was administered. Further, it is agued the

Defendant suffered a medical condition or was intoxicated to the level that any responses given by him should be rejected in the exercise of the discretion. The evidence received under objection is set out here and dealt with below "Consideration of the Evidence - Voir Dire Evidence".

12. Senior Constable Morris told the Defendant to sit down, but it appeared to him the Defendant did not want to. Senior Constable Morris said he was concerned about the injury, he wanted the Defendant to sit down; the Defendant also appeared intoxicated. He observed blood across the dash, the steering wheel and a "head strike" or "spider mark" on the passenger side. He had concerns there may have been someone else in the car and asked "Was there anyone else in the car?" and the Defendant said "No, there wasn't, just me". He said the Defendant was standing at the driver's side door during this conversation. The car keys were in the ignition, the ignition lights were on and it appeared the car had stalled on impact with the tree. Soon after that conversation and police finding the Defendant's license in his shorts in the back of the vehicle, the ambulance arrived.

13. In terms of other relevant evidence, Senior Constable Morris could find no abrasion marks on the seat belt or friction marks on the plastic seat belt guide. Senior Constable Morris also asked the Defendant who was driving and he said "I was". Photos of the inside of the vehicle (Ex P5) were tendered through Senior Constable Morris.

14. Senior Constable Morris said it was his view as an accident investigator the Defendant was the driver. He said that opinion was based "on the angle of momentum as the car is turning right, if the driver's not wearing a seat belt, due to that direction of travel, veering to the right, and then the sudden stop, the person, in normal circumstances, when you have a collision straight on the person is thrown forward". He also noted the tyre marks as a relevant basis for this opinion. He agreed no finger prints or samples for DNA were taken saying he wouldn't take those steps unless it involved serious injury

or a fatality. Senior Constable Morris agreed with the proposition that the Defendant appeared "smashed". Senior Constable Morris said he had no intentions of arresting the Defendant as he knew he would be going to hospital because of his injuries.

15. When put to him that at the moment Senior Constable Morris gave the Defendant the direction to sit down, he was in custody, Senior Constable Morris said "That's something that he would have to determine himself". He said, "I was going to let him go with the ambulance". He agreed he had strong cause to suspect the Defendant. Senior Constable Morris disagreed he had conducted an *interrogation*. He said he needed to ask these questions "there and then" as if there had been other persons present there may be injuries. He also stated that drink driving was a regulatory offence and he didn't need to caution for it.

16. Senior Constable Morris said he attended 15 Feldeg Avenue as part of his investigation. He spoke to James Pearse and another person who identified themselves as a manager. He agreed he hadn't followed up on who that person was. He agreed his information received was there were two girls and 4-5 males present on the evening. He said there was no other person identified as the driver through his inquiries. Senior Constable Morris said he thought it would take him only 45 seconds to run the distance between Feldeg Avenue and the accident site. He agreed it was a possibility that another person drove the vehicle and fled the scene. He said the accident was reported at 2.54am. From Senior Constable Morris' inquiries, he could not identify anyone else who left the party at the same time as the defendant. He noted the matter was dealt with as a summons matter, not arrest.

17. Senior Constable D'Souza gave evidence of his own observations and the conversation concerning the identity of the driver. He described the Defendant as "intoxicated but coherent"; he was not "falling over" and was *not* unsteady on his feet. He said he was "slightly agitated". He said his

investigations indicated the Defendant left the party alone. He disagreed the Defendant was barely able to communicate. He said the Defendant was not a suspect at the time of police arriving at the accident scene. He said he became a suspect after Senior Constable Morris spoke to the Defendant; Senior Constable D'Souza conceded the Defendant was in custody.

18. The hearing was adjourned to allow Mr James Pearse to give evidence. He agreed he and a number of friends including the Defendant went back to his home at 15 Feldeg Avenue. He said Dylan (the Defendant) and "Dan" arrived. They were drinking Rum. He said the Defendant left by foot by himself out towards the park at about 2.00am. He said there could have been 20 people coming or going to his house that night – he said he was not aware of some of the people. He said the Defendant "was pissed" when he left, he was staggering. He said there was a practice of employees at the workplace putting vehicle keys under seats. He said there were three sets of keys for the vehicle, stored in a key cabinet. He said he told police the Defendant walked out of the back door at his house and that was his recollection when he gave evidence.

19. The Defendant did not give evidence in the proceedings.

Consideration of the Evidence

(i) The Voir Dire Evidence

20. There is reasonable consistency between the evidence of police that they thought the Defendant was intoxicated, although there is some difference between them on the degree of intoxication. I can in any event readily find the Defendant was well affected by alcohol and injured: (inpatients notes of Dr Piotrowski "D2"). The injuries do not appear to have been serious on examination. Dr Pitrowski's notes indicate nasal bruising/bleeding left side nose swollen/nostrils crusted blood/minor laceration. Although I accept police evidence it was their intention to ensure he went with the ambulance

and summons him later, I am content to regard the Defendant as in de-facto custody as understood from authorities such as *The Queen v Emily Jako, Therese Marshall and Manis Robinson* [1999] NTSC, per Mildren J.

21. Had the Defendant sought to leave the scene, (however unlikely that may have been in the circumstances), it is likely he would have been restrained from leaving. Senior Constable D'Souza acknowledged as much. The Defendant was not cautioned when he was asked whether there was anyone else in the vehicle or whether he was driving. I accept that a lack of traditional caution will often mean (although not invariably so), that an admission made by a person in custody will be inadmissible. In these circumstances and at the early stage of the investigation, I see nothing improper about police making enquiries on who the driver was or whether there was any other person in the vehicle. It is a public safety issue. The fact that the answers given by the Defendant were given without caution does not of itself mean the answers were not voluntary. In *Azar v The Queen* (1991) 56A Crim R 414, it was held that "what is involved is an inquiry as to the accused's will, rather than as to the accused's state of knowledge, including knowledge of his legal rights" (Gleeson CJ at 419). It is clear from authorities such as *Azar* that knowledge of the right to silence is not a necessary precondition to voluntariness, although lack of such knowledge may have "practical or evidentiary significance" on the question of voluntariness. *Azar* at 420.

22. Much has been made in submissions on behalf of the Defendant concerning compliance with the caution and recording provisions of the *Police Administration Act* (NT), however those provisions do not apply to these offences. Those offences do not carry a maximum imprisonment penalty greater than two years which is necessary to enliven the section. (*Police Administration Act* (NT) s 139(c)). The question of admissibility must be determined on the basis of common law principles.

23. During the course of the hearing I canvassed the question of a driver's legal obligations to give relevant details to Police. On closer examination and with the benefit of submissions of counsel, I note Regulation 9(2) *Traffic Regulations* (NT) provides that if Police believe a person to be a driver who has committed a traffic offence, the driver may be required to produce their licence and personal particulars. (R 9(1)). In contrast, if Police believe a driver has committed an offence, they may require a person to provide their particulars and any information that may identify the driver of the vehicle or assist in investigating the offence. (R 9(2)). Clearly, Police believed the Defendant to be the driver and he was therefore required only to produce his licence and provide personal particulars. In my view however, admissions made against interest when a person is intoxicated and injured (albeit apparently not in a significant way) are of such limited evidential weight that they should be excluded. I appreciate that at times statements made by a person when intoxicated have been held to be involuntary: *R v Smith* (1992) 58 SASR 491, however the question of voluntariness is not so clear on these facts. There is a real question of reliability in these circumstances and I would exclude that part of the evidence objected to.

(ii) Consideration of the Remainder of the Evidence

24. For the charges to be found proven, the prosecution must exclude beyond reasonable doubt any other hypothesis consistent with innocence. In practical terms in this case that means the prosecution must negative that another person drove the Defendant in the Defendant's work vehicle shortly after or around the time the Defendant left 15 Feldeg Avenue; that the other person crashed the Defendant's work vehicle into a tree in a nearby park and left the vehicle within a few minutes, leaving the Defendant injured in the vehicle.

25. In my assessment of the evidence, the circumstances cumulatively lead to the conclusion beyond reasonable doubt that the Defendant was the driver. It

was the Defendant's work vehicle; the fact that the keys were placed under his seat is a neutral point – it hardly provides a basis to the hypothesis that some one else drove. No-one else was seen leaving with the Defendant. One witness said the Defendant left 15 Feldeg Avenue via the back door, but that does not exclude the Defendant from simply going to the front of the house.

26. The evidence of Mr and Mrs Farlam is compelling. Mr Farlam heard no car door slam and saw no other person within minutes of the sound of the crash. The position of the Defendant's body with his legs on the driver's side and slumped on the passenger's side is highly probative. Senior Constable Morris agreed it was "possible" some one else drove and decamped the scene but I do not take that answer to be conclusive. I must make a decision based on all of the evidence, including the evidence of Mr and Mrs Farlam whose evidence leads to the strong inference that there was no-one else driving or in the vehicle.

27. By its nature, much of Senior Constable Morris' evidence is opinion but in my view, his evidence concerning momentum, the likelihood of the Defendant being thrown forward and to the side on or after impact accords with common sense or experience. I accept his technical evidence concerning the indicators pointing to the conclusion that no seat belt had been worn and note this is consistent with Mr Farlam's observation of the Defendant. Much has been made of the fact that Police did not interview all persons who were at 15 Feldeg Avenue on 27 March 2008, however clearly there was a party, people were drinking and coming and going. It is unlikely in the circumstances that other persons would have been of any more assistance than Mr Bartlett and Mr Pearse who were called. I note that Mr Bartlett gave evidence of good character in terms of the Defendant being a responsible driver. I keep that in mind but it does not detract from the ultimate conclusion that I am drawn to that the Defendant drove on this occasion. It is not uncommon for people to act contrary to their usual character when significantly affected by alcohol. For these reasons I found

the charges proven and as indicated in Nhulunbuy on 3 March 2009, I forward reasons to the representatives of the parties today.

28. I note that sentencing submissions will be heard on 7 April 2009 at 10:00am at Nhulunbuy.

Dated this 3rd day of March 2009.

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JENNY BLOKLAND
CHIEF MAGISTRATE