CITATION: *[2009] NTMC 025*

PARTIES:	STUART AXTELL DAVIS
	v
	MICHAEL ALFRED STEVENS
TITLE OF COURT:	Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20827763
DELIVERED ON:	25 June 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	22.5.09 and 4.6.09
JUDGMENT OF:	Mr Daynor Trigg SM

CATCHWORDS:

Traffic Act – section 29AAA(1)(a).
Drive a motor vehicle in a public place whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle.

REPRESENTATION:

Counsel:

Prosecution:	Ms J Truman
Defendant:	Mr P Elliott

Judgment category classification: B
Judgment ID number: [2009] NTMC 025
Number of paragraphs: 165

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

No. 20827763

[2009] NTMC 025

BETWEEN:

STUART AXTELL DAVIS
Complainant

AND:

MICHAEL ALFRED STEVENS
Defendant

REASONS FOR DECISION

(Delivered 25 June 2009)

Mr Daynor Trigg SM:

1. On 30 October 2008 a complaint was laid in this court against the defendant alleging that he:

> On the 15th August 2008
>
> At Darwin in the Northern Territory of Australia
>
> 1. drove a motor vehicle, namely a Toyota Camry Sedan, NT 798058, in a public place, namely the car park and access road of Sky City Casino, whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle.
>
> Contrary to Section 29AAA(1)(a) of the Traffic Act.

2. Accordingly, in order for this prosecution to succeed they must prove each of the following matters beyond all reasonable doubt, namely that:

> (1) on the 15th day of August 2008;

(2) at Darwin in the Northern Territory;

(3) the defendant drove a motor vehicle;

(4) namely a Toyota Camry Sedan, NT 798058;

(5) in a public place, namely the car park and access road of Sky City Casino;

(6) whilst under the influence of alcohol;

(7) to such an extent as to be incapable of having proper control of the vehicle.

3. Elements (1) to (4) inclusive are proved by the admissions of the defendant (as hereinafter set out) in ExP1. Whilst ExP1 addresses the fact that the vehicle in question "left the car park" driven by the defendant, there is no mention of the "access road of Sky City Casino" or any "public place" in ExP1. Surprisingly therefore, element (5) is not fully addressed in ExP1.

4. "Public place" is defined in *section 3(1) of the Traffic Act* to mean:

> a place (other than a public street) open to or used by the public or to which the public is permitted to have access whether on payment of a fee or otherwise, but does not include a track in an enclosed area used for motor vehicle or bicycle racing or speed trials.

5. In order to establish element (6) "it is sufficient for the prosecution to prove that as a result of the consumption of liquor the mental or physical faculties of the driver are so affected as to be no longer in a normal condition" (*Noonan v Elson; Ex parte Elson [1950] StRQd 215*). "The question whether a person is under the influence of intoxicating liquor is a pure question of fact." – *Traffic Offences and Accidents (Third edition) by Douglas Brown @ paragraph 9.8.*

6. The learned author (*Douglas Brown*) goes on to make a number of other observations as follows:

In *Lowe v Suckling* [1983] TasR (NC) 9 it was held that a driver's incapacity can be proved by what occurred and his conduct after stopping, and evidence of bad driving is unnecessary. Likewise in *Miller v Roberts* (1986) 22 A Crim R 331 (SA) there was held to be sufficient evidence of the driver's condition after she had stopped driving to justify the inference that she was incapable of exercising effective control when driving.

In the jurisdictions which require the degree of influence be measured by the capacity to exercise proper control, there may be evidence to show that a driver is under the influence but there may not be sufficient evidence to show that he was so much under the influence as to be incapable of exercising effective control (*Burrows v Hanlin* [1930] SASR 54; *Pulleine v Button* [1948] SASR 1 at 8).

The offence requires an assessment to be made of the drivers general condition due to alcohol and whether that condition justifies a conclusion that his driving will in all probability be affected to such an extent as to be incapable of having proper control of the motor vehicle. The assessment of the driver can seldom be made while the driver is actually inside a moving vehicle at the steering wheel. He may be observed driving from outside the vehicle. That driving may depart from the general norm. But it is not until the vehicle has stopped and a witness has an opportunity to observe the driver at close quarters that an assessment can be made of his condition.

In many instances the evidence will be circumstantial. <u>There may be direct evidence of the driver having taken a number of drinks</u>. The precise amount of liquor consumed may be known or there may be a reliable approximation. <u>There may have been erratic driving. There may be evidence of a driver's physical reactions and behaviour when the vehicle stops. There may be evidence of his breath smelling strongly of liquor. His speech may be slurred. He may have undue difficulty understanding what is said to him.</u> He may be aggressive. There may be evidence of alcohol having been consumed in the vehicle, for example, empty beer cans on the front seat or floor. There may be evidence of extreme dilation of the pupils of his eyes. There may be signs of tremors, or a flushed countenance and of confusion.

In each case the prosecution needs to prove not only that the driver has consumed liquor but also that the affect of the

consumption has disturbed the action of the driver's mental or physical faculties so that they are no longer in their normal condition. If a driver drinks some liquor but not enough to affect his faculties to this extent, that driver if he drives does not commit the offence. Evidence of the smell of liquor on the breath is merely one factor, namely the consumption; there must in addition be sensible signs that he has been affected by liquor, for example, as manifested by the driver's physical appearance, actions, conduct, speech or behaviour (*Noonan v Elson* [1950] SRQ 215 at 236). **It is recognised that there are indicia being certain abnormalities of behaviour and certain physical signs which evidence when a person who has ingested alcohol had become influenced by it. If there is accepted evidence of such manifestation of these indicia the court is entitled to conclude, in the absence of evidence to the contrary, the indicia are the effects of alcohol and that the driver, no matter what his tolerance to alcohol, is under its influence** (*O'Connor v Shaw* [1958] QdR 384 at 386).

There is no burden on the prosecution in every case to prove what is the normal condition of the driver (*Grayson v Crawley* [1965] QdR 315).

Proof that the defendant actually drove a motor vehicle is required. Proof of the quality of his actual driving is not essential to draw an inference that he is not exercising proper or effective control. There does not need to be direct evidence of his lack of proper control while driving". (emphasis added; as will appear later in these reasons, each of the under-lined matters have direct relevance to this matter)

7. In my view, observations made of a person shortly before they commenced to drive are just as relevant as observations made shortly after the act of driving. The shorter the time between the observations and the act of driving the more easily the conclusion can be drawn that a person was in a similar condition when they drove.

8. In *Pulleine v Button [1948] SASR 1* (which was a case dealing with an offence of "driving a motor vehicle whilst so much under the influence of intoxicating liquor as to be incapable of exercising effective control of the vehicle") the appellant had drinks at two or three different

hotels during the afternoon; he was then driving and turned right, in front of an approaching vehicle, thinking he had ample time to cross, and an accident occurred. The appellant argued with the other driver as to who was at fault. Police were called, and when they arrived they noted that the appellant "smelt strongly of liquor and was slightly unsteady on his feet, his speech was confused, and his eyes appeared to be fixed and sleepy". At pages 6-7 Abbott J stated:

> It is to be observed that s 48 as it now stands enables the Court to find a defendant guilty of being so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of his motor vehicle, although he merely "occupies the driver's seat and attempts to put a motor vehicle in motion." This provision, I think, clearly indicates that the Legislature looks to the degree of intoxication of the person charged, and enables the Court to convict of this offence despite the fact that he has not actually driven his vehicle at all. If, as seems to be the clear intention of the Legislature, a man can be found guilty of this offence, without having driven his vehicle at all, it would seem that the test of whether or not he is so much under the influence of liquor or a drug as to be incapable of exercising effective control may sometimes not depend very much upon the actual driving of his car, even when he has in fact driven it without accident.
>
> If a very drunken man is seated at the wheel of his car and attempts to start his car, the mere fact that he is actually able to put the ignition key into its keyhole and turn it, would not indicate that he was capable of exercising effective control. Whether he was capable or not must depend, I think, on the inference to be drawn from all the facts, and especially from the facts relating to his intoxication.
>
> In my opinion, the offence penalized is that of being under the influence of liquor to such an extent as to satisfy the Court, beyond any reasonable doubt, that he is unable to exercise effective control of his vehicle. The extent of the defendant's drunkenness, i.e., whether he is so much under the influence as to be incapable of exercising effective control, is a question of fact as to which the Court must certainly be satisfied beyond reasonable doubt; but the Court can, I think, properly reach that state of satisfaction upon inferences drawn from evidence which may possibly not include any actual act of driving by the

> defendant; or on the other hand, that state of satisfaction may be reached notwithstanding evidence of acts of driving which appear compatible with his being capable of actually driving his vehicle on a straight course."

9. In *Hunter v Fitzgerald [1951] SASR 126* (again a case dealing with an offence of "driving a motor vehicle whilst so much under the influence of intoxicating liquor as to be incapable of exercising effective control of the vehicle") the appellant had been drinking but his estimates of how much "allow for a considerable margin of error". He was seen driving by police "veering from the centre to the right and back again to the centre of the road……and at times ran off the metal on to the soft shoulder of the road. The appellant was examined by a doctor "and the doctor confirms the evidence of the two constables that the appellant was unsteady on his feet, and that his speech was slurred. According to the doctor, 'there was a certain degree of muscular inco-ordination exhibited by the actions involved in his picking up an object from off the floor, but on the other hand, the muscular co-ordination, as shown by the 'finger to nose test', was within normal limits'. In the opinion of the witness, the appellant's reactions would be delayed." The appellant (in order to explain his manner of driving) called evidence that his car had a broken spring which gave the car a tendency to veer to the right. In dismissing the appeal against conviction, Napier CJ stated at page 128:

> "It seems to me that the driving of a motor vehicle upon the public highway is an occupation that calls for a high degree of concentration. Unless the driver is able to give his undivided attention to his driving and to exercise the requisite degree of care and skill, he is a menace to the public safety. That, I take it, is what the Legislature has in mind when it refers to 'exercising effective control'. For that purpose the driver requires to be in full possession of all his faculties. He has to keep alert, and look out. He has to judge speed and distance, and to react promptly or instinctively to any threat of danger…. A man whose speech is slurred by the drinks that he has taken is not likely to be on the alert, or as capable of keeping a

lookout, as a sober man would be. And finally, it appears that the appellant was not in a state to realise, and react to danger, as quickly and promptly as a sober man should. The inability to act, in these respects, as he might be expected to act when sober, could easily have resulted in grave injury or serious damage to person or property. Fortunately, as it turned out, nothing of that sort happened, but I think that the intention of the statute is to reduce the risk of accidents upon the roads by prohibiting people from driving motor vehicles when they are not in full possession of their normal faculties."

10. In *R v Burnside [1962] VR 96@97* Sholl J said:

> The second element in this case, in relation to this alternative, is driving "while under the influence of intoxicating liquor" and that does not mean "drunk" in the popular sense : it means that it must be proved that he was influenced by liquor, that his reactions were affected.
>
> The third element is that that influence must be such that he was incapable of having proper control of the motor car. The emphasis, rightly I think, is placed on the word "proper". He does not have to be incapacitated to such an extent that he cannot get into the car or that he cannot turn the ignition key, as counsel put it. It is sufficient if he is incapacitated to the extent that he is incapable of having proper control of the motor car, but nothing less will do. It must be established that he was driving, that he was under the influence of liquor at the time, and that that influence was such that he was incapable of having proper control of a motor car. A temporary loss of capacity would be enough. It does not have to be established that he was in that condition for the whole of the particular journey or for any defined period of time. If it appears that he was in that condition at any time while actually driving, over any part of the journey from Brighton to the scene of the accident, that would be enough to establish that alternative.

11. I respectfully agree with these decisions, and apply them in the instant case.

12. In the *Concise Oxford Dictionary of Current English (eighth edition)* "effective" is defined to mean "actual; existing in fact rather than

officially or theoretically (took effective control in their absence)"; whilst "proper" is defined to mean "accurate, correct (in the proper sense of the word; gave him the proper amount). Colloq. Thorough; complete (had a proper row about it)". In my view, the two words are not dissimilar in the context in which they appear. They are intended to distinguish the actions of a normal, prudent, sober driver from those of a person who is sufficiently under the influence of alcohol to no longer be a normal, prudent, sober driver. The Legislatures (irrespective of whether the word "effective" or "proper" is used) have both sought to target those persons who choose to drive after consuming alcohol, whereby they are an increased risk of causing injury or damage as a result of their physical and/or mental faculties being affected by alcohol.

13. In the reference text "drugs & drug abuse (third edition)" published by the Addiction Research Foundation, a number of observations are made about alcohol use and it's effects (wherein I note that "CNS" refers to "central nervous system"). Some of these observations are as follows:

> **At page 268** – Although alcohol is a CNS depressant, it's usual early effects (after one to three drinks within approximately one hour) are heightened activity and disinhibition, resulting from depression of the inhibitory and behavioural control centres of the brain. This causes many drinkers to feel gregarious, expansive, jovial, relaxed and more self-confident, although some drinkers feel irritable, depressed or sleepy. Different individuals' emotional responses to alcohol vary widely, and can be greatly affected by the individual's mood before drinking and the drinking context.
>
> Several perceptual and motor functions are impaired by low to moderate doses, including perception of distance and time, pain perception, reflex response and reaction time, and fine motor dexterity. Some people experience slurred speech and impairment of gross motor co-ordination.

> **At pages 60-61** – Driving a car is a complicated task; the addition of alcohol makes it even more complex. Driving involves three elements: skill (the ability to perform), processing (making judgments while performing a number of tasks) and attitude.
>
> Driving is a "divided-attention task". That is, it involves several simultaneous tasks. Impaired drivers whose physical driving skills may not be adversely affected by relatively low blood alcohol levels may nevertheless become involved in accidents because they cannot integrate quickly enough the many pieces of information that must suddenly be considered in an emergency or in a suddenly complicated driving situation.
>
> Possibly the most dangerous effect that alcohol has on driving, however, is on the driver's attitude. It has been found to increase willingness to engage in risk-taking behaviour. Obviously, increased risk-taking increases the probability of accidents. This alteration in the risk-taking threshold is not related to ability to perform the necessary manoeuvres or to process information.

14. In my view, these observations are generally matters of common knowledge and experience, and not matters requiring expert evidence. I have included them herein as they succinctly summarise what I would otherwise have understood and accepted as being the general situation. I would add that the effect of alcohol on an individual differs from person to person. Further, the effect of a given amount of alcohol on a particular person may change from day to day depending upon a number of factors. Some of these factors would include whether a person was tired, whether a person had eaten (and if so what, and when), a person's mental state (whether depressed, sad, happy etc) at the time, a person's individual consumption levels over the preceding days etc.

15. I now turn to consider the particular circumstances of this matter.

16. The complaint was first listed in court on the 12th day of November 2008. After a number of adjournments the matter came before me on

the 22nd day of May 2009 for a contested hearing. Ms Truman appeared to prosecute the charge and Mr P Elliott appeared as counsel for the defendant. The charge was read and the defendant pleaded not guilty.

17. Ms Truman sought to tender a "Notice to Admit Facts" which she stated contained facts that the defendant admitted. This tender was not opposed by Mr Elliott, who confirmed that the defendant did admit (which I take to be pursuant to *section 379(1)* of *the Criminal Code Act*) the matters contained in the document. I marked this document ExP1. Ms Truman read the contents of ExP1 onto the record. ExP1 stated as follows (and the references to "you" are clearly referring to the defendant):

> 1. On 15 August 2008 you attended at the Sky City Casino ("the Casino") at Darwin for the third day of an international conference for Commissioned Officers and Senior Managers in the Northern Territory Police, Fire and Emergency Services;
>
> 2. At approximately 4.00pm the conference ended and you went with other police members to the Keno Lounge at the Casino;
>
> 3. At or about 6.30pm you left the Casino with a number of other police colleagues and travelled to "Shenanigans Bar" ("Shenanigans") in Mitchell Street, Darwin;
>
> 4. You travelled to Shenanigans in a vehicle driven by Commander Bertram Hofer in the company of Superintendents Colin Smith and Sean Parnell:
>
> 5. At or about 7.30pm you returned to the Casino with a number of other police colleagues;
>
> 6. You travelled to the Casino in a vehicle being driven by Superintendent Colin Smith;
>
> 7. Upon your return to the Casino you went to the gambling area with a number of other police colleagues;

8. At about 10.50pm you were approached by security staff employed by the Casino and asked to leave the gambling area;

9. After being asked to leave you left the gambling area of the Casino and exited through the main front entrance;

10. Shortly after having left the Casino you then entered into the Marquee Bar of the Casino and you were approached by security staff and asked to leave;

11. You then left the Marquee Bar and walked to the car park. You then entered and sat in the driver's seat of a grey Toyota Camry Sedan, NT registration 798 058 ("the vehicle");

12. Shortly thereafter the vehicle left the car park occupied solely by you in the driver's seat of the vehicle and you were driving the vehicle.

18. Accordingly, ExP1 establishes that the defendant was at four licensed premises (the Keno Bar, then Shenannigans, then the gambling area of the Casino, then the Marquee Bar) between the hours of 1600 and sometime after 2250. It does not establish, however, that the defendant had any alcoholic drinks at any of these establishments.

19. Ms Truman then sought to tender a statutory declaration of Nantharaj Manathevan declared on the 1st day of April 2009 (over 7 months after the day in question). Mr Elliott had no objection to this tender, and the document became ExP2. In ExP2 Manathevan stated that he was employed by the Casino as a part-time Table Game inspector, and on 15 August 2008 he was working on roulette table ARO1. His duties were to ensure "the dealers pay out correctly and also to look for intoxicated people playing at the tables". However, he went on to say that he could not recall whether he pointed out a drunken male at the table on 15 August 2008 to Maree Barrow, who was the Pit Boss. But if he did, he had no further involvement in the matter. Given the lengthy delay it is not surprising that he has no real recollection.

20. The first witness called in the prosecution case was Maree Barrow. Barrow stated that she was an assistant Pit Boss at the Sky City Casino. She had been employed by the Casino for about two and a half years and her job was to oversee table gaming. On 15 August 2008 she was working at the Casino. She started about 7.30pm and was due to finish at about 4.00am the following day.

21. Barrow stated that her attention was drawn to someone at the roulette table. This was in the early evening. The person who her attention was drawn towards was described as about five foot ten inches tall, of medium build, with a long sleeved blue shirt, the shirt was rolled up to the sleeves, and he had fair hair.

22. The person was playing roulette. She observed that his placing of bets was messy; he was not stable on his feet; he was leaning over other patrons; and his placing of bets was not co-ordinated properly. I find that the person referred to was the defendant.

23. Barrow said that she had done training to identify people under the effect of alcohol and she went on to describe some of the factors that she looks out for. Barrow stated that she formed the opinion that the person had enough to drink and he shouldn't be gambling for his own benefit and the benefit of others. When pressed as to the reasons for that opinion she relied on the following:

    - He was not placing his bets correctly;
    - He was leaning over other patrons;
    - He was not steady on his feet.

24. I note that in subsequent evidence (ExP3 to which I will turn shortly) a film was produced that only showed the defendant at the roulette table for about 19 seconds before he was spoken to. Accordingly, I was

unable to note from that any objective evidence to support the first two reasons that Barrow relied upon, but I did note from ExP3 (to which I will refer shortly) that the defendant was unsteady on his feet. That does not mean that Barrow did not see what she said that she saw.

25. Barrow went on to explain that when placing bets at roulette it was necessary to place the bets so that it was either straight up on a number or covering two numbers or on a corner to cover four numbers. She said that people can also knock over other peoples chips and that can cause a dispute which is not a very nice thing to happen. She said that the defendant wasn't placing his chips on top of other's bets (which she said is where they should go) and his placement of the chips could have caused a dispute. She said that she observed the man (who was the defendant) for about ten to fifteen minutes before she formed the opinion as to his intoxication.

26. Barrow stated that she then phoned surveillance which she said was the Casino's policy. She said she was obliged to inform surveillance and it was up to them to send a security person and she then documents the matter in their internal incident reports. She said she had no further involvement with that man but she saw him go towards the bar with security. She went on to say that she did not notice whether he was drinking at all.

27. In cross-examination Barrow stated that she thought she was observing the man sometime between 7.30pm and 9.30pm but she wouldn't state her life on it (by reason of the admitted facts and for reasons that appear later I find that she was mistaken in relation to this time, and her observations took place probably sometime between 2215 and 2240 hours). She was unable to say how long the man had been at the roulette table. She confirmed that he wasn't

hanging on to the table rather he might have leant on it. She confirmed that in her recorded statement to police (which was apparently done on 16 August 2008) she told police that she believed the man was intoxicated because he was hanging on to the table. However, she said that what she meant by this is leaning over the table.

28. Barrow confirmed that she did not approach or talk to the man at all and said that she is not allowed to do this. In relation to the time she had the man under observation she said that she called security possibly after about five minutes of watching him and then it took between five and ten minutes for security to come down.

29. Barrow stated that she had been involved in the ejection of a lot of people and estimated dozens and dozens over her two and a half years at the Casino. It was suggested to her that without smelling the breath of somebody she could not be able to distinguish a person affected by alcohol or tired. She replied by saying she had been doing it for thirty years and she believed that she can tell the difference. This reference to “thirty years” was not expanded upon nor explained in re-examination.

30. In my view, this evidence raises the possibility that the defendant was affected by alcohol at the time that he was observed by Barrow. Whether I am ultimately able to be satisfied (beyond all reasonable doubt) that he was affected by alcohol will depend on an assessment of all the evidence in the case.

31. The next evidence in the case was a disc of CCTV footage from the Casino. This disc was played without objection and was then marked ExP3. Both prosecution and defence counsel advised me that they accepted the times as shown on ExP3 as being accurate. The vision was of surprisingly good quality and, in my view, allowed me to make

an objective assessment of the defendant and whether he appeared to be functioning in a normal manner or not.

32. In my view, a person does not have to be an “expert” to form an opinion in relation to matters of general life experience, provided that a person is suitably experienced in life. For over 50 years I have regularly been around persons who have consumed alcohol. I consume alcohol. I have played at and been a member of sporting or other clubs where alcohol has been a prevalent part of the associated social scene. I have attended hotels, clubs and restaurants and social events regularly over the years where alcohol has been readily available and consumed. I have lived in Darwin, where alcohol use is very prevalent, for a total of about 24 years of my adult working life. I have personally seen and experienced persons (known to me, vaguely known to me and not known to me) showing the full range of effects from alcohol consumption.

33. Accordingly, given the length of time that the defendant is shown on ExP3 (some 15 minutes) and the good quality of it, I feel comfortable in being able to make my own assessment of the defendant’s appearance (even though he is not personally known to me). I have also had the benefit of seeing the defendant in court during this hearing (over two days). I have seen him walk to and from the witness box. I have seen him whilst he gave evidence. I have therefore had a good opportunity to see him away from licensed premises, and compare that with how he appeared in ExP3.

34. I now turn to consider the contents of ExP3, and I make the following observations with respect to it (and in doing so I will refer to the defendant as “MS”, Sean Parnell as “SP”, Renee Roos as “RR” and David Cooper as “DC”):

- It commences at 22:50:06 and shows MS standing beside a roulette table holding a dark drink in a short (spirit type glass) in his right hand (the drink may be alcoholic);

- Between 22:50:06 and 22:50:23 it shows MS moving around on the one spot in what may be a “swaying” type action, and then take a drink and holding the glass in an unconventional way (more underneath the glass, as if the glass was sitting in his palm, than with his fingers around it);

- MS is clearly not as stationary as the other persons in view and standing around the table and does appear to be swaying and/or unsteady on his feet;

- At 22:50:25 RR approaches MS from behind him and to his left and makes contact with him; and as she does SP comes into view drinking a dark drink in a short (spirit type) glass in his left hand; SP moves directly towards MS and RR;

- Between 22:50:25 and 22:50:27 MS turns to his left to look at RR who appears to be saying something to MS, and SP is at the left shoulder of MS with his head down as if to listen to RR;

- Between 22:50:27 and 22:50:30 MS turns to his left to face RR and as he does so he appears to over-balance a little towards SP, before re-gaining his balance;

- Between 22:50:30 and 22:50:39 RR points towards her right, and MS turns back to the table (presumably to collect his “chips”) and SP is in close proximity;

- Between 22:50:39 and 22:50:50 MS gathers up his “chips” and turns to his right towards SP, by which time another male (Bravos, who is also holding a dark drink in a spirit type glass in his right hand) approaches the two and is now to the right of SP;

- Between 22:50:50 and 22:50:56 MS walks a few steps towards some slot machines with RR following and SP behind her; MS appears to drop something on the ground and turns back and down to his left as if to retrieve whatever he may have dropped;

- The camera angle now changes to show a view from above where MS has moved to, and now facing towards the gaming tables;

- At 22:51:00 the camera zooms out so that MS, RR and SP can now be seen to the left of the picture;

- The camera zooms back in closer to MS and at 22:51:05 an unidentified male can be seen passing what appears to be a betting “chip” (which would appear to be what the defendant dropped) to MS, who takes it in his left hand;

- By 22:51;08 RR then moves towards the camera and turns to face MS with SP standing to the left of MS (however there is an overhead obstruction between the camera and where MS is standing, such that MS is effectively obscured, and RR becomes obscured as she moves further in line with the obstruction);

- At 22:51:20 the camera changes to now show a picture facing towards the slot machines, so that RR, MS and SP are now within view (although there are some other persons standing between the camera and MS, so that the view is not unobstructed);

When the defendant gave evidence he said that he was winning a lot, and had a “stack of chips up to my arm”. This would not appear to be supported by ExP3. Whilst the view of the defendant’s “chips” on the table is obscured by other persons, he is able to pick them all up in his left hand (whilst still holding a drink in his right hand) and does not place any in his pocket before leaving the table (even though he managed to drop one shortly thereafter) with Roos. I will consider this aspect of the evidence further when I turn to consider the defendant’s evidence.

Up to this point in time, ExP3 would indicate that MS appeared to be somewhat unsteady on his feet. His actions would, in my view, be consistent with the possibility that he may be affected by alcohol, and would support the evidence of Barrow. I return to ExP3:

- Between 22:51:20 22:51:55 and RR is in conversation with MS and he bends down and to his left a few times to place his right ear closer to RR (as if he is having difficulty hearing her);

- Between 22:51:55 and 22:52:36 SP moves closer from the left of MS and appears to talk to RR; RR continues talking to MS with SP in close proximity and joining in rarely;

- At 22:52:36 SP looks towards MS and appears to move his right hand towards MS as if to make contact with him and say something to him;

- Between 22:52:45 and 22:52:50 RR ends her conversation with MS and moves past MS on his right and takes up a position one to two steps behind MS (in a position where she can continue to observe MS);

- Between 22:52:50 and 22:53:26 SP places his right arm around the shoulders of MS and although looking away from the camera appears to be talking to him, and trying to move MS to the left of camera; MS and SP take a couple of small steps towards the left of camera, but then stop; MS and SP are conversing and at 22:53:00 SP points his left index finger in the direction of the left of camera; both MS and SP take a drink from their glasses which are held in their left hands (without being able to hear what is being said the general impression is that SP is encouraging MS to leave, but MS is needing some convincing);

When the defendant later gave evidence, he stated in cross-examination that SP was trying to encourage him to “leave it”, and not make an issue about it, and leave the area. This is consistent with what I observed in ExP3. I return to a consideration of ExP3:

- Between 22:53:26 and 22:53:54 SP and MS are in close conversation, and at times the camera zooms in to give a closer view of MS’s face (his right eyebrow appears to be lower than his left at times, and his general expression conveys the suggestion that he is not fully understanding what is happening or why; and his general facial appearance is different to how the defendant presented in court, and the difference could, in my view, be explained

by alcohol); both MS and SP take further drinks from their glasses, and MS appears to be moving around on the one spot more than SP (and more than I would expect);

- Between 22:53:54 and 22:54:00 SP starts walking towards the left of camera, and MS starts following after a short delay; SP stops to await MS and puts his right hand out and around MS (as if to guide him towards the left of camera) and both start walking to the left until out of camera range;

During this period the general impression remains that the defendant gives the appearance of a person who appears to be affected by alcohol. I return to a consideration of ExP3:

- Between 22:54:03 and 22:54:10 the camera switches to a view looking out the main entrance doors of the casino and then pans to the right until it picks up MS and SP walking together towards the exit, again with SP's right hand in the lower back of MS (as if guiding him towards the exit) as they enter into the entry area and both turn right towards the exit;

- Between 22:54:10 and 22:54:20 MS and SP (still with his hand on MS's back to guide him) turn towards the right (in the direction of the exit) and as this occurs MS appears to move to his right in an unsteady motion, and then as he walks away from the camera his gait appears not completely steady;

- Between 22:54:20 and 22:54:43 MS stops a few steps from the sliding glass exit doors, and SP also stops and they both take a drink from their glasses (with MS appearing as if he almost over-balanced when he was tipping his glass up with his left hand to drink out of it); SP then turns to face MS and they again appear in conversation; MS appears to be swaying slightly as he is standing; MS takes another drink with his left hand (and the arching of his back and general movements would suggest a person who may not be sober or in complete balance);

- Between 22:54:43 and 22:54:54 MS finishes his drink and then turns back towards the camera and takes two steps (in a way that suggests he is not in complete control of

his body or balance); MS then walks towards the camera (in a manner that suggests to me that he is not completely steady on his feet) and places his empty glass on a bench; and at this stage RR can be seen standing to the left of the camera watching MS and the exit;

- Between 22:54:54 and 22:55:05 MS walks back towards the exit and SP approaches and again places his hand near his back for a short time as if to guide him; as MS walks he has both hands in his pockets and appears unable to walk in a completely straight line and appears to over-balance slightly and sway to the left on one occasion;

- As MS and SP are exiting SP still has his drink in his hand and is called upon by a person/or persons out of screen to the left of the camera; SP stops, quickly finishes his drink and places it on a bench to the left of the exit door;

- At 22:55:15 MS walks out the first sliding glass door of the casino with SP closely behind him;

- Between 22:55:15 and 22:55:23 MS and SP walk out of the casino, through the second sliding glass doors and towards a roadway (and as he does so MS appears to be swaying to his left and then right as he walks);

I note that when MS gave evidence before me he stated that he didn't particularly like "bundy and coke", but this is inconsistent with the way he made certain to get every last content of liquid from the glass, not only once, but twice.

By this point in time, ExP3 would satisfy me that MS was unable to stand without swaying; he was unable to walk in balance (without swaying); he was having difficulty walking in a straight line or in a normal unaffected manner. In my view, his actions could not be explained wholly or partly on the basis of tiredness. Whether I could be satisfied that his observed actions were due to alcohol would depend upon a consideration of all the evidence in the case, but it would appear to be a strong possibility. By this stage of ExP3 I would

be satisfied that he did not have the ability to have proper control of a motor vehicle, as his motor functions were clearly adversely affected. I return to ExP3:

- At 22:55:24 the camera changes from the one inside the casino looking towards the exit, to one that is looking from the right of the exit towards the crossing on the roadway and a path beyond (with part of what is apparently Sweetheart's Marquee Bar in the top right of the picture);

- Between 22:55:25 and 22:55:52 the camera moves to the left and shows MS starting to walk across the roadway and SP staying on the kerb; MS stops and walks back to SP; SP appears to have a card or piece of paper in his right hand which he is showing (or offering) to MS; Ms keeps his hands in his pocket; MS and SP converse for a short period of time, and then they both commence to walk together across the roadway with the camera moving to follow them;

- Between 22:55:52 and 22:55:55 MS walks with his hands in his pockets on the pathway (across the roadway) and appears to not be walking steadily or in a straight line (veers to the left); he then appears to over-correct and move to the right and almost bump into SP;

- The camera then changes to a camera looking from beyond the entrance to the Marquee Bar looking back along the path towards the casino;

- Between 22:55:56 and 22:56:09 SP and MS walk towards the Marquee Bar entrance with SP slightly ahead. MS takes a step to his left to avoid a free-standing sign near the entrance; SP and MS turn right and enter the bar; DC can be seen standing near the door of the entrance and he turns his head to the left to apparently watch SP and MS enter;

I find it strange that a senior serving police officer, who had been asked to leave the Casino due to his intoxication, would then enter another bar which was part of the same complex. In my view, this behaviour would not be inconsistent with the actions of an intoxicated

person. The defendant was asked in cross-examination what he and SP were talking about when they stopped immediately outside the Casino (apparently in the taxi area), but the defendant couldn't recall. He was also asked whether SP tried to give him a "cab charge", but he didn't recall that either.

By this point in time, ExP3 would satisfy me that MS was unable to stand without swaying; he was unable to walk in balance (without swaying); he was unable to walk in a straight line or in a normal unaffected manner. His actions would be consistent with him being adversely affected by alcohol. I return to ExP3:

- The camera then changes to a camera inside the Marquee Bar which is pointing down the length of the inside area and facing away from the direction of the main Casino building itself;

- The Marquee Bar is not busy at the time MS and SP enter (there is one person at the bar further away from the camera and a few people in the foreground seated at tables);

- Between 22:56:10 and 22:56:23 MS and SP enter the bar from camera left and walk directly up to the bar which is directly facing them; MS appears to misjudge the bar as he approaches with his right forearm extended (as if to lean on the bar) and initially rocks his upper body backwards; he then turns to his right (to place his right forearm on the bar) but again his upper body moves away from the bar before he then moves forward again to place his right arm upon the top of the bar;

- Between 22:56:23 and 22:57:01 it appears that some conversation with a bar person then takes place and this person proceeds to start getting some drinks and places what appears to be a bottle of beer down in front of SP;

- Between 22:57:01 and 22:57:30 DC approaches MS and SP from the left of camera and starts signalling the bar person; DC then stands at the bar to the right of MS (and

closest to the camera) and speaks to MS and SP; DC moves away from the bar area;

- Between 22:57:30 and 22:59:17 MS and SP remain standing at the bar; SP is in conversation with some bar staff; SP drinks from his beer; MS moves slightly away from the top of the bar and then back to it on three occasions; MS and SP are in conversation and MS's back is generally towards the camera;

- Between 22:59:18 and 22:59:26 SP picks up his bottle of beer in his left hand and turns to his right and begins to walk away from the bar in the direction of the exit through which he and MS had entered; MS follows SP slightly behind and to the left of him; as MS walks past a male who is seated and facing towards the camera MS appears to make contact with the rear of this person as the person's head immediately turns to the right to look at MS and MS turns back towards the male with his left hand extended (in what appears to be an apologetic gesture) and takes a step back to touch the male on the right shoulder;

There was no obstruction or reason for MS to make any contact with the male person. There was no-one standing in the area. There was more than sufficient room for MS to be able to walk (if he could walk properly) without connecting with anyone. I return to ExP3:

- Between 22:59:27 and 22:59:39 MS and SP proceed to the entrance; SP places his right forearm out as if to block MS but MS keeps walking and exits the Marquee Bar; DC (who has returned to the door of the bar) indicates to SP (which appears to be an indication that he can't walk out holding the bottle of beer); SP remains in the bar; MS departs the bar by himself and turns right on the path heading towards Gilruth Avenue;

- The camera then changes to the camera outside the marquee bar that is facing the main casino building, but MS is just disappearing from view; the camera turns to the right to locate and follow MS again;

- Between 22:59:43 and 22:59:52 MS is seen walking in the direction of Gilruth Avenue; MS has his right hand in his

pocket and starts on the left side of the path but appears unable to maintain that position and moves (sways) to the right, before disappearing behind an advertising sign;

- The camera is then switched to a camera that looks over a pedestrian walkway that then leads into the casino car park area; this camera is then turned around to face back towards the path leading to the marquee bar;

- Between 23:00:00 and 23:00:32 MS is seen walking along the path approaching the camera; he appears to over-balance for no good reason and stagger to his left; he continues walking in an unco-ordinated and ungainly manner; again moving to the left for no reason (appearing incapable of walking in a straight line) and moving right, left and then right again as he crossed the pedestrian crossing;

I note that the pavers on the path along which MS is walking are such that I am clearly able to see if he is walking in a straight line or not. And he clearly doesn't.

I note that from 22:59:39 SP does not appear again in ExP3. However, I have had a good opportunity to observe SP and his movements. SP would appear to be affected by alcohol on what I have observed, but to a lesser extent than MS. SP was not having difficulty standing. SP was not swaying whilst he was standing. SP was not unsteady on his feet when he was walking. SP was not appearing to have difficulty with his balance whilst walking. SP was not appearing to have difficulty in maintaining a straight line whilst walking. However, I noticed all of these things in relation to MS.

By this point in time, ExP3 strongly indicated to me that MS appeared to be intoxicated (subject to there being some cogent evidence later in the case as to his consumption of alcohol), in that he was unable to stand without swaying; he was unable to walk in balance (without swaying); and he was unable to walk in a straight line or in a normal unaffected manner. As such, I am satisfied that MS was incapable of

having proper control of a motor vehicle. But whether that was due to alcohol (or some other cause) would depend upon the evidence as a whole. I return to ExP3:

- Between 23:00:32 and 23:01:04 MS enters the car park area again not walking in a straight line and swaying (moving) to the left as he walks; then to the right; then to the left again; then turning to the right (in an unbalanced manner) before disappearing off camera to the right between parked cars;

- There are cars driving within the car park which appears to be open to and used by the public; the car park appears to be quite full;

- Between 23:01:45 and 23:02:07 MS is seen to re-appear from the right, back into camera range; MS walks through two rows of parked cars, through a road area, and through two more rows of parked cars (apparently looking for his car);

- Between 23:02:07 and 23:02:36 MS appears to be activating his key to see if any lights come on; lights flash on a car to the left of the camera, but MS takes a few seconds to notice this; MS turns to his left and walks towards this vehicle; MS opens the driver's door of a motor vehicle and sits in the driver's seat;

- Between 23:02:36 and 23:04:14 MS sits in the driver's seat and stays there; MS appears to be moving within the car, but it is not possible to see what he is doing; the lights on the car are not turned on;

- At 23:04:14 the lights on the car are turned on;

- Between 23:04:23 and 23:04:53 MS commences to reverse the car and the front wheels turn to the left; MS then commences to drive forward turning the front wheels back to the right; MS turns right, without stopping or indicating his intention to turn right (towards the tennis courts), in front of a car with it's left hand indicator on; MS drives towards the Casino and tennis courts entrance roads;

- On the section of roadway that MS is on there is a white arrow painted on the road to indicate a direction of travel that is straight ahead; in the middle of the road there are two unbroken white lines (to divide the two sides of this roadway):

- Between 23:04:53 and 23:04:57 MS drives forward and to his right, such that his right hand rear tyre is either touching the very outside of (or just over) the right hand side of the furthest unbroken white line from the left side of the road; there was no parked vehicle or other reason for MS to need to cross double unbroken lines;

- Between 23:04:57 and 23:05:03 MS proceeds to turn right onto the Casino access road (heading towards Gilruth Avenue) without stopping; and at no time did MS indicate his intention to turn right;

- MS accelerates and disappears from view;

- There is no further sighting of MS on ExP3.

Based upon the objective evidence provided by ExP3, and taking ExP3 as a whole (and if there were no other evidence) I would find that MS was moderately to heavily affected by something to such an extent that he had difficulty standing without swaying; he was unable to walk in a balanced normal way; he was unable to walk in a straight line; he was unable to walk in a normal unaffected manner; he was unable to walk without swaying or swerving as he did so; he was unable to remember where he had left his car (although this by itself may not be unusual). My observations of the defendant from ExP3 would be consistent with the “something” he was affected by being alcohol, but a final decision on that would depend upon there being evidence that he had in fact consumed alcohol prior to the events depicted in ExP3. I am satisfied beyond all reasonable doubt that MS was incapable of having proper control of the motor vehicle that he was driving (as further borne out by his crossing double unbroken

lines; and as further borne out by his turning right on two separate occasions without indicating) as seen in ExP3.

MS was not staggering or stumbling severely, nor was he falling over. He was not affected to that extent. In my view, he was showing all the signs of a person who had “the wobbly boots” on. He was, in my view, in no condition to be behind the steering wheel of a motor vehicle and he should not have driven.

35. At the time MS was drinking (whether it be alcohol or not will depend on later evidence) and gambling in the Casino he was a member of the public. His car was in a car park which was open to him as a member of the public. He used the car park and the entrance road into the Casino as a member of the public in order to drive towards Gilruth Avenue. Accordingly, on the evidence I find that the car park of the Casino and entrance road to the Casino were (at the time MS drove) open to and used by the public. I therefore find that they were both public places.

36. I bear in mind that ExP3 is not the only evidence in the case, albeit that it is, in my view, strong objective evidence. At the end of the day the guilt or innocence of MS is to be assessed based on a proper weighing up of all the evidence. I will now turn to a consideration of the other evidence.

37. The next witness called in the prosecution case was Renee Roos (who was the “RR” referred to in relation to my examination of ExP3). Roos stated that she was a senior security officer at Sky City Casino and she had been employed there for three years. Prior to that she had been a police officer with New South Wales Police for about three years.

38. On 15 August 2008 Roos was acting security officer shift manager. She believed she started work at about 6.00pm and was scheduled to finish at either 2.00am or 4.00am.

39. Roos says she was called by surveillance in relation to a man at a roulette table sometime between 9.00pm and 10.00pm she believed (but, for the reasons as noted earlier, this is in fact likely to have been between 2240 and 2250). She then attended Pit One where she spoke to the Pit Boss, Barrow.

40. Roos said she then observed a Caucasian male standing at a roulette table. She observed him for a short period probably three minutes and then a further three to four minutes. She described the man as slim-ish build, light blue shirt and grey pants. On the evidence I am satisfied that the person she observed was the defendant.

41. Roos advised that she had also done training in relation to drug and alcohol and again listed the sorts of matters that she looks out for. Through Roos a copy of the Sky City Casino internal procedures list in relation to intoxication was tendered (without objection) and became ExP4. This document stated as follows:

> "1. When making an assessment of someone's level of intoxication refer to the following behavioural signs:
>
> (a) Swaying and/or dozing while sitting at a bar or table.
>
> (b) Spilling drinks and the inability to find one's mouth with glass.
>
> (c) Clumsy, uncoordinated.
>
> (d) Change in gait – stumbling.
>
> (e) Difficulty moving around objects.
>
> (f) Bumping into or knocking over furniture.

(g) Falling down.

(h) Vomiting.

(i) Glassy eyes, lack of eye focus, loss of eye contact.

(j) Inability to pick up change from table/bar.

(k) Letting cigarette burn in ashtray without smoking it.

(l) Making irrational or nonsensical statements.

(m) Altered speech patterns, such as slurred speech.

(n) Rambling conversation, loss of train of thought.

(o) Becoming loud, boisterous and making comments about others.

(p) Becoming careless with money, buying rounds for strangers etc.

(q) Annoying other customers and employees.

(r) Becoming agitated or argumentative.

(s) Aggressive or belligerent.

(t) Crude Behaviour.

(u) Inappropriate sexual advances.

2. If a person is observed exhibiting a combination of several (more than two) of the above Behavioural Signs of Intoxication there is a strong indication that the person is intoxicated."

42. Roos stated that when she was with New South Wales Police she had training in relation to drug and alcohol observations as well, and she frequently had to use those skills, and said she did this everyday. Now that she works at the Casino she says she uses that experience every shift.

43. Whilst observing the male (who I find was the defendant) she noted and observed that he was leaning on the table like he may have had difficulties. In my view, this observation is consistent with my observations (albeit for about 19 seconds) of the defendant standing at the roulette table. He did not appear steady on his feet, and in my view, Roos was justified in her decision to approach the defendant and ask him to leave.

44. Roos said that she approached the male and told him that he had been observed under the influence of alcohol and she needed to speak to him. The person (who was the defendant) moved back from the table and Roos spoke to him. There was another male with the man (who I find was Superintendent Sean Parnell) and she said that the two men spoke together when they moved to the smoke machine area. When she spoke to the defendant she noted the following in relation to him:

- Slurred speech;
- Glassy eyes;
- Strong smell of liquor on his breath; and
- He appeared to have poor balance.

45. This evidence is strongly suggestive that the defendant was affected by alcohol. Her evidence as to the defendant appearing to have poor balance is consistent with my observations of the defendant on ExP3, and I accept this evidence. I accept the evidence of Roos as to her observations and interaction with the defendant. Based upon the evidence of Roos, and my own observations of the defendant in ExP3, I would be satisfied (subject to a consideration of all the later evidence in the case) that the reason for the defendant's altered state was due to the fact that he was affected by alcohol.

46. Roos stated that when she was speaking to the defendant near the smoke machine the defendant seemed to be questioning why he was being asked to leave. She told him that she had observed signs of intoxication and informed him what they were, but the defendant seemed to think he had done something wrong. Roos said she told the defendant he had done nothing wrong it was just that he had had too much to drink. Roos said she told the defendant that she had observed him:

- Unsteady on his feet;
- With glassy eyes;
- And from speaking to him he had slurred speech.

47. Roos said that the defendant mumbled something to her about having done something wrong. She said that she heard the other male (Parnell) mention to the defendant something about getting him a taxi and that he had a cab charge. She said that because of that she did not advise the defendant not to drive and to get a cab, as she normally would have. When the defendant later gave evidence he said in cross-examination that he didn't recall Parnell saying that he would give him a cab charge. I accept the evidence of Roos that this was in fact said.

48. When the defendant gave evidence he said that he was questioning why he was being asked to leave, as he did not believe what Roos was telling him. He went on to say that he believed he was being asked to leave because he was winning. I will return to consider this aspect of the evidence later in these reasons.

49. Roos stated that the defendant had a drink while she was speaking to him, it was a dark liquid in a short glass. Roos told the defendant that he would be required to leave the Casino.

50. Roos said that she didn't notice whether Parnell was unsteady on his feet also, as her main attention was on the defendant.

51. The defendant and Parnell then went to the main entry and Roos went with them and stood a few metres behind and observed them. She said that the defendant was slightly unsteady on his feet and a bit slow with his gait. I agree with these observations as they are consistent with my observations from ExP3 (although in my view, I would have described him as a bit more than "slightly unsteady on his feet"). Roos said that she stood in view of the main entrance and watched the defendant walk out. She said that was the extent of her involvement.

52. I note that the majority of the involvement between Roos and the defendant and Parnell is captured and shown on Exhibit P3. There is no sound associated with Exhibit P3, and accordingly no conversations were able to be picked up, nor is the manner of the defendant's speech.

53. In cross-examination, Roos stated (having been shown part of ExP3) that the defendant was shown not to be standing still, but he was swaying on his feet. She went on to confirm that she believed the defendant had slightly slurred speech and he was mumbling and she couldn't understand what he was saying. Also he had a strong smell of intoxicating liquor on his breath, which she stated was spirits. She stated that his eyes were "red and glassy, glazed".

54. I accept the evidence of Roos as being generally accurate and reliable.

55. The next witness called was David Cooper (who was the "DC" referred to in relation to my examination of ExP3). Cooper was a part time security officer who worked at the Casino between June and August

2008. He was working on the night of 15 August 2008 in the Marquee Bar.

56. Cooper stated that he worked with Victoria Police in 1976, was later a transport patrol officer, then with the Military Police and also had been a prison officer. It was clear from the evidence of Cooper that he had little memory of the events of this night at all. Even when shown the part of ExP3 which related to his involvement, this did not seem to particularly refresh his memory.

57. Cooper said that he had received a radio message that a male had been asked to leave the Casino premises and therefore he approached the gentleman not far from the bar and told him he had to leave the grounds. He stated that the man was very polite and he wished everyone was that easy. He went on to note that the man (who was the defendant) seemed a bit unsteady on his feet and he had obviously been drinking.

58. Cooper said the defendant left and headed towards the car park. He stated the defendant was a little bit under the weather, he had seen worse. In cross-examination Cooper stated he remembered the defendant looked a bit unsteady as he left down the path. He said he saw him briefly as he was leaving.

59. I generally accept the evidence of Cooper as it confirms my observations of the defendant on ExP3, save that I find the defendant was more affected than Cooper remembered.

60. The next witness called was Sean Parnell (who was the “SP” referred to in relation to my examination of ExP3). Parnell is a Superintendent with Police based in Alice Springs. He stated he had been a police officer for twenty four years and had known the defendant for twenty years.

61. On Friday 15 August 2008 Parnell was at the Casino to attend a two day Commissioned Officers Conference. The defendant also attended the conference. Parnell described it as a low key and relaxing conference. The conference finished around 4.00pm on the 15th, and he then went down stairs to the bar to the left of the lift (which appears from later evidence to be the Keno Bar). He stated that virtually everyone from the conference was at the bar. He couldn't say for certain if the defendant was there.

62. Parnell stated that he was drinking beer initially and it would have been heavy beer as he didn't drink light beer then. Parnell stated that he had quite a considerable number there and couldn't recall leaving the bar. He was asked how many beers he had and he said "at least fifteen, maybe more, hard to tell". I note that this evidence (if true) is at odds with some other evidence (that I will turn to shortly) that service in the Keno Bar was very slow.

63. Accordingly, on Parnell's evidence he had at least 15 "heavy" beers in a period of 150 minutes (as I find from ExP1 and later evidence that he was at the Keno Bar from about 1600 until about 1830), or at least 1 "heavy" beer every 10 minutes on average over the whole period that he was there. This is a very large amount. Given the amount consumed by fellow police officers during this period (as will become apparent later in these reasons), the amount Parnell claims to have consumed is an extraordinary amount, and, in my view, something that would have stood out. If true (and I am unable to accept that it is true) then Parnell would have been drinking at a rate of approximately 5 times faster (or 5 drinks to 1) than any of the other police who were in attendance, and who gave evidence before me.

64. Parnell stated that he didn't recall going to any other establishments that night. It is clear (from the admitted facts (ExP1) and other oral

evidence) that Parnell went to Shenannigans for a period somewhere between about 1830 and 1930 hours, and then returned to the Casino where he still was when the defendant was asked to leave at about 2250 hours.

65. Parnell went on to say that he had no memory of seeing the defendant after he left the conference around 1600 that day. It is clear from other evidence, and I find, that the defendant was at the Keno Bar whilst Parnell was there also (but given that it may have been crowded, it is not unrealistic that he may not have noticed the defendant). However, it is also clear from other evidence, and I find, that the defendant went to Shenannigans in the same motor vehicle as Parnell and they were there together. I am unable to accept Parnell's evidence that he had no memory of seeing the defendant after he left the conference around 1600. He may not have been able to recall him in the Keno Bar, but in my view, he should have recalled being in the same car as him.

66. It is clear from other evidence, and I find, that the defendant returned to the Casino at or about the same time that Parnell did. It is clear from ExP3, and I find that, when the defendant was approached by security at the Casino, Parnell was immediately there and stayed with the defendant thereafter, and appeared to be trying to take care of the defendant. I am unable to accept that Parnell had no recollection of the defendant after 1600. He had significant and direct involvement with the defendant as shown on ExP3.

67. The evidence of Parnell does not sit comfortably with my observations of him in ExP3. In my view, Parnell did not appear affected by alcohol to any great degree. Parnell was not swaying whilst he was standing; his co-ordination appeared reasonable; he was not unsteady on his feet; and he appeared to be able to walk in a straight line. However, I

do not know what time Parnell stopped drinking. Parnell was still having what appeared to be a bottle of beer in the Marquee Bar when the defendant finally left the area. How many more, if any, alcoholic drinks Parnell had after this time is unknown on the evidence before me.

68. Ultimately, the evidence of Parnell was of no assistance in relation to the matter, albeit that it is clear from ExP3 that Parnell was the man talking to the defendant and security; standing with the defendant in the front foyer of the Casino; leaving the front foyer of the Casino with the defendant; walking down the pathway towards the car park with the defendant; entering the Marquee Bar with the defendant; going up to the bar with the defendant; ordering some drinks at the bar; standing with the defendant after the defendant had again been asked to leave; and with the defendant until he left the Marquee Bar by himself and turned right and walked off towards the car park. Therefore Parnell should have been in a good position to describe the defendant's condition (and the amount of alcohol the defendant may have consumed), subject to the problem that he had been drinking alcohol himself.

69. As already noted, it is the evidence of Parnell that he can't remember anything in relation to any of these events. Parnell did not give any evidence to suggest that he suffered any head trauma that evening which would have explained his stated amnesia (but nor was he asked). Nor did Parnell suggest that it was normal for him to have amnesia (let alone retrograde amnesia) after he had been drinking (but nor was he asked). From my observations of the defendant and Parnell on ExP3, it is the defendant who was considerably more affected by alcohol than Parnell. Accordingly, if anyone might have had "memory" problems concerning this night, I would have expected the defendant to be the more likely.

70. I am unable to accept Parnell's evidence that he has no memory of this night from the time he was in the Keno Bar. I am unable to accept his evidence as to how much he had to drink whilst at the Keno Bar. In any event, his evidence does not assist the prosecution or the defence.

71. In the end result, the evidence of Parnell is of no assistance in deciding the ultimate issue in this case. I am not able to assume or infer anything adverse to the defendant because Parnell may have been unwilling to give evidence of his observations and knowledge. I am unable to speculate as to what his evidence may have been if he didn't have his alleged "memory" problem. Conclusions can only be drawn from positive evidence in the case.

72. The next witness called was Bertram Hofer. He is a Commander in the Police based in Alice Springs. He has been a police officer for twenty eight years and has known the defendant for over twenty years. He also attended the conference at the Casino on 15 August 2008. He said the conference had some intense elements to it.

73. Hofer said the conference finished about 4.30pm or 5.00pm on the Friday and he went to the Keno Bar with others. He saw the defendant at the Keno Bar and spoke to him there. He saw the defendant drinking alcohol and from memory he was having a beer early in the piece. He was not in a shout with the defendant and could not say how much the defendant was drinking. Hofer was drinking light beer.

74. Hofer stated that he was drinking light beer and had between two and four beers in the time he was at the Casino. He left the Keno Bar some time between 6.00pm and 7.00pm. Hofer drove the defendant and Parnell and Colin Smith to Shenannigans Bar to meet other colleagues. Hofer said they spent an hour at Shenannigans chatting

with a variety of people and during this time he had no direct recollection of seeing the defendant drinking.

75. Hofer said that he left Shenannigans with Parnell and got a lift back to the Casino with Superintendent Reed. He left his car in town as he was not prepared to drive.

76. Back at the Casino Hofer met up with other people from the conference and had a couple more drinks. Ultimately he sat down and played blackjack. He noticed that the defendant was in the gaming room at some stage but can't say when the defendant got there. Hofer continued to drink beer, as he rarely drinks anything else. Hofer stated he had quite a bit to drink but he could not be more specific other than to say that he didn't feel incapacitated.

77. Hofer stated that he didn't make any observations about the defendant being affected by alcohol.

78. The next witness called was Peter Gordon. He is a Superintendent of Police and has been in the police force for nearly twenty eight years. He has known the defendant as a colleague for ten years and reasonably well for the last eighteen months to two years.

79. Gordon also attended the conference at the Casino on 15 August 2008. He said the conference finished around 4.00pm that day and he went to the Keno Bar with a group. The defendant was there with several others. Gordon said that he had two to three light beers at the Keno Bar and said there were about thirty or forty people from the conference at the bar. He was not one hundred per cent sure if he had bought a beer for the defendant at all but he did note that the defendant did have a beer while he was there however, how many beers he had no idea.

80. Gordon stated he was at the Keno Bar until 6.00pm when he then left and went home. He stated he was one of the first to leave. Gordon was asked if he made any observations of the defendant being under the influence of alcohol at all and he stated that when he was speaking to the defendant he didn't appear to be affected at all.

81. In cross-examination Gordon said it was a fairly arduous three day conference and for him personally it was very exhausting. He stated that there was very slow service in the Keno Bar (which is at odds with the evidence of Parnell) as there was another group in there as well and they were ordering fancy cocktails. He noted one time he waited some eight to nine minutes to get an order. He noticed that the defendant had one beer but he couldn't say if he had any more, or if so, how many. He said he had no idea what sort of beer the defendant drinks.

82. The next witness called was David Proctor. Proctor is a Superintendent of Police based in Darwin who has been a police officer since 1987. He has known the defendant more closely over the last eight to nine years but doesn't socialise with the defendant outside of work.

83. Proctor also attended the conference on 15 August 2008. He said the conference was pretty good and there was a lot of information crammed into the two days. He said the conference finished on the Friday some time around 3.45pm or 4.30pm. He remembered the time because he was leaving straight away to go and pick up his partner (Kylie Anderson).

84. After the conference finished Proctor left the Casino and went to pick up his partner and then took her to Shenannigans to meet other people. He did not go to the Keno Bar at the Casino.

85. Proctor arrived at Shenannigans some time between 4.30pm and 5.00pm. He said he was a "sober Bob" that night so he was not drinking. He noticed that the defendant, Hofer and Parnell came in about an hour after he arrived at Shenannigans. He could not recall any direct contact between himself and the defendant. He did not directly see the defendant drinking, but assumes that he was. He did not make any specific observations of the defendant.

86. Proctor left Shenannigans around 7.00 to 7.30pm as he and his partner had a dinner invitation. He could not recall speaking to the defendant at the hotel. In cross-examination Proctor stated that he didn't notice anything to indicate the defendant was under the influence of alcohol while he was there.

87. The next witness called was Kylie Anderson. She is a Senior Sergeant of Police based in Darwin and has been a police officer for nine years. She is the partner of Proctor. She has known the defendant for twelve years.

88. Anderson stated that she went to Shenannigans on 15 August 2008 with Proctor and arrived about 5.00pm. She was drinking heavy beer and had about three to four beers. She saw the defendant at Shenannigans at about 6.30pm and spoke to the defendant, although not in depth. She remembered that she bought a round of about seven to eight drinks and the defendant was one of the drinks that she bought, but she couldn't recall specifically what the defendant had to drink. She thought the defendant had a beer from memory. She said they were standing around a table and in a group so there was no direct conversation with the defendant. Her attention was not drawn to the defendant and she made no observations of him. She and Proctor left at about 7.00 to 7.30pm.

89. In cross-examination Anderson said she didn't really take any notice of the defendant but if there had been something unusual she would have noticed it.

90. The next witness called was Peter Bravos. Bravos is a Superintendent of Police based in Darwin. He has been a police officer since 1987 although a police officer in the Northern Territory since 1998. He has known the defendant for nine to ten years.

91. Bravos also attended the conference at the Casino on 15 August 2008. On the Friday the conference finished at 4.00pm or shortly thereafter. He went to the bar down stairs but he didn't notice if the defendant was there or not. He was at the bar for probably two to three hours and he was drinking light and heavy beer. He said that he more than likely had three to four beers and he was with McAdie and Telfer, talking.

92. Bravos said that they went to Shenannigans for a short time (about ten to fifteen minutes) and then went back to the Casino. He had no alcohol at Shenannigans. He said he went to Shenannigans with McAdie, who drove.

93. Bravos stated that he didn't notice the defendant at Shenannigans and he spoke to a number of people there. He went back to the Casino with McAdie and Telfer at maybe 8.00 or 9.00pm but he didn't pay attention. When back at the Casino he went into the card table area but didn't see the defendant when he went in but he eventually did see the defendant.

94. Bravos said that he first noticed the defendant at the roulette table at about 2300 as he was standing watching people bet. Bravos was drinking alcohol, mostly beer, but he may have had a spirit and coke.

95. Bravos stated a short time later security came and spoke to the defendant (this may have been about five minutes after he first noticed the defendant) but he couldn't hear what they were saying. Bravos was watching what was going on and noticed Parnell walk up to them as well. He was watching the interaction for about one to two minutes and the only observation he made was that there was no argument or raised voices. Bravos said that he did not see the defendant walking and the last time he saw them the defendant and Parnell had turned towards the exit but he has no recollection of them leaving.

96. In cross-examination Bravos said that when he saw the defendant at the roulette table he only saw him out of the corner of his eye and didn't make any observations about the defendant. He went on to say he was watching the interaction with security but he didn't notice anything to indicate that the defendant was under the influence of alcohol.

97. The next witness called was Mark McAdie. He is an Assistant Commissioner of Police and has been a police officer for some thirty four years. He is based in Darwin and has known the defendant for about thirty eight years. He has a regular interaction with the defendant through work. He also attended the conference at the Casino and stated that on 15 August 2008 the conference finished about 4.00pm. He then went to the Keno Bar with a group of people.

98. McAdie stated that the defendant was certainly at the Keno Bar at some point in time but he could not say when he arrived or left. McAdie had two or three small light beers at the Keno Bar although he did put $100 across the bar. He did not pay particular attention to what the defendant was drinking.

99. McAdie left the Keno Bar around 7.00pm and drove to Shenannigans with Bravos. The defendant was at Shenannigans when McAdie arrived, to the best of his recollection. McAdie had one glass of coke at Shenannigans. McAdie wasn't taking particular notice of what the defendant was drinking at Shenannigans but he thinks he was drinking beer.

100. McAdie only stayed at Shenannigans for about fifteen to twenty minutes as the group had decided to move on. He decided that the "group" was too intoxicated to drive and should get lifts. I do not take this evidence as any direct evidence that the defendant was "too intoxicated to drive" at this point in time, as it was a general statement about the "group" rather than about the defendant. He returned to the Casino with Bravos.

101. McAdie arrived back at the Casino and he noticed the group that he had seen at Shenannigans were on the gaming floor at the Casino. He noticed the defendant on the gaming floor a short time after he had arrived back at the Casino.

102. McAdie had one light beer (he thought) and left the Casino around 10.00pm or a little after.

103. McAdie was asked whether he made any observations of the defendant and he stated that he had. He said at one point he was standing next to the defendant at the roulette table and "I have to say I formed the opinion he was intoxicated". He was asked for the basis for this opinion and he said:

- He had known him a long time;
- He had seen him intoxicated on occasions before;

- He particularly noticed that when the defendant is intoxicated he looks sleepy, his eyelids tend to close.

104. McAdie didn't believe that he had spoken to the defendant at the Casino. He was asked if he could make any assessment as to his ability to drive and McAdie stated he would require a person to do things before he could make that assessment, and as he hadn't had a chance to do that he wouldn't make that assessment.

105. McAdie stated that on each of the three occasions that he had noticed the defendant he had a drink but he couldn't say what he had been drinking or the alcohol content of what he had been drinking. He specifically saw him drink from three different drinks.

106. Given McAdie's knowledge of the defendant over many years he was, in my view, in a reasonable position to express a view as to his intoxication. Although he had not worked "on the streets" as a police officer for many years, in my view, you don't lose your ability to determine whether someone is affected by alcohol or not. That is particularly so if the person is known to you and you have seen them both sober and intoxicated before.

107. In my view, people who drink alcohol, or who associate with people who do are generally able to identify the signs that relate to the intake of alcohol by a person. The signs will vary from person to person. Some people become loud, some aggressive, some inappropriate, some sleepy. Generally, all persons who are affected by alcohol will display some signs of effect on their appearance (such as glassy eyes, difficulty in focussing, dilated pupils, flushed complexion etc) and manner of speech (slow or rapid speech, slurred speech etc) and brain functioning (inability to understand straight-forward propositions, incoherent speech, argumentative, over-reactive etc) and motor skills

(such as co-ordination, balance, standing, sitting, leaning, walking, driving, grasping, holding etc).

108. McAdie's assessment that the defendant was intoxicated when he saw him at about 2200 hours or thereabouts I accept, as it accords with what I saw of the defendant from 2250 hours on ExP3.

109. That was the extent of the evidence called on 22 May 2009. The hearing was then adjourned to 4 June 2009 at 10.00am part heard before me to continue with the evidence.

110. When the hearing resumed on 4 June 2009 Colin Smith was called to give evidence. Smith is a Superintendant of Police, and has been in the police force for almost 28 years. He has known the defendant for almost that whole time and described their relationship as "good friends".

111. Smith also attended the conference at the Casino in August 2008. Smith said that (after the conference finished on the Friday) he went down to the Keno Bar on 15 August 2008 with the defendant. They were drinking together and were in a shout. They bought each other a beer (midstrength), then someone put money on the bar and they had one more after that. He said that the defendant and he had the same amount of alcohol at the Keno Bar (but it later transpired that Smith went up to the room he was staying in at the Casino for about 5-10 minutes during this period, and therefore clearly couldn't say what the defendant had to drink during the period that he was away). He said there were people from another conference there as well, and the bar was over-whelmed, and the service was pretty slow (which is at odds with Parnell's evidence).

112. Smith then went to Shenannigans with Hofer and the defendant and maybe someone else. From the earlier evidence of Hofer it is clear

that this “someone else” was Parnell (who stated in evidence that he had at least 15 heavy beers at the Keno Bar, and couldn’t remember leaving there). If Parnell’s evidence is true (and as noted earlier I am unable to accept it) then he should have been very memorable, as he should have been very intoxicated.

113. At Shenannigans, Smith said someone bought him a beer when he went in, and that was the only beer he had while he was there. He said that the defendant had a beer too, and they were basically in the same group. He got a lift back to the Casino with Pryce and the defendant was also in the car. They arrived back at the Casino close to 1900 hours. They went to the gaming area, and bought a beer when they first walked in.

114. Smith said that he and the defendant played roulette. They were standing as there were no seats. He said they weren’t drinking much at the table. He had a rum and coke, but couldn’t recall if it was he or the defendant who bought it. In cross-examination he said that he had 1 midstrength and then 1 or 2 rum and cokes at the roulette table. He said the defendant was playing some system that he did not understand, while he was just placing the odd bet. At some point in time the defendant gave him some “chips” to look after for him, but he stated that the defendant wasn’t winning lots when he was with him.

115. Smith said that he left the roulette table around 2000 hours and went and played blackjack for 2 or 3 hours. He was apparently doing quite well and he was bought 2-3 rum and cokes while playing. Not long before he was told the defendant had been asked to leave the Casino, the defendant came over to him and asked for the return of the “chips”. He had a brief conversation with the defendant, and nothing stuck in his memory about the defendant at that stage, and he didn’t show any signs of intoxication.

116. In cross-examination Smith stated that when the defendant is intoxicated it is very obvious. He said the main indicator is that the defendant can almost doze off while he is standing up, without falling over. I note that this evidence is consistent with the evidence of McAdie.

117. Of all the witnesses called in the prosecution case, Smith was the one who was mainly drinking with the defendant. Accordingly, his evidence was that between 1600 and about 2000 (some 4 hours) the defendant consumed:

- 3 midstrength beers at the Keno Bar;
- 1 beer at Shenannigans;
- I midstrength beer while playing roulette; and
- 1 or 2 rum and cokes while playing roulette.

118. Accordingly, on Smith's evidence the defendant had 5 beers and 1 or 2 spirits (a total of 6-7 alcoholic drinks) over a period of about 4 hours that he was in his company. There was no suggestion that Smith or the defendant had consumed any food during this period of time, or had any water or soft drinks. I am satisfied that this quantity of alcohol would have had some affect upon the defendant.

119. The next witness called was David Pryce. He is a Superintendant of Police. He has been a police officer for over 20 years, and whilst he has known the defendant all of his career he has never worked for him. He also attended the conference at the Casino in August 2008.

120. Pryce made no mention of attending the Keno Bar after the conference ended on 15 August. He said he went home at about 1700 (but didn't say what he did before that). He then went to Shenannigans sometime between 1800 and 1830 and his main

purpose was to catch up with Parnell. He had 1 light beer and 1 diet coke at Shenannigans, and noticed that the defendant appeared to be drinking a beer there. He then gave the defendant and Smith a lift back to the Casino. He recalled the defendant ringing his wife while he was in Pryce's car, and he got the impression that the defendant was staying at the Casino, but didn't say what he heard to gain that impression.

121. Back at the Casino, Pryce was drinking soft drink and was keen not to get into a shout with anyone, and was talking with Parnell and Hofer. He said that Parnell was playing roulette and got a "huge payout" straight away, was "flush with money" and said he was going to have a "good night". If Parnell had consumed as much as he said he did at the Keno Bar, then I would have expected Pryce to have noticed that he was heavily intoxicated. He made no mention of any such observation, or indeed any adverse observation about Parnell. However, I bear in mind that the issue in this case was the level of intoxication of the defendant, not Parnell. Accordingly, that issue was not addressed directly in other evidence.

122. He did not specifically recall the defendant drinking at the Casino. He said that the defendant and Smith were talking together mainly. He was then talking to McAdie, Bravos and another (whose name I did not pick up clearly). Pryce left around 2100-2130 at the same time McAdie left. In cross-examination he said there was nothing about the defendant that concerned him.

123. The final witness called in the prosecution case was Kate Vanderlaan. She is a Commander in the Police, and has been a police officer for 30 years. She also attended the conference in August 2008, and attended the Keno Bar at the conclusion of the conference on 15 August. She said that she had a diet coke, and left at about 1815. She

said that she saw the defendant in the Keno Bar, but didn't see him drinking.

124. Ms Truman generally asked each of the prosecution witnesses who had known the defendant for years whether they had ever noticed anything unusual about the defendant. Although the same questions were not asked each time the general thrust of the evidence was that none of the witnesses asked had noticed anything unusual about the defendant's:

- Eyes (although there was some mention of redness);
- Balance;
- Walking/gait;
- Speech (although some noticed his speech had a bit of a drawl, or it was slow and deliberate);
- Powers of comprehension; or
- Hearing.

125. The prosecution case was then closed. I note that the prosecution case was silent as to what the defendant may have consumed, if anything, between the time Smith stopped drinking with the defendant (about 2000) and when the defendant is seen on ExP3 (about 2250) drinking what appears to be a spirit with coke.

126. At the conclusion of the prosecution case Mr Elliott made a "no case" submission. He relied upon the case of *The Queen v Everuss,* which was a ruling by Hampel J made on 17.6.87 in 87/574, as followed by the former Chief Justice Martin in *The Queen v Saunders* (action number 9821170 on 13.10.99), where Hampel J said:

> The question whether the accused can properly be convicted is a question of law, based though it must be on the judge's examination of the facts. But it does not depend on the judge's view of the credibility of witnesses or on the existence of competing inferences. It is concerned with whether the evidence is capable of proving the elements of the charge against the accused.
>
> In a case which depends on circumstantial evidence, the question must depend on whether, in the trial judge's view, such evidence is capable of excluding conclusions other than one of guilt.

127. Mr Elliott went on to submit (I hope I do his submission justice) that the charge is framed only with reference to "alcohol" when it could have alleged "or a drug". He said that by doing this the Crown case does not exclude the possibility that the observations made of the defendant could be explained by drug intake rather than alcohol intake. In addition, he submitted that the Crown evidence also does not touch upon whether the defendant's appearance and actions might be explained by tiredness or illness. He finally submitted that the defendant had no burden to introduce positive evidence, and it was at all times up to the Crown to lead evidence to rebut any reasonable competing inferences.

128. In relation to this submission, there clearly was no evidence before the court to suggest that the defendant had or might have consumed any drug prior to or during his driving of the motor vehicle. Accordingly, in my view, it was proper that this was not a part of the charge or the prosecution case. If the charge had included the words "or a drug", then an application to have these words severed at the end of the prosecution case would likely have been successful, as there was no evidence to support it. On the evidence at the completion of the prosecution case the ingestion of a drug was not a live issue.

129. Ms Truman in reply stated that there was direct evidence in the Crown case to show that the defendant had been seen drinking alcohol at the Keno Bar, at Shenannigans and at the Casino in the gaming area. In addition there was the evidence of Smith as to what the defendant had consumed while in his presence, plus the fact on ExP3 he is seen consuming a spirit at the time he is being asked to leave the Casino. Plus the evidence of Roos that the defendant had a strong smell of alcohol on his breath when she was talking to him. Plus Ms Truman sought to rely upon the observations of the defendant as shown in ExP3.

130. Finally, Ms Truman relied on the case of *Grayson v Crawley, Ex parte Crawley [1965] QdR 315* which was a decision of the Full Court. The judgement was delivered by Stable J (with whom Wanstall and Lucas JJ agreed). In that case it was argued that the magistrate failed to give due effect to a reasonable hypothesis consistent with the evidence and with innocence that the defendant's conduct was not due to liquor and/or drugs but to some other cause. The facts were that the defendant was heard by police speaking loudly as if arguing and unsteady on his feet. He was then seen to enter a bar with others and heard to say "we'll shake hands and have a beer". About an hour and a quarter later the defendant was seen driving by police, when he overtook their vehicle and then veered in causing them to need to veer and brake to avoid a collision. He was then seen to drive on the incorrect side of the road a number of times almost colliding with a number of parked cars. When apprehended he was noted to be unsteady on his feet and was holding onto the open door of his vehicle; his breath smelt of liquor and his speech was slurred. He was arrested and examined (for about 25 minutes) by a doctor about 25 minutes later. The doctor noted that the defendant: was unable to stand upright without wobbling; had normal blood pressure; had an

abnormally raised pulse; was not able to focus on an object 10 inches in front of his nose; had gross nystagmus on looking from left to right; and there was evidence of muscular incoordination. Accordingly, the doctor expressed the opinion that the defendant was incapable of having proper control of a motor vehicle. With the background of those facts Stable J referred to a decision of Stanley J in *Noonan v Elson, Ex Parte Elson* (supra) and went on to say at pages 322-323 of his judgement:

> Stanley J recognises a layman's capacity to observe, the, as it were, dawning of abnormality, its development to a stage when the drinker is obviously not fit to be in control of a vehicle, and to the further stage of hopeless intoxication. So, if the portion picked from his judgement is put back into its context it is apparent that it refers to the first stage, the borderline case, and not to the stage of obvious unfitness or to the stage of full intoxication. If a thing is "obvious" it is perfectly evident without need for further proof. To take an extreme and, I trust, hypothetical illustration, if one sees a man who is in charge of a car, smelling of liquor, trying clumsily to feed a parking meter with a sixpence his clumsiness may or may not be attributable to his intake of alcohol. He may be naturally clumsy, the sixpence may be bent, the meter may be clogged. But such charitable alternatives are hardly likely to come to mind if one sees the same gentleman trying to feed the meter with a bank note. In the present case the argument put forward for the appellant leaves no room for distinction. In order to prove its case against the hypothetical motorist the prosecution would have to prove affirmatively, in addition to other matters, that in his normal state or condition he did not feed parking meters with bank notes. That type of proposition is, to me, ridiculous.

131. In the instant case the prosecution has introduced evidence as to the defendant's normal state or condition. There is also some evidence as to what signs the defendant shows when he is under the influence of alcohol. In my view, it is not necessary for the prosecution to expressly negative every hypothetically possible explanation that someone might come up with to possibly explain some or all of the defendant's appearance at the time in question. For example, perhaps

some mild form of stroke (or middle ear problem, or some other unknown medical condition) might explain a lack of balance or co-ordination. It is not reasonable or necessary for the prosecution to somehow (and it is unclear how they could do it) deal with all such hypothetical matters. At no time was the suggestion of any "drug" raised with or by any witness. As noted earlier from the decision of *O'Connor v Shaw* (supra):

> It is recognised that there are indicia being certain abnormalities of behaviour and certain physical signs which evidence when a person who has ingested alcohol had become influenced by it. If there is accepted evidence of such manifestation of these indicia the court is entitled to conclude, in the absence of evidence to the contrary, the indicia are the effects of alcohol and that the driver, no matter what his tolerance to alcohol, is under its influence

132. At the end of these submission I ruled that there was a case to answer to the charge. In my view, there was evidence upon which the defendant could have been found guilty.

133. The defendant elected to give sworn evidence in his own defence. He gave direct evidence to deny that he was affected by alcohol as alleged. He also expressly denied that what was seen of him in ExP3 was as the result of alcohol. He suggested that it was because he was tired. In doing so, he has, in my view, placed his credibility in issue.

134. The defendant is a Superintendant of Police. He resides in Darwin and apparently has a house in Wanguri, on which he was doing extensions/renovations for the two months prior to the relevant time. He said in July 2008 he was working in Katherine and coming home to Darwin every weekend. He said that every weekend he was working on his house and suggested he was working from 0600 until dark (so as not to be unreasonable to neighbours).

135. The defendant agreed that he attended the conference in Darwin for each of the 3 days that it was on in August 2008. He said each lunch break over the 3 days he went off to buy tools or items that he needed to work on his house. He said that he did that on Friday the 15th of August as well. He had his car at the Casino, and on the 15th he had items he had purchased in the boot and back seat of the vehicle after he returned from his lunch-time shopping trip. The defendant was not asked, and therefore did not tell me, whether he had any food during his lunch-break, or indeed at any time during this day. None of the witnesses (including the defendant) made any mention of consuming any food from 1600 until 2250 that day. The evidence is therefore silent as to what the defendant may have eaten. But given the defendant's evidence his opportunity to get food would have been limited.

136. The defendant said that he found the conference draining, and at that stage his whole life was busy and draining.

137. The defendant was then asked some questions about specific parts of his body. In relation to his eyes the defendant said that he had "pterygium" (I have looked up this word in "*Gould's Medical Dictionary"* in order to get the correct spelling, but I have not read the entry therein as, in my view, this is a matter that was properly the domain of expert evidence) in both of his eyes. No evidence was called from any person qualified to give this evidence to support what the defendant had to say. As such, I am unable to give this evidence any weight.

138. However, the defendant is able to say what problems, if any, he has noted about his eyes. In that regard the defendant said that his eyes are always red. I did not notice this when he was giving evidence, and I was not invited by Mr Elliott to approach the defendant in the witness

box to make any close observations of the defendant's eyes. In addition, Hofer, Gordon, Proctor, McAdie, Smith and Vanderlaan had not noticed anything about the defendant's eyes. However, Gordon said that the defendant did have bloodshot eyes around the lower lid, redness; and Smith (when asked if he had noticed the defendant had red eyes) said words to the effect that a lot of his friends had red eyes and he just assumed that he'd had a big night the night before. I am not able to positively find that the defendant does have any particular redness in his eyes. Even if he did, this would not explain the additional observation by Roos that his eyes were "glassy". In ExP3 there were some closer observations of the defendant's face (when he was with Parnell near the smoke machine), and his general facial features and eyes, suggested to me that he was affected by alcohol.

139. The defendant went on to say that he has "Cleareyes" with him every day and he uses eye drops 4-6 times a day to clear up the redness and soothe the eyes. None of the witnesses made any reference to ever seeing the defendant have or use any eye drops, but that is no basis for rejecting this part of the defendant's evidence. I accept that the defendant may have red eyes from time to time, and that he uses eyedrops.

140. The defendant went on to say that he had arthritis in the left hip. Again no evidence was called from any person capable of giving an expert opinion to support this evidence. He said he first noticed a problem about two years before and his symptoms were pain down his left leg. He said at times he had no pain. None of Hofer, Proctor, McAdie, Smith or Vanderlaan had noticed anything about the defendant's gait. In addition, McAdie and Vanderlaan hadn't noticed anything about the way the defendant walked. In effect, none of the witnesses had ever noticed anything to suggest that the defendant walked other than normally. Having watched ExP3 numerous times

there is nothing to suggest that the defendant is having any difficulty with his left hip, left leg or any part of his lower body. The defendant is not limping or favouring any side of his body, and there is nothing to suggest any possible physical explanation for his manner of standing and walking as shown in ExP3. I reject this beyond all reasonable doubt if it is put forward as any possible explanation for the defendant's movements as shown on ExP3.

141. Finally, the defendant said that he has a substantial hearing loss at the high end. Again no expert evidence was called to support this. In my view the defendant can say he has noticed a difficulty with his hearing, and can say what he has noticed, but the initial evidence he gave is objectionable and I give it no weight.

142. The defendant went on to say (as he is capable of doing) that he has noticed that if he is in a crowded area or there is background noise, he doesn't pick up words. In addition, he doesn't hear high pitched noises like his watch alarm and his wife has to tell him to turn it off. I have no reason to not accept this evidence, and I do accept it. This evidence does provide a satisfactory explanation as to why the defendant is seen in ExP3 to bend down to place his ear closer to Roos when she is talking to him in the early part of ExP3.

143. The defendant confirmed that he went to the Keno Bar at about 1600 on 15 August 2008. He knew he had his car at the Casino, and he knew he had items in it, and he wasn't planning on leaving his car there. He was planning to take his car home. With that in mind he said he had planned to have 1 drink and then go, but he said he was persuaded to stay (although he did not say who by). Having changed his plans, he did not say what his new plans, if any, were.

144. The defendant said that he had 2 midstrength beers at the Keno Bar and he recalled a third schooner glass being provided to him. He said

that he didn't drink all of the third glass, and he may have had half of it (although it wasn't clear why this occurred). This evidence effectively mirrors the evidence of Smith. However, Smith didn't suggest that the defendant hadn't finished any of the beers that he had, and this wasn't put to Smith in cross-examination. Accordingly, in my view, this aspect of the defendant's evidence is likely to be either a recent memory or a recent invention.

145. The defendant then went to Shenannigans with Hofer, and had no alcohol on the way. He said that he stayed at Shenannigans for about 30 to 45 minutes and had 1 beer while he was there. Again it was a schooner glass. He assumed that he got a midstrength beer as he had stated that he didn't want a "heavy". This again mirrors the evidence of Smith.

146. The defendant was then driven back to the Casino by Pryce, and he had nothing to drink on the way. Despite being present in court while Pryce gave his evidence, the defendant did not give any evidence to suggest that Pryce was mistaken concerning the phone call that he said he overheard. Accordingly, it appears to be the case that by the time the defendant left Shenannigans he had decided that he was going to remain at the Casino (but for how long is unclear).

147. Upon arriving back at the Casino the defendant started playing roulette. Apparently the defendant had a "system" which he used when playing roulette. He said that he didn't like to leave the table while he was playing (although he did say he left once to go and get some "chips" off Smith that he had given him). The defendant went on to say that while at the roulette table he did not leave to go to the bar to buy drinks, and he didn't order any drinks from people who came around. He said he was at the table to win money.

148. The defendant said that after his return to the Casino he had 2 midstrength beers, and Smith got these both times. He also said that Smith bought a “bundy and coke” as well, which is a drink that he doesn’t particularly like. Accordingly this evidence again mirrors the evidence of Smith as to the quantity he consumed, but not the type of alcohol (as Smith said they had 1 beer, and then 1 or 2 Bundy and cokes).

149. He then said that much later SP walked past and handed him a “bundy and coke”, and this was about 10 to 15 minutes before he was asked to leave. The defendant went on to say words to the effect that “I think the drink in the video is the one SP gave me”. His evidence in regard to the last drink he had was clearly less than definite.

150. Accordingly, on the defendant’s evidence he drank:

- 3 midstrength beers at the Keno Bar;
- 1 beer at Shenannigans;
- 2 midstrength beers while playing roulette;
- 1 rum and coke while playing roulette with Smith;
- Nothing for about two or more hours; and
- 1 rum and coke just before being asked to leave at 2250.

151. This makes a total of 8 drinks (although he says he didn’t drink all of the last beer at the Keno Bar, which evidence I do not accept). Accordingly, on the evidence of the defendant during the period of 2 to 3 hours, that no other person gives evidence of having seen him have a drink, he says he had none. This may be truthful, but it may not be. It may be very convenient.

152. In evidence in chief it was put to the defendant that he seemed to be drinking the drink shown in ExP3 quickly, and he was asked why. The defendant's explanation was that he was tired and ready to leave. I am unable to accept the defendant's evidence that he was "ready to leave". I find that this is inconsistent with my observations of the defendant on ExP3. Rather than being "ready to leave" his body language and actions as seen on ExP3 leave the opposite impression. I reject this part of the defendant's evidence.

153. Also in examination in chief the defendant was asked about the change in his gait as seen on ExP3. The defendant suggested that he might have moved to avoid people, but he had no specific recollection. In cross-examination Ms Truman replayed portion of ExP3 (effectively the portions from 22:54:03 until 23:01:04) to the defendant and the following exchange then occurred:

> Q – Are you still maintaining that the reasons for the changes in your gait were to avoid coming into contact with certain things?
>
> A - Yeah, and sloppiness. Laziness I guess. Tiredness. Physical exhaustion.

I am unable to accept this evidence and reject it. Whilst at times there were other persons, or objects, in the vicinity of where he was walking I do not accept this as a plausible explanation for his manner of walking in an unsteady and unbalanced manner.

154. The defendant said that he recalled walking down the path to his car, and he was feeling absolutely exhausted. I accept that the defendant may well have been tired, but I am unable to accept that this can or does explain his erratic and unsteady method of walking. In my view, his unsteady gait is wholly explicable by being adversely affected by alcohol. It is not in my view explicable by being tired (or even exhausted). I do not accept the defendant's evidence that he was

"exhausted" as being honest evidence. If he was so "exhausted" as he says then it is inconsistent with his reluctance to leave the Casino (as I find that he was) and his going into the Marquee Bar (after being asked to leave the Casino, at a time he says he was "ready to leave" anyway). I find that the defendant's actions as observed on ExP3 are inconsistent with the defendant's sworn evidence before me, and I reject this portion of his evidence as not being truthful.

155. Further in evidence in chief the defendant was asked if he was sure of what he had to drink, and he said that he was. It seems to follow from the defendant's evidence that he had nothing at all to drink from about 2000 (as this was when Smith said he went to play blackjack, but he may have been a little out with the time, and it may have been up to 2030) until about 2240. None of the witnesses called to give evidence said that they saw the defendant have a drink of alcohol during this period, but the defendant was not with anyone in particular. He was playing roulette. Some of the police present saw the defendant playing roulette from time to time, but none of them appear to have stayed for very long near that table. The majority of them did not take particular attention of the defendant. They had no reason to do so. The only person who did appear to pay some attention to the defendant at the roulette table was McAdie, and his impression was that the defendant appeared intoxicated.

156. When Roos was talking to the defendant she said that he appeared to not understand why he was being asked to leave, and seemed to think he had done something wrong. The defendant said in his evidence that he asked Roos to explain the reason he was being asked to leave, as he didn't believe the reason he was given. He asserted that the reason he was asked to leave was because he was winning a lot. He said he had a stack of chips, up to his arm. I have difficulty with this evidence. Smith said in his evidence that the defendant had given

him some “chips” to look after for him earlier in the night. It is also clear that the defendant had retrieved those from Smith sometime before he was asked to leave. He clearly didn’t retrieve those on his way out, as he is at the roulette table (swaying and drinking) with “chips” on the table (as he has to recover them) at the time he is asked to move away from the table to speak to Roos. If he truly was winning a lot, then there would have been no need for him to retrieve the “chips” that Smith was holding at that time. Also, as noted earlier, when the defendant gathered up his “chips” he was able to do so in his left hand (without having to use two hands, and without having to put any “chips” into his pockets). He may have already had some “chips” in his pockets, but this is not obvious or apparent from ExP3 when viewed as a whole. The defendant said he didn’t cash his chips in that night. That appears to be correct. I am unable to accept the defendant’s evidence that he truly did win a lot this evening. I do not accept the defendant’s evidence that he had “a stack of chips up to his arm”. I do not accept that any alleged winning was any part of the reason that the defendant was asked to leave. The defendant’s stated thought processes are consistent with those of a person adversely affected by alcohol, who is confused.

157. In evidence in chief the defendant said that he felt well within his means, and felt more than capable of driving home (despite saying he was exhausted). He said there were no events in the car on the way home, and he just drove home. As noted in the authorities that I referred to earlier in my decision, the fact that a person does not have an accident is not determinative. In this case I got to see (in ExP3) a brief aspect of the defendant’s driving and it was not impressive, and far from perfect. He turned right (towards the tennis courts) while a car was on his right, without indicating. He failed to stay to the left of

two unbroken lines as he approached the Casino access road. He turned right towards Gilruth Avenue, again without indicating.

158. In addition, given the evidence of Roos, which evidence I accept, and my own observations from ExP3 I am unable to accept the defendant's evidence that he "felt more than capable of driving home". If that was his true belief (and I do not find that it was) then he was seriously wrong. That is nothing particularly unusual with drink drivers. As noted earlier their decision making processes are adversely affected, and their likely risk-taking increases.

159. I consider ExP3 to be very cogent and important evidence in this case, as it has allowed the court to see the defendant and make it's own observations of him, over a reasonable period. Thus, the court does not have to rely solely upon the observations of others. The court is able to assess the evidence of the witnesses against the objective reality of ExP3. The defendant has seen ExP3 and yet he maintains (on his oath) that he was not adversely affected by alcohol to the extent that he was not capable of exercising effective control of his motor vehicle. I am unable to accept his assertions or evidence as truthful or honest in this regard. It is one thing for a person to have a different memory or recollection to others, but in this case the defendant had the clear objective evidence of ExP3 available to him. He should have been embarrassed to have seen himself on it and his manner of movement. In not only maintaining his plea of not guilty in the face of ExP3, but then giving sworn evidence to try and water down the objective reality as shown on ExP3, the defendant has lost his credibility as a witness of truth before me.

160. I do not accept the defendant as a witness of truth, and generally reject his evidence. It is clearly possible that the defendant did have more to drink during the two hours or so from when Smith went to play

blackjack and ExP3 commenced. I do not believe or accept the defendant's evidence that he did not. But there is no evidence from which I can find that he did in fact consume alcohol, and if so what he had to drink, or how much. I cannot speculate.

161. On the evidence as a whole it is clear, and I find, that the defendant started drinking alcohol (beer) shortly after 1600 at the Keno Bar at the Casino. He then went to Shenannigans (between about 1830 and 1930 – ExP1) where he had further alcohol (beer). He then returned to the Casino where he went to the gambling area and had more alcohol (both beer and spirits). By 2250 (when he was approached by Roos) he was drinking spirits and had a strong smell of spirits on his breath. The amount of alcohol and the type of alcohol that the defendant consumed between 1600 and 2250 on the 15th day of August 2008 is not able to be accurately estimated on the evidence before me (but it was at least 8 glasses, and not the 7 that the defendant said he had in cross-examination).

162. I accept the evidence of Barrow, Cooper, McAdie and Roos as to their observations and views as to the defendant's state of sobriety. That evidence is consistent with and supported by how the defendant appeared in ExP3. On the evidence the defendant may have been feeling tired at the time he commenced drinking; there was no evidence to suggest that he had any food (nor was there any evidence to suggest that he had not) leading up to or whilst he was drinking; he was observed to be unsteady on his feet (by witnesses and in ExP3); he was observed to be swaying (by witnesses and in ExP3); he was observed to be "messy" with the placing of his bets; he was observed to be leaning on the roulette table; he was observed to have glassy eyes; he was observed to have a strong smell of alcohol (spirits) on his breath; and he was observed by me in ExP3 to act as earlier described. I find that all this evidence is consistent with the defendant

being adversely affected by alcohol. There was nothing in the evidence to suggest that any other explanation was plausible or reasonably open. There was no evidence to suggest even the possibility that the defendant may have taken any medication or drug at any relevant time. There was no evidence to suggest that the defendant suffered any health incident at the relevant time. The only suggested explanation (other than alcohol) was tiredness and a left hip problem and a red eye problem. I have specifically rejected these as a possible explanation (either alone or in combination with each other) for the defendant's state when he decided to drive his motor vehicle. At best, in my view, tiredness may have increased the effect of alcohol upon the defendant, but this is a further good reason why he should not have driven. His lack of steadiness and co-ordination (as observed by others and by me on ExP3) was such that he was in no condition to drive and he was, in my view, not capable of having proper control of his motor vehicle.

163. It is clear, and I find beyond all reasonable doubt, that the defendant was under the influence of alcohol to the extent that I observed in ExP3 (and as described by the four witnesses above mentioned), and that as a result of his alcohol intake he was incapable of having proper control of his motor vehicle.

164. On the evidence as a whole I find beyond all reasonable doubt that the defendant is guilty of charge 1.

165. I will hear from the parties on the question of penalty. Having been found guilty after a fully contested hearing, and as I have disbelieved the defendant, he is not entitled to any discount that might have been applicable for an early plea of guilty.

Dated this 25th day of June 2009.

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Daynor Trigg SM
STIPENDIARY MAGISTRATE