CITATION: *Cahill v Benjamin* [2010] NTMC 010

PARTIES:	LEIGH CAHILL
	v
	MESEKE BENJAMIN
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
FILE NO(s):	20904908
DELIVERED ON:	4 February 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	12 October 2009
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – *Traffic Act* – Fail to supply sufficient sample – defence of reasonable grounds for failure to supply - drive disqualified – sudden and extraordinary emergency
Hales v Psaras [2003] NTMC 024
Johnson v The State of WA [2009] WASCA 71
CTM v The Queen (2008) 82 ALJR 978
Traffic Act ss 29AAE, 31(1), 29AAU
Criminal Code s 33

REPRESENTATION:

Counsel:

Complainant:	Mr T Smith
Defendant:	Mr R Welfare

Solicitors:

Complainant:	Police Prosecutions
Defendant:	Welfare & Associates

Judgment category classification:	A
Judgment ID number:	[2010] NTMC 010
Number of paragraphs:	28

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

No. 20904908

[2010] NTMC 010

BETWEEN:

LEIGH CAHILL
Complainant

AND:

MESEKE BENJAMIN
Defendant

REASONS FOR DECISION

(Delivered 4 February 2010)

Ms Sue Oliver SM:

1. The defendant Meseke Benjamin, has pleaded not guilty to two charges under the *Traffic Act* alleged to have been committed on 8 February 2009. The first charge is one of failing to provide a sufficient sample of breath for analysis contrary to s 29AAE and, secondly, that being a person disqualified from holding a driver's licence drove a motor vehicle contrary to s 31(1) of the *Traffic Act*.

2. There is no dispute that the defendant was driving a vehicle, said to belong to a friend. He was stopped by police who were driving an unmarked vehicle on Trower Road after they observed it drift in the lane and the indicator being put on to turn left and then move lanes to the right. The defendant in his evidence said that he had intended to turn on the windscreen wipers but in that vehicle the indicator stick and windscreen wiper stick were reversed from the normal configuration. When asked where he was going he told the officers that he was going to the hospital. Constable Dudson, who gave evidence, was sceptical about this because the

defendant was not travelling in the direction of the hospital but seemingly away from it. Constable Dudson said that it was not raining.

3. The defendant was breath tested at the roadside and, as a result of the indication of blood alcohol produced, was arrested for the purpose of a breath analysis. He was not however showing any signs of intoxication. His speech and walking were "fine". He was taken to the Darwin Watchhouse where the other officer, Constable Burns, attempted to conduct the breath analysis. A Form 2 under the Traffic Regulations, ("Certificate on refusal or failure to submit to or provide a sample of breath sufficient for completion of breath analysis" ("the certificate")) was tendered. The certificate is prima facie evidence of the matters stated in the certificate and the facts on which they are based (s 29AAU).

4. Closed circuit television footage of the defendant both in the breath analysis room ("the breathalyser footage") and at the charge counter was tendered. There is no audio attached to the breath analysis room footage but audio is present on the charge counter footage.

5. Constable Dudson was not able to give evidence as to what occurred during the attempt to obtain a breath analysis as he was not present in the room at the time. Constable Burns was not called by the prosecution to give evidence of those events.

6. The certificate records the following relevant matters:

> 2. I asked if the subject was suffering from any illness and the subject responded "Yes my left hand side is real sick".
>
> 3. I asked if the subject was suffering from any disability and the subject responded "No".
>
> 4. I asked if the subject was suffering from any injuries and the subject responded "A car accident a long time ago".

5. I asked if the subject was taking any tablets, drugs, insulin or medicine and the subject responded “Pain tablets, I don’t know the name”.

The subject then said “Yes”

and the subject placed mouthpiece in mouth, exhaled for approximately two seconds and then tried to suck on the tube.

7. The defendant gave evidence. He was born in Sudan and gave evidence of the extreme circumstances that involved his family and how he went eventually to Botswana and from there to Australia as a refugee. On the day in question he got up at 5.00am to go to work and worked until 2.00pm. He went home and some people came to visit him. They came with some beer and a lady who was with them brought a bottle of champagne. The defendant was persuaded to have a Carlton Cold and then he had a sip of the champagne before having another beer. After that he began to experience pain in his chest down through his left abdomen to his testicle. He began experiencing pain when he tried to breath. He declined an invitation to go out with his friends, took Panadol, and went to bed. His account of what he drank and his becoming ill and going to bed was confirmed by Mr Abshir Elmi who was one of the friends present. Mr Elmi also confirmed that the alcohol had all been consumed while the defendant was sleeping. When the defendant woke he took more Panadol. He went back to sleep and woke about 9.00pm. When he breathed in and out he felt pain. He tried to sleep again. Around midnight he tried to call a friend but only got the “personal message”. He decided that he should go to hospital and decided to take the car of the lady who had been there earlier. He decided not to wait for an ambulance because there had been a previous occasion when a neighbour had called an ambulance and it took four hours. I accept his evidence that it was not a light decision because his loss of licence had made work and study very difficult and he had a pressing need to continue his work in order to support his siblings who are in very difficult circumstances in Uganda and rely on him for their financial support.

8. The defendant said that he drove towards the hospital and when almost there realised that he did not have his wallet and believed that he would need his Medicare card to get treatment because in the past it had always been requested in advance of treatment. He said he thought this was the law in Australia that to go to hospital you need a Medicare card. Near Hungry Jacks he turned and was driving back to his residence in Nightcliff to retrieve his wallet. It was on this journey that he was stopped by the police. The defendant's evidence was that Officer Burns was aggressive towards him and swore at him. He agreed that he became angry when arrested.

9. The defendant said that in the breathalyser room he was asked "like 'have you been sick'" and he said "yes" and when asked what happened he told him " 'I have the left side of my chest paining and my lower abdomen and it is going up to my testes' but he doesn't want to listen to that". This account is consistent with the physical movements that can be seen on the breathalyser footage. It is also consistent with what is noted on the Certificate, albeit in abbreviated terms, "my left side is real sick". In accordance with s 29AAU the latter is prima facie evidence that the defendant expressed that he was in pain. I accept the defendant's account that he told Constable Burns that he was presently experiencing pain.

10. He was then asked to breathe into the breathalyser and "I breathe – I real honest I breathe and I feel the pain – the pain come and although it was paining I wanted to give him the necessary sample to show him – to hold the breathalyser till complete. It pained too much." He asked if he could give another sample but said the officer said "No I explain it to you, you didn't do it, you're going to the cell". He said he then asked if there was another means of testing but that the officer didn't want to listen. In cross examination the defendant denied that he sucked on the tube as is described in the Certificate.

11. It is clear both from the defendant's evidence and what can be seen and heard on the footage at the charge counter that he became angry and abusive at that point. Although not immediately after his release the defendant eventually was able to attend the hospital with the assistance of a friend where tests were performed on him. A medical report dated 9 February 2009 from the Emergency Department of the hospital was tendered along with other records that indicate that the defendant has a long standing history of unresolved incidents of pain including problems following from Bilharziasis, a parasitic infection.

12. Although the Emergency Department made an initial diagnosis of Cardiomegaly this does not appear to have been confirmed by a subsequent echo cardiogram on 13 February. However the report does indicate that he was not well when seen in the Emergency Department. He was hypertensive and pain in the regions that he indicated during the attempted breath analysis was present on examination.

Failure to provide a sufficient sample

13. Section 29AAE provides for the offence of failing to provide a sample of breath sufficient for the analysis to be carried out. Subsection (6) provides that it is a defence to a prosecution for a relevant offence if the defendant satisfies the court that:

> (a) it would have been detrimental to the defendant's medical condition to have submitted to a breath analysis at the time the person was required to do so; or
>
> (b) the defendant had other reasonable grounds for failing to submit to a breath analysis.

14. It is submitted that because pain is an indication of detriment to medical condition, and the evidence establishes that the defendant was in pain, that he has established the defence in s 29AAE(6)(a). As Magistrate Blokland (as she then was) observed in *Peter William Hales v Charles Psaras* [2003]

NTMC 024 "It is easier to conceive that part of s 20(2) [*the equivalent provision to s 29AAE(6)(a)at the time*] to be applicable to the person who expressly refuses to submit because of fears of medical detriment".

15. However that limb of the defence may be available also on a failure to provide a sufficient sample. I do not think however that that limb of the defence is made out on the evidence. There is nothing to suggest that the continuation of breathing into the tube would have been detrimental to his medical condition. Pain may be a symptom of detriment but is not conclusive of it.

16. In any event, as I understood the defendant's evidence, it was that he tried to provide the sample but was unable to do so because of the pain he was experiencing. The issue then is whether the second limb of the defence applies, that is, whether the defendant had other reasonable grounds for refusing or failing to submit to a breath analysis. I note that although the defence provision refers specifically to a refusal or failure to **submit**, the defence is expressed to apply to the "relevant offence" under the section which is expressed as being a "fail[ure] to provide a sample of breath **sufficient** for the analysis to be carried out". In my view it is intended therefore to apply both to a complete failure to submit and to a failure to supply a sufficient sample. The defendant bears the onus on the balance of probabilities of establishing that he did have such reasonable grounds.

17. The evidence disclosed that the defendant informed police who apprehended him at the roadside that he was going to hospital. The certificate records his stating that he was in pain immediately before the analysis was attempted. CCTV footage is consistent with the description he gave. CCTV footage and audio immediately after at the charge counter confirms his same complaint. He attended at the hospital the next day and the tendered report is confirmatory of pain and ill health at that time.

18. In my view the defendant has discharged the onus and I am satisfied on the balance of probabilities that he was unable to complete the test because of the intervention of pain when he was breathing into the breathalyser apparatus.

Drive Disqualified

19. A certificate under s 199 of the *Motor Vehicles Act* was tendered which shows that the defendant was disqualified from driving from 29 September 2007 to 29 September 2012. There is no contest that at the time of this incident that the defendant was under a driving disqualification.

20. Unlike the majority of offences under the *Traffic Act*, the offence of drive disqualified under s 31(1) is not a regulatory offence (see s 51). The excuse of **s**udden and extraordinary emergency pursuant to s 33 of the Code may therefore have application. That section provides that a person is excused from criminal responsibility for an act or omission done or made under such circumstances of sudden and extraordinary emergency that an ordinary person similarly circumstanced would have acted in the same or a similar way.

21. The excuse of sudden and extraordinary emergency is a feature of the Criminal Codes and bears some relationship to the common law defence of necessity. The Northern Territory provision differs from the other Codes in that they refer to a sudden **or** extraordinary emergency whereas the NT Code uses the conjunctive "and". I have not been able to find any authority that has considered whether there is some differentiation between the NT Code provision and that of the other relevant jurisdictions. In *Johnson v The State Of Western Australia* [2009] WASCA 71 at the Court of Appeal (WA) Buss JA said

> "It has been suggested that a 'sudden emergency' is 'one which comes upon the accused unexpectedly, catching her or him off-guard'

whereas an 'extraordinary emergency' may also be unexpected or sudden but must be a situation of 'extreme gravity and abnormal or unusual danger"

22. It seems to me that the use of the conjunctive indicates that the legislature intended that **both** circumstances of emergency must be present for the defence to be successfully raised. Where evidence is successfully raised pointing to the s33 defence, the burden of negativing the defence rests upon the prosecution. See *CTM v The Queen* (2008) 82 ALJR 978.

23. The issue is to be approached in this way. On the version of the evidence most favourable to the defendant, can the court be satisfied beyond a reasonable doubt that

(a) The defendant's act of driving was not done under circumstances of 'sudden and extraordinary emergency' or at least that the defendant did not have an honest and reasonable, but mistaken, belief that such an emergency existed, and

(b) That it did not involve such circumstances that "an ordinary person similarly circumstanced would have acted in the same or a similar way."

See *Johnson v The State Of Western Australia* at [128]

24. As I have mentioned the defendant gave evidence of the terrible circumstances of his family in Sudan, including the killing of both his mother and father in separate incidents, and his separation from his siblings. After he arrived in Australia he was with assistance eventually able to locate them in Uganda. They remain there in difficult circumstances dependent on Mr Benjamin for their education and day to day living. Mr Benjamin is both studying and working 7 days a week in order to improve his situation for the benefit of his remaining family. He exists on minimal money himself in order to send as much as he can for their support. He has had ongoing health problems which have been difficult to diagnose and treat. His

evidence was that on the day in question he could get no relief from the pain that had beset him. His evidence was that he had reached a state of distress.

> "I say even if this is going to kill me at least I have to get next to the hospital so I can die. Maybe they can fix it up before anything gets worse. Then I found the key. I was honestly not going to drive given the fact that all the time, I lost this licence, it has made my life worse than anything I can hardly sometimes…But the reason I got the keys – that I stay alive so I can be able to keep their [his siblings] life going."

25. His evidence was, because the defendant's English though good is still at least his second language, somewhat disjointed. However I accept that he was clearly conveying a high state of anxiety that he might be dying and if he did his siblings would be left without any real support in Uganda. He was desperate to seek medical assistance to prevent that occurring. He sees their lives as dependent on his. It was in my view an honest and reasonable, though mistaken belief on his part that a sudden and extraordinary emergency that required him to drive himself to hospital had arisen.

26. It was not perhaps logical. Another person might have called an ambulance and waited for that assistance. Another person might not have gone back for his Medicare card when he realised that he did not have his wallet. But it is not a question of what another reasonable person would do but rather whether an ordinary person similarly circumstanced would have acted in the same or a similar way. Making that assessment includes looking at the defendant's background and circumstances. He is a refugee to this country from a highly traumatised background with ongoing medical problems and the anxiety of providing the only pathway to the future for his siblings who remain in Uganda. I cannot exclude that a similarly circumstanced person in the situation he found himself in that evening would not have made the same decision in order to get medical treatment.

27. I find that the prosecution have not discharged the onus of disproving the excuse of sudden and extraordinary emergency pursuant to section 33 raised on the evidence.

28. The charges are dismissed and the defendant discharged.

Dated this 4th day of February 2010.

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Sue Oliver
STIPENDIARY MAGISTRATE