CITATION: *Police v Whitlam* [2010] NTMC 019

PARTIES:	Brett Justin Verity v Adam Russell Whitlam
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Court of Summary Jurisdiction
FILE NO(s):	20923786
DELIVERED ON:	24 March 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	18th December 2009 & 25 February 2010
JUDGMENT OF:	Ms Fong Lim

CATCHWORDS:

Crime – Breath Analysis – Failure to supply sufficient sample – reasonable grounds for failure – section 29AAE (8)(b) Traffic Act
Crime – intoxication – incapable of control of motor vehicle – section 29AAA(1)(a)
Crime – Practice and Procedure – Voir Dire – finding of fact – apprehended bias

Fry v Jennings [1983] 25 NTR 19
Furnell v Betts [1978] 20 SASR 300
Fitzgeradl v DPP [1991] 56 A.Crim. R 262
Psaras v Littman [2006] 18 NTLR 189

Browne v Dunn [1893] 6R 67
R v Costello CCA (NSW) 15 December 1995, unreported, no 060114/95

REPRESENTATION:

Counsel:

Complainant:	Mr Ledek
Defendant:	Mr McGorey

Solicitors:

Complainant:	Director of Public Prosecutions
Defendant:	NAAJA

Judgment category classification:	C
Judgment ID number:	[2010] NTMC 019
Number of paragraphs:	49

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

No. 20923786

BETWEEN:

BRETT JUSTIN VERITY

Complainant

AND:

ADAM RUSSELL WHITLAM

Defendant

REASONS FOR JUDGMENT

(Delivered 24th March 2010)

Ms FONG LIM SM:

1. Whitlam is charged with two charges: driving under the influence of alcohol to such an extent as to be incapable of having proper control of a vehicle (section 29AAA(1)(a) Traffic Act) and failure to provide a sufficient sample of breath for analysis (section 29AAE Traffic Act).

2. I have previously ruled the breath analysis certificate and evidence of the breath analysis operator was admissible on voir dire (see Police v Whitlam [2010] NTMC 012).

3. Mr Whitlam was arrested for driving under the influence of alcohol and failure to provide a sufficient sample for breath analysis. The arresting officer Acting Sergeant Kidney attended the Beachfront hotel at closing time on the day in question as part of his duties as shift supervisor. He was talking to the security officer at one of the doors of the premises when Whitlam and another walked passed him into the carpark. He observed

Whitlam and his friend both to be unsteady on their feet. A little while later he observed Whitlam driving out of the carpark.

4. Kidney followed Whitlam's vehicle and says he noticed it swerving across the centre line of the road. He followed the vehicle activated his lights and Whitlam turned into Rossiter street to pull over to the kerb.

5. When Kidney approached the vehicle and requested that Whitlam participate in a roadside breath test he was not satisfied with Whitlam's effort to provide a sample. Kidney arrested Whitlam and handed him over to the other two officers who had arrived at the scene in a Police wagon. Those officers, Krepapas and Garland, then transported Whitlam to the Police station where Krepapas required Whitlam to undergo a breath analysis. The result was Whitlam failed to supply sufficient sample and was charged accordingly.

6. The court heard evidence from Kidney, Krepapas, Garland and the Whitlam.

7. There is no dispute that Whitlam was the driver of the vehicle stopped by Kidney nor that he was unable or unwilling to provide a sufficient sample at the roadside. There is no dispute that he had been drinking alcohol over a 4 hour period. What is in dispute is that he was intoxicated to a state that rendered him incapable of controlling his vehicle. Further in answer to the charge of failure to provide sufficient sample Whitlam alleges he had reasonable grounds for his failure and that is he did not receive sufficient instruction on how to provide a sufficient sample.

8. To find Whitlam guilty of both charges I must be satisfied beyond a reasonable doubt that Whitlam was so intoxicated he was incapable of controlling a vehicle and that he was given sufficient instruction on how to take the breath analysis test yet he still failed to supply a sufficient sample of breath for analysis.

9. **Preliminary issue:** On the 9th of March 2010 counsel for the Defendant submitted that because my prior ruling on voir dire had included a finding of

fact beyond a reasonable doubt that Krepapas had given sufficient instructions I should not continue to decide the ultimate issue because of a reasonable apprehension of bias. The Defendant has submitted upon the conclusion of the Defendant's case that sufficient instructions were not given. It was submitted that I had made a finding on that issue unnecessarily on voir dire and therefore should disqualify myself.

10. The Defendant did not give evidence on the voir dire and my ruling was made absent of that evidence. The Defendant subsequently gave evidence.

11. A magistrate sitting alone is the trier of fact and law, a magistrate is required to make rulings on a daily basis regarding the admissibility or otherwise of evidence and if the evidence is ruled inadmissible is required to put that evidence out of his or her mind when continuing a hearing. Magistrates in the Northern Territory are legally qualified and the law must assume that they have the capacity to consider evidence objectively (see Muirhead J in Fry v Jennings [1983] 25 NTR 19) and a legally qualified magistrate must by their training be able to disregard any inadmissible evidence they may have heard on voir dire (see Wells J in Furnell v Betts [1978] 20 SASR 300.

12. In Fitzgerald v DPP [1991] 56 A. Crim.R 262 the New South Wales Court of Appeal ruled that it could not be suggested that a ruling adverse to one party on the voir dire is grounds for a judge to disqualify himself. I also refer to the decision of Chief Justice Martin in Psaras v Littman [2006] 18 NTLR 189 in which his Honour found that even after a finding of guilt beyond a reasonable doubt it is proper for a Magistrate to accept fresh evidence up until the defendant has been sentenced. His Honour found even after the finding of guilt it is still possible for a magistrate to review all of the evidence in light of fresh evidence and possibly reverse his decision. These authorities support the my view that my finding of fact within the voir

dire is not a basis for disqualifying myself on the ground of apprehended bias.

13. It is my view that the finding of fact regarding the instructions given to Whitlam was required because the issue on voir dire was whether the certificate of failure to supply sample was admissible and to consider that issue I had to make an assessment of the whole process in light of the applicable regulations. I accept that the standard to which I am required to make that finding is the balance of probabilities however the fact that I have made that ruling on the basis that I am satisfied beyond a reasonable doubt does not preclude me from reviewing that decision in light of the evidence of the Defendant.

14. **Issues to be decided**
(1) Was Whitlam intoxicated and incapable of controlling his motor vehicle?
(2) Did Whitlam received sufficient instruction on how to provide a breath sample for the purposes of breath analysis?

15. **Was Whitlam intoxicated?** Kidney's observation of Whitlam was that he was staggering when he left the licensed premises. Kidney's observations were that a little while later when he saw Whitlam driving his car out of the car park he was driving at a slower than normal speed and had swerved across the solid white line. Whitlam's evidence is that he had been at home watching the footy in the afternoon and had been invited down to the Beachfront hotel by his uncle to celebrate obtaining his Certificate 111 qualification. Whitlam's evidence is between 7:30 -10:30 he had consumed two XXXX beers at home and then from 10:30 pm – 2:00am he had consumed a further four schooners of XXXX beer at the Beachfront.

16. Whitlam was certain of the total number of alcoholic drinks he had consumed during the course of that night. Whitlam claimed that his uncle with whom he had been drinking was more intoxicated than himself and was fairly drunk by the time Whitlam had joined him at about 10:30pm.

17. At closing time Whitlam states he was concerned about his uncle getting home and specifically thought about whether they should walk home or drive. He says he had made the decision to walk home and then changed his mind because he was worried about the tools which were in the back of his ute. That original decision to walk is an indication that Whitlam had a belief he was not in a fit state to drive.

18. Kidney's observations of Whitlam and his uncle were that they were both staggering as they left the hotel. He also stated that after he pulled Whitlam over and asked him why he was driving after drinking Whitlam replied "I wasn't driving nothing".

19. Some criticism was made of the prosecution failure to specifically put to the Whitlam in cross examination the allegation that he had swerved across the white line. It was claimed that failure was a failure to comply with the rule in Browne v Dunn [1893] 6R 67.

20. The application of Browne v Dunn has been considered in many cases within the criminal jurisdiction and limits have been placed on its application.

21. The Court of Criminal Appeal in NSW in R v Costello CCA (NSW) 15 December 1995, unreported, no 060114/95 sets out the two aspects of the rule as follows:

> The first rule, or the first aspect of the rule, in ***Browne v Dunn*** (1893) 6 R 67 is the rule of fairness which requires a party to put the nature of his case in contradiction of the evidence given by an opponent's witness to that witness in cross-examination so as to warn the opponent that there is such an issue and to enable the opponent to give evidence in corroboration or in contradiction of the first party's case. The second rule, or the second aspect of the rule, relates to the weight or the cogency of the evidence of a witness where it is not the subject of cross-examination.
>
> This second rule, or second aspect of the rule, in ***Browne v Dunn***(1893) 6 R 67 does not, however, impose any obligation upon counsel to challenge every word of a witness's evidence upon pain that any word not so challenged will be given greater weight or

> cogency by reason of his failure to do so. Many counsel appear to think that it does, and a great deal of time is often wasted at trials while counsel for the accused suggests that each phrase used or statement made by a Crown witness is untrue. That has never been necessary, and Crown prosecutors who submit to juries that any particular phrase or statement not specifically challenged in cross-examination should be taken as having been accepted as true, even where the issue has been taken in a general way (as it was here), misunderstand the rule.

22. In the present case Whitlam was present at the time Kidney gave his evidence and heard the allegations made by Kidney. Whitlam chose to give evidence and was not specifically taken to those allegations by his counsel. There was some evidence of his uncle playing with the car's stereo volume and distracting him but he did not specifically deny swerving or claim that if he did swerve it was due to his uncle playing with the volume. It is accepted that the prosecution did not specifically put Kidney's observation to Whitlam in cross – examination.

23. The rule in Browne v Dunn has been applied to ensure the fairness of procedure to give witnesses to account for contrary views on the facts and to consequently to assist the fact finder in assessing the cogency of the evidence before them, whether it is a magistrate, judge or jury. The rule applies to the prosecution's cross examination of the defence witnesses.

24. In the present case the prosecution did not put to the Whitlam he had swerved over the white line. He was not given a chance to deny that allegation. Equally Whitlam did not give and alternative explanation for the alleged swerving. The evidence of the Uncle playing with the stereo controls was of little assistance to the court. Whitlam was asked in cross examination whether if in the past when he was using the stereo controls that affected his driving and he denied it had.

25. The failure of the Whitlam to put a positive explanation for the alleged swerving is not to be held against him and he is under no obligation to provide an explanation. His failure to deny that he swerved is a product of

the allegation not being put to him by either his counsel or the prosecution. The prosecution must still satisfy the court beyond a reasonable doubt that the defendant did swerve and the reason was because he was intoxicated.

26. The evidence of Kidney is unchallenged in his observation of swerving. Once Whitlam pulled over to the kerb Kidney observed him to have bloodshot eyes and a dazed look on his face. Kidney also recorded Whitlam's response to the question "why are you driving after drinking" as "I wasn't driving nothing". Whitlam says his response to this question was "I was driving". Either response makes little sense in the circumstances where the question was asked while Whitlam was seated in the drivers seat of the vehicle.

27. Krepapas observed Whitlam to be not walking straight and smelling strongly of alcohol as he walked past her into the paddy wagon. Garland observed Whitlam to be unsteady on his feet when he got out of the car and walked toward the paddy wagon.

28. Defence submitted I should take into account the CCTV footage of Whitlam in the watch house when he was being processed. It is submitted that footage shows Whitlam walking as directed without staggering and that supports a finding that he was not in such a state of intoxication that he could not have had proper control of the vehicle.

29. My observation of that footage is that while Whitlam did walk in a straight line he seemed to be swaying while standing at the counter, taking his t-shirt on and off twice in quick succession, had the inability to place an item on the counter twice, and when asked to pick up some coins he had dropped holding out his hand and challenging the police officer with the words "do you want them" in an aggressive manner. It is also evident from that footage that Whitlam was arguing with one of the police officers at the charge counter that officer can clearly be heard to be saying "I am not going to stand here and argue with you about it". All of those observations suggest a

degree of intoxication of Whitlam at the watchouse about 40 -60 minutes after his initial apprehension.

30. The CCTV footage supports the view that while Whitlam could have been intoxicated it is not conclusive about his level of intoxication while driving earlier. The footage does raise doubt as to the police officers initial observations of Whitlam "staggering".

31. The observations of Kidney were out of his peripheral vision (when he saw Whitlam and his uncle "stagger" out of the Beachfront) and for a short length of driving. It is possible that the "stagger" is more attributable to the uncle than Whitlam. Even with that in mind there can be no criticism of Officer Kidney's decision to stop Whitlam's vehicle nor his decision to arrest him given his inability to blow properly into the roadside breath test machine there were clearly reasonable grounds for doing so.

32. The observations of Krepapas and Garland were of Whitlam to be "a bit unsteady on his feet" and "swaying" corroborate Kidney's assessment of Whitlams lack of sobriety. The manner of driving and the responses from Whitlam gave rise to a reasonable suspicion that he should not be driving however that is not enough to establish beyond a reasonable doubt he was incapable of controlling his motor vehicle.

33. Given all of the evidence I cannot be satisfied beyond a reasonable doubt that Whitlam was in such a state of intoxication that he was incapable of properly controlling his vehicle and he must be found not guilty.

34. **Was Whitlam given reasonable instructions on how to submit a sample?** In my earlier decision I ruled that sufficient instructions were given the Whitlam by Krepapas on how to provide a sufficient sample. I have now had the benefit of Whitlam's evidence of what he says occurred in the breath analysis room and have had the opportunity to review the video footage of

that room in light of Whitlam's evidence and Defence Counsel's submissions.

35. I rely on my previous observations of the evidence of the three police officers and do not intend to repeat myself in relation to those observations as to the content of their evidence.

36. Whitlam denies he was ever given proper instructions on how to blow into the machine, he says he was being interrupted by the other officers and became confused as to what he was supposed to do. He also denies uttering the alleged insults towards Krepapas and Garland. He denies being obstructive. Whitlam says the only instructions he received were after the first blow he was told "not hard enough" and after the second "not long enough". He does not remember any reference to stars.

37. When cross examined about his answer to the question " do you have any illness" to which he answered "mental illness" Whitlam says he was joking. That response is an indication that he was not taking the procedure seriously and accords with the police officers' evidence that he was being obstructive and a "smart alec". Whitlam's responses and attitude is consistent with someone who was not intending to co – operate with the process.

38. The footage of the breath analysis room has no audio and therefore cannot be used to corroborate was what said by any one present. Counsel for Whitlam submits that the footage shows Krepapas having very little eye contact with Whitlam before he takes the tube to his mouth the first time from which I should conclude that she did not give her usual instructions On review of that footage I have observed some things of note.

39. Contrary to the submissions by counsel for Whitlam my observations are:

    1. Krepapas does speak to the Whitlam before giving the tube to him to blow, while she is doing that she is looking at him and he is nodding

2. Krepapas does, while talking to Whitlam, run her finger along the front panel of the machine consistent with her indicating to the area in which the "stars" are shown.

3. After the first blow Krepapas does speak with the Whitlam again.

40. Further observations are :

1. Whitlam's conversation with Kidney after the second blow is accompanied by Whitlam shrugging his shoulders a lot.

2. After Kidney's conversation with Whitlam he makes a gesture with his hands which commonly indicates stop or no more.

41. Defence counsel submits that there is very little eye contact between Krepapas and Whitlam and that certainly seems to be the case except for the period I have set out in the previous paragraph. It is evident on several occasions that the Whitlam is leaning over trying to get Krepapas to look at him. Defence counsel submits I should infer from that lack of eye contact that Krepapas could not have given proper instructions.

42. In my view those actions could also indicate Krepapas not responding or reacting to insults and smart alec comments being made by Whitlam as alleged by the police officers involved.

43. The footage also shows Krepapas, Kidney, Garland and another officer looking at the machine subsequent to the test having been undergone while the readout remained on the machine over a period of several minutes. Defence counsel submits this is an indication of concern about how the breath analysis process unfolded. There could be a number of reasons why the officers consulted and an obvious alternative is whether the readout was sufficient to charge Whitlam with a failure to supply sufficient sample. The readout tendered into evidence shows two attempts within a minute of each other. I do not accept the Defendant's submission that the only explanation is that there was concern about how the analysis occurred.

44. Defence counsel also suggests that the fact that Krepapas clearly reaches for a third mouthpiece and Kidney gives a demonstration on how to blow after Whitlam has had a second blow corroborates Whitlam's evidence of a request for a third blow and also shows the officers were concerned about the process. I agree it may corroborate a request for a third blow however as Kidney was not in the room for the first attempt it does not necessarily support the view that the police officers were concerned about the process. Those actions could just as easily support the view that the officers decided against allowing the Whitlam a third attempt because he had already had two attempts and was being obstructive.

45. The footage therefore does not assist in establishing concern by the officers about the process or not.

46. The inconsistencies within Whitlam's evidence shows him to be an unreliable witness. His response to the question of whether he said he "wasn't driving nothing" was non responsive repeating only that he was driving. He stated he personally took the readout from the machine yet that clearly was not the case, he stated he was being interrupted by the police officers while Krepapas was explaining the process to him however he also says that he did not receive any explanation of the process, he claims he was not intoxicated however had made the conscious decision not to drive but changed his mind because he was worried about his tools (not because he thought he was safe to drive). Whitlam also claims he was not abusive or obstructive however he can be clearly heard to be having a disagreement with the officer at the charge counter and also when he picked up the coins from the floor he can be offering those coins to the officer in a defiant manner.

47. For the reasons I have set out above and the observations in my previous decision I reject Whitlam's evidence and find myself satisfied beyond a reasonable doubt that Whitlam was provided with the sufficient instructions

on how to provide a sample and after those instructions were given he failed to comply.

48. In relation to the requirement to require a person to provide a second sample after they have failed to provide sufficient sample I agree that there is no power in the police to require a second blow however that does not stop them from offering a second blow to a person. That offer is entirely within the discretion of the officer concerned and nothing can be inferred from that offer.

49. **Conclusion:**

(1) Defendant is found not guilty of charge 1 – driving motor vehicle under the influence of alcohol to such an extent as to incapable of having proper control of the vehicle.

(2) Defendant is found guilty of charge 2 – failure to provide a sufficient sample of breath for analysis.

Dated this 24th day of March 2010

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Tanya Fong Lim
STIPENDIARY MAGISTRATE