CITATION: Police v Martin *[2011] NTMC 032*

PARTIES:	POLICE
	v
	SHAUN MICHAEL MARTIN
TITLE OF COURT:	Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	21038923
DELIVERED ON:	17 August 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	10.6.11, 30.6.11 & 8.7.11
JUDGMENT OF:	Daynor Trigg SM

CATCHWORDS:

Application by prosecution to re-open their case:
Shaw v The Queen (1952) 85 CLR 365 followed;
R v Chin (1965) 16 ACrimR 147 followed;
Morris v R [2010] NSWCCA 152;
Wollongong City Council v Ensile Pty Ltd [2008] NSWLEC 202;
Burridge v Tonkin [2007] VSC 230;
Jones v Purcell BC9503825;
R v Wasow (1985) ACrimR 348;
Criminal Code – section 33 "sudden and extraordinary emergency"

REPRESENTATION:

Counsel:

Prosecution:	Mr Wallace-Pannell
Defendant:	Mr Brock

Solicitors:

Prosecution:	Summary Prosecution
Defendant:	NAAJA

Judgment category classification: A
Judgment ID number: [2011] NTMC 032
Number of paragraphs: 52

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

No. 21038923

[2011] NTMC 032

BETWEEN:

POLICE
Complainant

AND:

SHAUN MICHAEL MARTIN
Defendant

REASONS FOR DECISION

(Delivered 17 August 2011)

Daynor Trigg SM:

1. On 12 January 2011 a complaint was laid against the defendant alleging that he had committed the following offences:

> On the 20th November 2010
>
> At Darwin in the Northern Territory of Australia
>
> 1. did drive a motor vehicle, namely a Mitsubishi Utility, NT 703-502 on a road, namely Rapid Creek Road, Rapid Creek, with a medium range blood alcohol content namely, 0.129%
>
> Contrary to Section 22(1) Traffic Act.
>
> AND FURTHER
>
> On the 20th November 2010
>
> At Darwin in the Northern Territory of Australia
>
> 2. being a person who was disqualified from holding a drivers licence, drove a motor vehicle, namely a Mitsubishi

Utility, NT 703-502 on a road, namely Rapid Creek Road, Rapid Creek

Contrary to Section 31(1) Traffic Act.

2. The matter proceeded before me on 10 June 2011, at which time the defendant pleaded not guilty to charges 1 and 2.

3. At the end of the prosecution case a number of exhibits were tendered without objection, and which were intended to prove a number of elements of the prosecution case that apparently were not in dispute. Neither counsel addressed me in relation to any of these exhibits.

4. ExP1 comprised three documents, namely:

- A Dragar Alcotest 7110 Operators Book completed by David Burnell;
- A Dragar Alcotest 7110 printout; and
- A Form 1 certificate (in the name of David Burnell) of performance of breath analysis under the *Traffic Regulations.*

5. ExP2 comprised a copy of a NT Police gazette dated 4 February 2010, that on 20 November 2009 Commander Maxwell Pope purported to authorise David Joseph Burnell to use a Dragar Alcotest 7110, "in pursuance of *regulation 59* of the *Traffic Regulations".*

6. After all of the evidence herein and submissions were completed I adjourned the matter to consider my decision. In doing so I noted that *Regulation 59* in fact authorises the Commissioner to make such an authorisation. Accordingly, unless there is a power that enables the Commissioner to delegate this power (and I note no evidence of any delegation was put in evidence) then ExP2 may be of no force or effect.

7. “Commissioner” is not defined in the *Traffic Regulations,* and accordingly, in my view, being subordinate legislation it should have the same meaning as in the *Traffic Act.* That meaning is “the Commissioner appointed under the *Police Administration Act”* (see *section 3(1)*). *Section 10* of the *Traffic Act* deals specifically with the power to delegate powers and functions under that Act. However, that power to delegate is limited to “the Minister, the Director or the Registrar” only and does not extend to the Commissioner.

8. I was not aware of any express power that enables the Commissioner to delegate his authorisation under *Regulation 59* to anyone, let alone to Commander Pope. Even if there was such a power, no evidence of any such delegation was before me.

9. Accordingly, I had the court co-ordinator contact both counsel by email to appear before me on 30 June 2011 at 2pm to address me on this aspect. Both counsel appeared before me, and the prosecutor applied to re-open his case in order to tender a further document which purported to be a delegation from a person who purported to be the Acting Commissioner of Police to the person who holds the position of “Commander, Human Resource Development” to authorise persons under *Regulation 59.* The application to re-open was opposed by Mr Brock and the tender of the document was also opposed.

10. Mr Wallace-Pannell referred me to *section 14(4)* of the *Police Administration Act,* which is in the following terms:

> (4) In addition, the Commissioner may, in writing, delegate to a member, or an employee within the meaning of the Public Sector Employment and Management Act, the Commissioner's powers or functions **under another Act**. (emphasis added)

11. Accordingly, it appears that the Commissioner of Police does have a general power to delegate any of his powers or functions under the

Traffic Act. However, there is no power in the *Traffic Act* for the Commissioner to authorise any person to operate any particular breath analysis machine. This power appears to only arise from the *Traffic Regulations.* It is to be noted that *section 14(4)* as set out above is limited to "powers or functions under another Act". In *section 18* of the *Interpretation Act*:

> In an Act:
>
> Act means an Act passed by the Legislative Assembly and assented to under the Northern Territory (Self-Government) Act 1978 (Cth), and includes:
>
> (a) a Territory Ordinance; and
>
> (b) an Ordinance or Act of South Australia in its application to the Territory; and
>
> (c) a part of an Act.

12. Accordingly, on it's face it does not include a Regulation, unless it might be considered as "a part of an Act". Regulations come under the definition of "subordinate legislation" in *section 18* of the *Interpretation Act* as follows:

> subordinate legislation means:
>
> (a) regulations, rules or by-laws to which section 63 applies; or
>
> (b) a statutory instrument that, under an Act, is an instrument to which section 63 applies.

13. However, the answer to this somewhat circuitous problem appears to come from *Section 21* of the *Interpretation Act,* which states:

> In an Act, by, **under**, pursuant to or in pursuance of that Act or **another Act** means by, under, pursuant to or in pursuance of that Act or other Act or a statutory instrument under that Act or other Act. (emphasis added)

14. And “statutory instrument” as defined in *section 18* of the *Interpretation Act:*

> means an instrument of a legislative or administrative character

15. And, “instrument of a legislative or administrative character” is also defined in *section 18*:

> instrument of a legislative or administrative character includes regulations, rules, by-laws, orders, determinations, proclamations, awards, documents and authorities made, granted or issued under a power conferred by an Act.

16. Accordingly, I find that the Commissioner of Police does have the power to delegate his function under *Regulation 59* of the *Traffic Regulations.* Further, I find that a person acting in the position of Commissioner of Police has the same power (see *section 38(3) Interpretation Act).*

17. However, neither counsel took me to any decided case to assist me in deciding, what was the appropriate test that I needed to apply in considering the application. Accordingly I adjourned that application to 8 July 2011 at 0900 (being the time the matter had initially been adjourned for decision) before me for further argument.

18. When the matter resumed on 8 July 2011 Mr Wallace-Pannell referred to *section 28A* of the *Evidence Act,* and submitted that the gazette notice was admissible and spoke for itself. *Section 28A* is in the following terms:

> (1) Evidence of an instrument of a legislative or administrative character, or of any of the terms of such an instrument, may be given by the production of:
>
> (a) the Gazette purporting to set out the instrument;
>
> (b) a document printed by the Government Printer and purporting to be a copy of the instrument; or

> (c) a document purporting to be certified by a Minister, or by an officer having the custody of the instrument, as being a true copy of the instrument or any of its terms.
>
> (2) Where by any law in force in the Territory a person holding public office is authorized or empowered to do any act, production of the Gazette purporting to contain a notification of the act's having been done is evidence that the act has been duly done.
>
> (3) No proof shall be required of the handwriting or official position of a person certifying a document as mentioned in subsection (1)(c).

19. However, there would appear to be a couple of difficulties with this submission. Firstly, it is unclear whether the Commissioner of Police holds "public office". Secondly (and more importantly), on it's face ExP2 does not purport that the Commissioner of Police has in fact delegated his function under *regulation 59.* If that was specifically referred to in the gazette notice, then I consider the submission might have some force. Absent that, it does no more than raise the possibility that a delegation may have occurred. Accordingly, in my view, this submission does not take the prosecution case any further. The prosecution, in my view, would still need leave to re-open their case to place the delegation into evidence. I turn now to consider that application.

20. The starting point would appear to be the High Court decision of *Shaw v The Queen (1952) 85 CLR 365,* where the court (comprising Dixon, McTiernan, Webb, Fullager and Kitto JJ) decided that:

> Although the judge presiding at a criminal trial has a discretionary power to allow the Crown to reopen it's case and adduce further evidence after the close of the case for the defence, **it is only in very exceptional circumstances that such a course should be permitted**.
>
> A rigid formula would be unsafe in view of the almost infinite variety of difficulties that may arise at a criminal trial but **the**

occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all it's proofs during the progress of the Crown case and before the prisoner is called upon for his defence. (emphasis added)

21. In 1985 the High Court again considered the issue in *R v Chin (1965) 16 ACrimR 147.* At Page 151 Gibbs CJ and Wilson J stated:

> The principles that govern the exercise of the discretion of a trial judge to call evidence after the close of the case for the defence have been discussed in this Court in *Shaw v. The Queen [1952] HCA 18; (1952) 85 CLR 365, at pp 378-380, 383-384, Killick v. The Queen [1981] HCA 63; (1981) 147 CLR 565, at pp 568-571, 575-576 and Lawrence v. The Queen (1981) 38 ALR 1, at pp 3, 7, 22-23*. The general principle is that the prosecution must present its case completely before the accused is called upon for his defence. **Although the trial judge has a discretion to allow the prosecution to call further evidence after evidence has been given for the defence, he should permit the prosecution to call evidence at that stage only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen.** The principle applies where the prosecution seeks to call evidence to rebut matters raised for the first time by the defence; if the rebutting evidence was itself relevant to prove the prosecution case (unless, perhaps, it was no more than marginally, minimally or doubtfully relevant: *Reg. v. Levy and Tait (1966) 50 CrAppR 198, at p 202*) and the need to give it could have been foreseen it will, generally speaking, be rejected. The principle would not prevent the prosecution from giving in reply evidence directed to an issue the proof of which did not lie on the prosecution, such as insanity, or from rebutting evidence of the accused's good character, provided that the prosecution had not anticipated the raising of an issue of this kind and led evidence with regard to it, for the prosecution must not split its case on any issue. **Also, it has been held that evidence may be given in reply to prove some purely formal matter the proof of which was overlooked in chief**. (emphasis added)

22. At page 157-158 of the same decision, Dawson J stated:

The rule (sometimes referred to merely as a practice) which governs the reopening of the prosecution case after the close of the case for the defence, was examined in *Shaw v. The Queen [1952] HCA 18; (1952) 85 CLR 365* and was reconsidered recently in *Killick v. The Queen [1981] HCA 63; (1981) 147 CLR 565 and Lawrence v. The Queen (1981) 38 ALR 1*. The prosecution may be permitted to adduce evidence after the close of the defence case in the discretion of the trial judge. **The discretion is, however, to be exercised in favour of the prosecution** only in exceptional circumstances **and the guiding principle is that the prosecution ought not to be permitted to split its case. That is to say, the prosecution must call all the evidence available to it in support of its case during the presentation of that case. If it fails to do so, it ought not to be allowed to remedy the situation by calling evidence in reply except in exceptional circumstances**. Beyond saying that exceptional circumstances do not embrace a situation which ought reasonably to have been foreseen by the prosecution or which would have been covered if the prosecution case had been fully and strictly proved, this Court has declined, having regard to the multifarious directions which a criminal trial may take, to lay down any rigid formula. In *Shaw's Case*, at p.380, Dixon, McTiernan, Webb and Kitto JJ. expressed the view that:

"It is probably enough to say that the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence."

The prosecution will not, of course, be seeking to split its case when the evidence which it wishes to call by way of reply is to rebut evidence which forms no part of its proofs as, for example, where the defence of insanity is raised or evidence of good character is called by the accused. Even then, if the nature of the evidence which the accused intends to call should have been known to the prosecution so that it would have been possible to deal with it by calling evidence in the prosecution case, the proper course may be to refuse the prosecution permission to reopen its case in order to call rebutting evidence. Thus it was held in *Killick's Case* that the prosecution ought not to have been permitted to call evidence after the close of the defence case in order to rebut an alibi raised by the accused which ought to have been foreseen by the

prosecution because it had been raised in earlier proceedings. Where evidence which the prosecution seeks to call by way of rebuttal is also confirmation of the case which it has sought to make, the trial judge must exercise his discretion to ensure the observance of the principle which finds its expression in the rules which have been laid down. See *Killick's Case*, at p.576. If the evidence was only of marginal, minimal or doubtful relevance to the prosecution case, it may properly be admitted to rebut the defence case. **There is also authority for the proposition that the prosecution may be permitted to reopen its case to repair omissions of a formal, technical or non-contentious nature. See Archbold, Criminal Pleading, Evidence and Practice, (41st ed. 1982), par.4-414, and the cases there cited.**

The relevant principle is essentially one of fairness. The accused is entitled to know the case which he has to meet so that he may have adequate opportunity to determine what questions he may wish to ask in cross-examination, what evidence, if any, he may wish to call and what objections, if any, he may wish to raise in the case against him. Ordinarily the depositions upon which he is committed for trial will provide him with this information in advance and if the prosecution intends to call additional evidence it is required to give notice of its intention to do so. **The whole procedure would be undermined if the prosecution were permitted, save in exceptional circumstances, to call evidence in support of its case after the close of the case for the defence.**

The principle of fairness which underlies the general rule that the prosecution must lead the evidence, upon which it relies to establish its case, in the course of presenting that case, has an application beyond the exercise of the discretion to allow the reopening of the prosecution case. If in the course of cross-examination of an accused person or his witnesses, the prosecution asks questions with a view to eliciting evidence for the first time which could and should have formed part of its evidence in chief, then that evidence may be excluded in the discretion of the trial judge if its admission for the first time during cross-examination would unduly prejudice the accused, having regard to the obligation resting upon the prosecution to make its case known before the presentation of the defence case. *See R v. Kane (1977) 65 CrAppR 270.*

There are, of course, considerations which arise in the disallowance for this reason of questions put during cross-

examination which do not arise upon an application by the prosecution to reopen its case. Cross-examination, including the cross-examination of an accused person by the prosecution, may extend to all matters in issue, whether or not they were the subject of evidence in chief by the witness. Thus, apart from any unfairness which may arise from a failure to observe the general requirement that the prosecution should, during the conduct of its case, lead all the available evidence upon which it wishes to rely, there is no reason why it should not lead in cross-examination evidence which relates solely to its own case. With this may be contrasted the practice in Federal courts and many State courts in the United States of America where the view is taken that cross-examination must be limited to matters of credit and matters raised in evidence in chief. See Wigmore on Evidence, Chadbourn Rev. (1976), pars 1885 et seq. This view has never been taken in this country.

When considering whether any unfairness arises, there is the circumstance that a witness may be re-examined, or further witnesses called, to deal with matters raised for the first time in cross-examination, if necessary after a sufficient adjournment has been granted or other accommodation made to allow for any unfair element of surprise. And it must always be remembered in this context that there may be matters peculiarly within the knowledge of an accused which the prosecution, although it is not able itself to call the accused as a witness, cannot be precluded from establishing in cross-examination if the accused goes into the witness box even though they be matters which support the prosecution case. It may be observed that if notice of intention to adduce evidence with respect to a particular matter is given by the prosecution and that matter is raised in cross-examination, even for the first time, there must be less force in any suggestion of unfair surprise. But there is no requirement that notice be given of the evidence which the prosecution intends to attempt to elicit during cross-examination and if the defence is alerted by notice to the fact that the prosecution intends to attempt to prove some matter by additional evidence, the notice will almost certainly refer to the calling of additional evidence in the prosecution case rather than during cross-examination. Nevertheless, such a notice may be of significance in determining whether questions asked during cross-examination constitute an unfair attempt to elicit evidence for the first time at that stage. It may be sufficient to alert the defence to some matter upon which the accused or his witnesses may be questioned if they are called to give evidence.

> All of these considerations, and no doubt others to which I have not adverted, will bear upon the exercise by a trial judge of his discretion to disallow cross-examination by the prosecution for the purpose of adducing evidence which could and should have been tendered during the presentation of the prosecution case. Necessarily the discretion is not as confined, or cannot be as rigorously applied against the prosecution, as in the case of an application by the prosecution to call evidence by way of reply when only exceptional circumstances will justify the granting of the application. (emphasis added)

23. Mr Wallace-Pannell also purported to refer me to the judgment of Brennan J, but in fact it was that part of the decision of Dawson J that I have set out above, that he quoted from.

24. The prosecution submit that the "oversight" is of a "**formal, technical or non-contentious nature"** and therefore should be allowed. However, Mr Brock submits that on a proper reading of the *Shaw* and *Chin* decisions, it is not the case that there are two ways that the prosecution will be allowed to re-open, with the second being if the evidence is of a formal or technical kind. This submission would appear to be supported by the case of *Morris v R [2010] NSWCCA 152,* where McClennan CJ at CL (with whom Buddin J and Barr AJ both agreed) held that it was a one stage rather than a 2 stage test to be applied, stating:

> [27] Although the trial judge referred to Chin and identified the relevant passage his Honour concluded that there was a two stage test which the Crown must satisfy being, at the first stage, that the circumstances are "very special or exceptional" and "secondly, whether the Crown ought reasonably to have foreseen, at some earlier stage than when the applicant was made, the need to call such evidence."
>
> [28] It was submitted that his Honour's understanding that Chin required a two stage approach and imposed an inappropriate and rigid process when considering the issue was not correct. Reference was made to the joint judgment of Dixon, McTiernan, Webb and Kitto JJ in *Shaw v R (1952) 85 CLR 365 at 3890* where their Honours said:

> It seems to us unsafe to adopt a rigid formula in view of the almost infinite variety of difficulties that may arise at a criminal trial. It is probably enough to say that the occasion must be very special or exceptional to warrant a departure from the principle that the prosecution must offer all its proofs during the progress of the Crown case and before the prisoner is called upon for his defence.
>
> [29] It was further submitted that his Honour misunderstood the relevant facts. It was submitted that although defence counsel had intimated that an expert would be called at an early stage his Honour had himself identified that the issue would require the Crown to call its own expert. It was submitted that this necessity was apparent during the Crown case and although the appellant's counsel may have indicated that she would call an expert this did not have the consequence that the Crown could assume that it would not need to address the issue in its own case.
>
> [30] In my view the appellant's submission should be accepted. The question of whether the circumstances are "very special" or "exceptional" is to be determined having regard to all of the relevant circumstances. As the passage which I have extracted from Chin makes plain one of those circumstances, which may itself be determinative is whether the need to call further evidence "ought reasonably to have been foreseen." That issue is not to be resolved as a separate question although of considerable significance when determining whether the application to reopen should be granted.

25. Mr Brock's submission would appear to be further supported by the case of *Wollongong City Council v Ensile Pty Ltd [2008] NSWLEC 202,* where Jagot J stated:

> [13] The applicable principles are as follows.
>
> (1) The trial judge has a discretion to allow evidence in reply but it has been described as one available only where the "circumstances are very special or exceptional" (*R v Chin (1984) 157 CLR 671 at 676 and 684).*
>
> (2) The guiding principle is that the prosecution must present its case completely before a defendant is called upon for a defence (*Chin at 676 and 684; Shaw v R (1952) 85 CLR 365 at*

379–381 and 383; Killick v The Queen (1981) 147 CLR 565 at 568–572).

(3) Examples of very special or exceptional circumstances might include where the prosecution could not have anticipated the defendant's evidence about a matter where the onus did not lie on the prosecution or where the evidence was not available when the prosecution closed its case or involves a purely formal, technical or non-contentious matter (*Chin at 667 and 684*). However, courts have avoided prescribing any strict formula beyond the observation that evidence the prosecution could reasonably have foreseen or which would have been covered if the prosecution's case had been strictly proved is generally not seen as falling within the scope of a very special or exceptional circumstance (*Chin at 684*).

(4) Where the onus to prove an exculpatory matter lies on the defence a prosecutor may call evidence rebutting the matter "provided that the prosecution had not anticipated the raising of an issue of this kind and led evidence with regard to it, for the prosecution must not split its case on any issue" (*Chin at 677*). Irrespective of the concept of splitting a case, if the nature of the defence's evidence sought to be rebutted should have been known to the prosecutor "so that it would have been possible to deal with it by calling evidence in the prosecution case, the proper course may be to refuse the prosecution permission to reopen its case in order to call rebutting evidence" (*Chin at 685*).

(5) In summary:

The relevant principle is essentially one of fairness. The accused is entitled to know the case which he has to meet so that he may have adequate opportunity to determine what questions he may wish to ask in cross-examination, what evidence, if any, he may wish to call and what objections, if any, he may wish to raise in the case against him. Ordinarily the depositions upon which he is committed for trial will provide him with this information in advance and if the prosecution intends to call additional evidence it is required to give notice of its intention to do so. The whole procedure would be undermined if the prosecution were permitted, save in exceptional circumstances, to call evidence in support of its case after the close of the case for the defence (*Chin at 685–686*).

26. I therefore accept Mr Brock's submission that it is a one stage process, rather than two.

27. In the case of *Burridge v Tonkin [2007] VSC 230* the factual scenario was not too different (but sufficiently so) from the instant case, because it also considered the issue of proving an operator's authority to operate a breath analysis machine. However, unfortunately Williams J didn't decide all issues raised on the appeal and stated in paragraph 71:

> ……it is not necessary for me to determine whether his Honour's decision could, in any event, have been supported on the alternative ground that the proof of authorisation was a formal or technical matter in the circumstances. I note, in this regard, that the transcript shows[14] that the prosecutor suggested to his Honour that the proof of the operator's authorisation was a formal matter, but that the learned Magistrate expressed the view that it was not.

28. My researches have located another case with some factual similarities, namely *Jones v Purcell BC9503825,* being a decision of Hansen J sitting in the Victorian Supreme Court. His Honour noted:

> The appellant's reply was in effect to contend that the magistrate could not on ordinary principles have exercised his discretion to permit the prosecution to reopen its case and call further evidence and in this respect he relied *on R v Chin (1984-1985) 157 CLR 671 at 676, 684*. One does not doubt the general principle that the prosecution must present its case completely before the defendant is called on for his defence and that it should not be permitted to reopen to call evidence which ought to have been foreseen as necessary to prove its case. However it may be a different matter in relation to "some purely formal matter the proof of which was overlooked in chief" (per Gibbs, CJ and Wilson, J at 677). And at 685 Dawson, J said "There is also authority for the proposition that the prosecution may be permitted to reopen its case to repair omissions of a formal, technical or non-contentious nature: see Archbold's Criminal Pleading, Evidence and Practice, 41st ed (1982), para4-414, and the cases there cited. The relevant principle is essentially one of fairness."

> An instance is *Hansford v McMillan (1976) VR 743* where a County Court judge had refused to allow the informant to reopen his case to prove the proclaiming of Pentridge Gaol as a gaol. Anderson, J. held that the judge had erred in the exercise of his discretion. He pointed to the distinction in proceedings before a jury and before a judge alone. His Honour concluded (at 749) that "There is a very substantial weight of authority to the effect that an informant may reopen his case to meet an objection that some formal proof of a matter that really does not admit or denial has been overlooked." In relation to the curing of a deficiency his Honour referred to the remark of Hood, J in *In Re Kendrick (No 2) (1903) 28 VLR 472 at 475* that "As to not allowing a slip to be cured, it would be monstrous if a party could be defeated because his counsel had overlooked some little point."
>
> Clearly a magistrate has a discretion to permit the prosecution to reopen its case in appropriate circumstances. In this case the particular points did not identify themselves.

29. The stage that a case has reached also appears to be a very relevant consideration. Hence in the case of *R v Wasow (1985) 18 ACrimR 348 @ 350* Street CJ stated:

> At the close of the Crown case objection was taken to what was said to be a deficiency in the Crown case against the appellant following from an absence of real evidence and that the material found in the flat was Indian hemp. After hearing argument from both sides the learned Judge gave leave to the Crown to reopen its case and call evidence on two aspects: first, that in common parlance Indian hemp is frequently referred to as "hash"; and secondly, that an analysis of what was found identified it as Indian hemp. It is contended that the learned Judge erred in permitting the Crown to call this supplementary evidence, without which, so it is said, there was an inadequate evidentiary basis to support the charge brought against the appellant.
>
> Irrespective of the question regarding the inadequacy of the case without this evidence, it was plainly a matter for the decision of the trial Judge whether or not to grant permission to the Crown to reopen and tender this additional evidence**. The case stands on an entirely different footing from a case in which the Crown seeks to reopen after the close of the accused's case.** (*Shaw v The Crown 85 CLR 365*).

> The Court has been referred in written submissions that have been filed on behalf of the appellant and the Crown to a substantial number of cases in which courts have been called upon to consider applications for reopening of the prosecution case in order to supplement deficiencies in the evidence. There is plainly discernible in this line of authority recognition that the prosecution could ordinarily expect to be granted leave to reopen to supplement a deficiency that may have arisen through oversight. The bringing of criminal charges involves the prosecution on behalf of the public and in the protection of the public interest of breaches of the public law. There can be little said in principle by way of justification for permitting accused persons to evade due and proper processes of criminal law by some rule which would preclude the Crown reopening to remedy an oversight after the formal words "The Crown Case is Closed" have been pronounced. If the Crown had sought to tender this evidence before formally closing its case and before the legal argument advanced by an appellant, it would, as of right, have been entitled to do so. The circumstance that the defect was disclosed in the course of legal submissions on behalf of the appellant falls far short of establishing that it was on its face unfair to the point of being unjust for the learned trial Judge to grant leave to reopen to recall this supplementary evidence. There are many cases in which, where the presiding judicial officer has refused such leave, an appellate court has intervened by holding that the discretion reposing in the presiding officer ought to have been exercised in favour of allowing the reopening. (emphasis added)

30. Accordingly, it appears that the courts are more willing to allow the prosecution to re-open it’s case at a no case stage, than after all the evidence has been completed. Where, as in this case, all the evidence is complete it appears that the prosecution should not be allowed to re-open unless there are “very special or exceptional” circumstances. In my view, the only circumstance relied upon herein is that the prosecution did not turn it’s mind to it, and the defence didn’t take the point and didn’t appear to have been alive to it.

31. Both the prosecution and defence appear to have been concentrating on the more substantial issues in the case. ExP1, P2 and P3 were all tendered in quick succession at the end of the prosecution case and

immediately before the prosecution closed their case. As the exhibits were being marked up by the orderly, Mr Brock announced that he called the defendant to give evidence. There was no “no case” submission. Consequent upon some recent legislative changes the administrative function of swearing or affirming the witness now falls to the presiding judicial officer. Hence, I had to turn my attention to that function, so I only had the opportunity to give the tendered documents a very cursory peruse before the defence went into evidence.

32. Had the documents been tendered at the opening of the prosecution case (which would have been preferable), or had there not been this sudden rush of activity at the end, it is likely that I would have identified the problem before the defence went into evidence.

33. It is clear that no-one was alive to the problem until I raised it whilst my decision was pending. If the difficulty had been addressed at the no case stage then I would have most likely allowed the prosecution to re-open to address that issue. It has not been suggested that any witness will need to be recalled, or any additional witness called. The defence (not having noted the problem) could not be heard to suggest that they ran their case (including XXN) in a way that would have been different if the delegation was in evidence. The issue is whether I should not allow the re-opening given that the defence did go into evidence and all evidence has closed.

34. Clearly, if the prosecution is not able to re-open their case then the defendant would be entitled to be found not guilty on charge 1, but on a ground that was not contemplated when the case was completed. In my view, there are competing interests of justice in this matter. There is not only the interests of the defendant, but also the interests of the community in relation to bringing drink drivers to justice.

35. In addition, in the instant case the prosecution is assisted (in my view) by *section 29AAU* of the *Traffic Act* which states as follows:

> (1) In any proceedings in a court, a certificate in the relevant prescribed form purporting to be signed by:
>
> (a) a person authorised by the Commissioner under this Act to use a prescribed breath analysis instrument for this Act; or
>
> (b) a member of the staff of a hospital or health centre; or
>
> (c) an authorised analyst or a person employed by an organisation authorised as an analyst;
>
> is prima facie evidence of the matters stated in the certificate and the facts on which they are based.

36. Accordingly, the certificate forming part of ExP1 is prima facie evidence (amongst other things) that:

- David Burnell was a member of the police force; and
- He is authorised by the Commissioner to use a breath analysis instrument known as a Drager Alcotest 7110 for the purposes of the Traffic Act.

37. The ambiguity was created by ExP2, because on the face of that document Burnell was not in fact authorised by the Commissioner, but rather by a Commander. Hence the ambiguity that the prosecution now seek to clarify. Applying the relevant principles as laid down in the cases of *Shaw* and *Chin* I find that this is an appropriate case to allow the prosecution to re-open their case, but only to allow them to tender the foreshadowed delegation. I accordingly allowed that to occur, and the delegation was tendered on 17 August 2011 and became ExP4.

38. I now turn to consider the evidence in this matter.

39. The first prosecution witness was Constable Jason Everingham. His evidence was as follows:

- At 0220 hours on 20 November he did a traffic (not “truck” as appears in the transcript) apprehension on Rapid Creek Road, near Sergison Circuit, past the Beachfront Hotel – T4;
- The vehicle apprehended was a dark coloured 4 wheel drive – T4;
- The vehicle was driving excessively slowly……at almost walking pace – T4; “we were travelling behind the vehicle for a little bit of time…..we were travelling the same as the walking pace of the vehicle we were following” –T8; it was “not correct” that the car wasn’t actually moving at the time he saw it……..the car was moving…..it was “absolutely not” stationary…..the car was moving – T13;
- He approached the driver, and conducted a roadside breath test which was positive – T5;
- The driver was then arrested for a breath analysis – T5;
- The driver “pretty much said straight out that he told us that he was disqualified” –T5; the first thing he identified when he asked for his licence was the fact he was disqualified – T10;
- The driver gave his reasons for driving that “a mate of his was fighting with a female in the walk – the footpath just adjacent to where we were” – T5; and he explained that his friends had been arguing and he was trying to help them out – T11;

- He asked him “where he was driving from and where he was driving to” and he replied “from the Beachfront to here” – T5; but he may have asked the question in more general terms like “where have you come from?” as he tries to keep it as general and as non-technical as possible – T12.

40. The next prosecution witness was Constable David Burnell (and not “Byrnell” as appears on the transcript. His evidence was that:

    - They apprehended a drink driver at 0220 on 20 November on Casuarina Drive – T14;
    - He was a passenger in the police vehicle – T18;
    - “we came around a corner and he was probably 100 – 150 metres in front of us moving very slowly.....I would say about walking pace” – T14; it was an unusual drink driver as he moving “so slowly” – T16; it was not possible the vehicle wasn’t moving “because the vehicle was moving, because when we sighted it to when we stopped it it was still going momentum forward and it has also moved to the left hand side of the road when we’ve pulled it over”....”it was definitely moving” – T19;
    - He thought he activated the lights when they were about 25 metres away from the vehicle – T15;
    - It was a reasonably straight stretch of road – T15.

41. The defendant gave evidence in his own defence, and Unocha Burrburr (hereinafter referred to as “UB”) also gave evidence. I will set out the defendant’s evidence in normal type and UB’s evidence in **bold** type. Their evidence was that:

- At the time of this incident he was living with Timothy Burrburr (hereinafter referred to as “TB”) and UB – T21;

- From about 5 or 5:30 he was drinking beer with UB at their residence……and he had about 6 beers – T22; **started drinking around 4 or 5 o’clock – T31; probably would have drunk a carton – T 32;**

- About 9pm TB drove the 3 of them to the Beachfront Hotel where he and UB were drinking rum until about 1:30 or 2 – T22; **TB drove them to the Beachfront probably around 10 o’clock – T31; she couldn’t say how many rums she had…..she was pretty intoxicated – T33;**

- TB and UB were having an argument so they decided to leave….he did not know what the argument was about – T23;

- The car was parked “at the car parks directly across the road from the front bar of the Beachfront” – T23; **TB went to go and get the car from around the back and come and pick us up from the side – T32;**

- He was in the back behind TB, TB was driving and UB was in the front passenger seat – T23; **UB was in the front with TB and the defendant was behind in the back – T32;**

- TB and UB “were still arguing and then we drove for about 150 metres, 200 metres from Beachfront heading towards Trower Road…..UB’s threatened to jump out so TB pulled up and she jumped out of the car and TB went to go look for” – T23; they were “long gone on the footpath…..I couldn’t see them” – T26; **UB was still arguing with TB……”I was telling him to pull over and then I jumped out of the car”**

– T32; she couldn't say if the car was still in motion – T33; she walked off towards the lights "because I was walking home"....on a pathway....TB chased her....and caught up with her – T33;

- TB was driving pretty slowly at the time because they were arguing – T23;
- TB didn't change the direction of the vehicle when he pulled up.....it was on a curve....and he remembered side rails and the concrete slabs on the side – T23; **she didn't know if the road where the vehicle stopped was straight or curved – T33;**
- "The car was left on the side of the road.....left on, running" – T24; "on the left side, yes, on the left lane of the road" – T26;
- He was "pretty sure" the hazard lights had already been activated by TB – T26:
- It was a manual car – T24;
- He didn't observe where TB and UB went – T24;
- His "immediate response was to get the car off the road because I thought it was a danger hazard. I mean it was a danger hazard because it was on a curvy bend" – T24;
- He moved into the front driver's seat "to move the car because it was left on".....he "immediately put the seat belt on and I was – just wanted to get it off the road" – T24; the danger he was worried about was "myself and the car being damaged and others if there was a different car that collided with it.....because of the curvy bend, a car would have

come……at any speed and would have not noticed it" – T24; if he didn't move it "it would have just been left in the road, anything could have happened" – T25;

- "I was just about to move the car……I didn't move it at any point, didn't move the car at any point"……he was in the driver's seat for about 30 seconds….the police came – T24; "and I jumped into the front and I sat in the front just thinking if I should or shouldn't move the car" – T29;
- He knew he wasn't supposed to be driving…….he knew he was disqualified…..he knew he was over the limit…….so he knew he was in a fair bit of trouble – T27;
- He was going to move the car "to a side street…it was just a couple of metres away from it, about ten or fifteen metres away from it" – T25;
- The police didn't ask him where he had driven from……but asked where he had come from and he said the Beachfront – T25;
- When asked by police if he had been drinking "I said yes, my licence is disqualified, my friend and his wife are arguing" – T25; "I did tell the police that my friend and his partner was arguing and I was trying to get the car off the road" – T27;
- **The defendant "rang when he was in the back of the paddy wagon" – T33.**

42. I have considered the evidence in this matter. Both police officers were clear in their evidence that the vehicle that the defendant was in was not stationary, but was moving slowly (about walking pace) at the time they observed it. The defendant (who clearly must have been

intoxicated given the amount he apparently had been drinking, and the fact he had been drinking for many hours) was adamant that the vehicle wasn't yet moving. It is a necessary and important part of a police officer's job to make accurate observations about the movement of motor vehicles. It is something that a general duties officer would do continually whilst they were on patrol or on duty. A police officer would be alerted to a vehicle that was stationary on a public road, or that was moving very slowly, or that was moving erratically, or that was moving too fast, or that appeared to have something else different or unusual about it. If the vehicle was stationary the two police officers would have noticed this. I am unable to accept the evidence of the defendant in this regard.

43. I find that the defendant was driving the vehicle slowly forward (at about walking pace) along Casuarina Drive at the time it was first observed by the police witnesses.

44. I generally accept the defendant's other evidence in the case (other than the amount he had to drink, which I find was probably more than he said). In addition, there is an issue about what the defendant told police (if anything) about why he was in the driver's seat of the vehicle. Everingham was the only police officer who had the conversation with the defendant at the time. Accordingly, the evidence of Burnell didn't assist on this point. In XXN of Everingham it was put to him by Mr Brock "and he explained that his friends had been arguing and *he was trying to help them out*" (T11.1), and Everingham agreed with this suggestion. However, as noted above in his evidence in chief the defendant initially said he told police "my friend and his wife are arguing" (T25), and that was the full extent of it. No mention of "trying to help them out" or how. Then in XXN the defendant said (as also noted above) "I did tell the police that my friend and his partner was arguing *and I was trying to get the car off the road*" (T27).

This was not what was put to Everingham in XXN. I am unable to accept that the defendant told police at the time that he was trying to get the vehicle off the road.

45. I make the following findings of fact:

- Shortly before 0220 on 20 November 2011 the defendant was a back seat passenger in a vehicle that was being driven by TB from the Beachfront hotel along Casuarina Drive;
- At the time Casuarina Drive was a public street open to and being used by the public;
- The vehicle was being driven by TB who had not been drinking;
- UB was in the front passenger seat, she was heavily intoxicated and was arguing with TB;
- The defendant was in the back of the vehicle and was also intoxicated;
- At the time the defendant was a person who was disqualified from driving (ExP3) and the defendant knew he was disqualified;
- UB was telling TB to stop the car;
- TB stopped the car, and UB jumped out with the intention of walking home on the pathway off to the left of the car;
- TB jumped out of the vehicle, leaving the vehicle running on the left side of Casuarina Drive and chased after UB;
- The defendant was left in the rear of the running vehicle;

- The defendant waited for a short period of time, but neither TB or UB returned, and he could not see where they were;
- The defendant was concerned as to where the vehicle had been left, in relation to his own safety, the safety of the vehicle and the safety of other road users;
- The defendant decided to move the vehicle away from it's position and into a side street that was a short distance away;
- As the defendant was moving the vehicle (at walking pace) the police came upon him and observed him driving;
- The vehicle's engine was on, the defendant placed the gearbox into gear and was steering the vehicle as it proceeded forward under the power of the engaged engine;
- The defendant was "driving" the vehicle (in relation to charge 1) pursuant to *section 19(2)* of the *Traffic Act;*
- The defendant was "driving" the vehicle (in relation to charge 2) in the ordinary meaning of that word;
- The police activated their emergency lights and apprehended the defendant;
- The defendant admitted that he had been drinking, and that he was a disqualified driver;
- The defendant told police that his friend and his wife had been arguing, and he was trying to help them out;
- Everingham submitted the defendant to a roadside breath test which produced a positive result;

- The defendant was arrested for the purpose of a breath analysis and placed into the rear of the police caged vehicle;
- The defendant rang UB or TB from the rear of the police vehicle;
- The defendant was conveyed to the Darwin watch house for the purpose of a breath analysis;
- At 0300 on 20 November 2010 officer Burnell conducted an analysis of a sample of the defendant's breath on a Drager Alcotest 7110 machine, and a reading of 0.129% was obtained (ExP1);
- Officer Burnell had been authorised to operate a Drager Alcotest 7110 by Maxwell Colin Pope, Commander, Human Resource Development, purportedly in pursuance of *Regulation 59* of the *Traffic Regulations* by gazettal notice dated 4 February 2010 (ExP2);
- The person holding the position of Commander, Human Resource Development had properly been delegated to authorise persons under *Regulation 59* of the *Traffic Regulations.*

46. In relation to charge 2, Mr Brock submitted that a charge under *section 31(1)* of the *Traffic Act* is not a regulatory offence. I agree with this submission, as it is expressly excluded by *section 51* of the *Traffic Act.* Hence, as Mr Brock submitted, the defences in the *Criminal Code* are available. In particular, Mr Brock sought to rely upon the defence in *section 33* of the *Criminal Code,* which was in the following terms:

> Subject to the express provisions of this Code relating to self-defence and duress, 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; and he is excused from criminal responsibility for an event resulting from such act or omission.

47. An “ordinary person” is not a person who is affected by alcohol, but this is somewhat difficult to reconcile with the concept of “similarly circumstanced”. Because, in this case we are dealing with a person who knows that he is a disqualified driver, and who knows that he has been drinking beer and rum for many hours leading up to the time of the relevant decision.

48. This defence having been raised it is not necessary for the defence to prove it, but rather for the prosecution to negative it beyond all reasonable doubt.

49. What were the options available to the defendant in the circumstance that he found himself? He could have:

1) Done nothing and sat in the car and hoped TB returned shortly to move the car;

2) Sat in the car and rung TB to ask him to return;

3) Got out of the car and rung TB to ask him to return;

4) Got out of the car and left it, either running or turned it off;

5) got out of the car and tried to alert any approaching vehicle of it’s presence;

6) turned the car off and tried to push it to a position of safety;

7) got into the driver’s seat to move the car to a safer position.

50. On the evidence before me, it is clear, and I find, that the defendant availed himself of option 7. On the evidence I find that the situation

the defendant found himself in had occurred suddenly, and he had no involvement in it's creation. TB and UB were out of his sight. He had no reason to know if they would be returning, or when. He decided to move the car to a safer spot, which I find was not an unreasonable decision in the circumstances that he suddenly found himself in. The road was not a quiet back road. It was one of the major roads in that area, and one where traffic could be expected. It was an "extraordinary" event, in that it was out of the ordinary. People don't "ordinarily" jump out of cars, leaving them running and on the road in the ordinary course of events. Because of the time of night, and the location of the car (on or near a bend) the prosecution haven't satisfied me that it wasn't an emergency, and that the car should have been left where it was.

51. In the circumstances of this case I find that the prosecution have failed to negative the defence available (and raised on the evidence) under *section 33* of the *Criminal Code,* beyond all reasonable doubt. I therefore find the defendant not guilty of charge 2. Charge 2 is dismissed and the defendant is discharged.

52. However, charge 1 is a regulatory offence, and accordingly the defence under *section 33* of the *Criminal Code* is not available on that charge. I find the defendant guilty of charge 1. I will hear counsel on the question of penalty and any other matters that may arise.

Dated this 17th day of August 2011.

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Daynor Trigg
STIPENDIARY MAGISTRATE