

CITATION: *Alexander Fairweather v Daniel Kelly* [2023] NTLC 26

PARTIES: Alexander FAIRWEATHER

v

Daniel KELLY

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22229075

DELIVERED ON: 18 December 2023

DELIVERED AT: Katherine

HEARING DATE(s): 26 October 2023

DECISION OF: Acting Judge Murphy

**CATCHWORDS:**

CRIMINAL LAW – Evidence – Judicial discretion to admit or exclude evidence.

Section 23(1)(a) of the *Traffic Act 1987* (NT) created an offence for a person to drive motor vehicle with a low range breath alcohol content – Section 28(1)(a) of the *Traffic Act 1987* (NT) created offence for person to drive motor vehicle while whilst there was a prohibited drug in their body.

Section 29AAL of the *Traffic Act 1987* (NT) created a right for a person who is in custody after having undergone a breath analysis saliva test or given a sample of blood under the *Traffic Act 1987* (NT) to ask to communicate with a medical practitioner with regards an examination or blood test and imposed an obligation upon police to make a arrangements that are reasonable in the circumstances for that person to communicate with a medical practitioner for that purpose.

Section 29AAU of the *Traffic Act 1987* (NT) allows evidence pertaining to *inter alia* a breath analysis or drug analysis to be tendered by certificate in court proceedings and the matters referred to in that certificate and facts upon which they are based constitute prima facie evidence in that proceeding.

Where the defendant has been charged with offences under sections 23(1)(a) (low range drink driving) and 28(1)(a) (drug driving) of the *Traffic Act 1987* (NT) and certificates of analysis confirming that at the relevant time the defendant's breath alcohol reading (BrAC) was over the prescribed breath alcohol limit and there was a prohibited drug in the defendant's body – Where the defendant after having been subjected to a breath analysis and a saliva test had requested a blood test and was then held in custody for 7 hours – Whether the police complied with their obligation to make a arrangements that were reasonable in the circumstances for the defendant to communicate with a medical practitioner to make arrangements for the taking of a blood sample from the defendant – Where the prosecution sought to tender certificates of analysis confirming that at the relevant time the defendant's BrAC reading was over the prescribed BrAC limit and there was a prohibited drug in the defendant's body – Whether there exists a residual common law discretion to exclude lawfully obtained, probative, non-confessional evidence unaffected by impropriety or risk of prejudicial misuse where admission would render the defendant's trial unfair – Whether the defendant's trial is unfair in relevant sense if the analysis certificates were admitted into evidence.

WORDS AND PHRASES – “Bunning v Cross discretion”, “forensic unfairness”, “general unfairness discretion”, “unfair trial”.

*Interpretation Act 1978* (NT)

*Traffic Act 1987* (NT)

*Traffic Regulations 1999* (NT)

*Police v Dunstall* [2015] HCA 26

*Police v Dunstall* [2014] SASFC 85

*Police v Hall* [2006] SASC 281

*Harrison v Wojtasik* [1988] SASC 1103

*French v Scarman* (1979) 20 SASR 333

*The Queen v Pluto* [202] NTSC1

*The Queen v McConnell* [2013] NTSC 81

*Director of Public Prosecutions v Moore* [2003] VSCA 90

*Bunning v Cross* (1997) 141 CLR 54

## REPRESENTATION:

*Counsel:*

Police: Blundell

Defendant: Davison

*Solicitors:*

Police: Director of Public Prosecutions

Defendant: NT Criminal Lawyers

Decision category classification: A

Decision ID number: [2023] NTLC 26

Number of paragraphs: 51

IN THE LOCAL COURT  
AT KATHERINE IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 22229075

BETWEEN:

Alexander FAIRWEATHER

Complainant

AND:

Daniel KELLY

Defendant

### REASONS FOR DECISION

(Delivered 18 December 2023)

ACTING JUDGE MURPHY

1. The defendant was charged with 4 offences, namely
  - a. Charge 1: Criminal damage, contrary to section 241(1) of the *Criminal Code Act 1993* (NT);
  - b. Charge 2: Low range drink driving, contrary to section 23(1) of the *Traffic Act 1987* (NT) (the *Traffic Act*);
  - c. Charge 3: Drug driving, contrary to section 28(1)(a) of the *Traffic Act*;
  - d. Charge 4: Drive without due care, contrary to Regulation 18 of the *Traffic Regulations 1999* (NT) (the *Traffic Regulations*).
2. On 26 October 2023 the defendant entered a plea of guilty to charges 1 and 4 and a plea of not guilty to charges 2 and 3. The only issue in contest as between the parties was the admissibility of the toxicology analysis certificate<sup>1</sup> with regards charge 3 (the drug driving charge) and the breath analysis certificate<sup>2</sup> with regards charge 2 (the low range drink driving charge). The defendant asserts that both analysis certificates should be excluded from evidence due to an asserted failure by police to make arrangements that were reasonable in the circumstances for the defendant to communicate with a medical practitioner (which would constitute a breach of section 29AAL of the *Traffic Act*). Consequently, the matter proceeded by way of voir dire before me.

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<sup>1</sup> Exhibit P10 – Statutory Toxicology certificate of analysis, Oliver Locos, 13 March 2023.

<sup>2</sup> Exhibit P2 – Certificate on Performance of Breath Analysis, Constable Brooklyn Engles, 20 September 2022.

3. The facts giving rise to the charges are particularised in the statement of facts<sup>3</sup> that were tendered during the voir dire. In summary those facts are:
  - a. On 20 September 2022 the defendant drove his car into the front fence of the complainant's property, reversed his car off of the fence, then drove the same car into the same fence causing \$6,596.70, verbally abused the complainant, then drove home;
  - b. The complainant called the police. The police attended at the defendant's residence, located him in his front yard, arrested him, took him back to the Katherine Police station and subjected him to a breath analysis and saliva test.
4. During the voir dire the following witnesses gave evidence:
  - a. Constable Brooklyn Engles;
  - b. A/Sergeant Robert Angove;
  - c. A/Sergeant Colin O'Keefe;
  - d. Constable Thean Leng.

#### **The evidence of Constable Brooklyn Engles**

5. During her testimony, Constable Engles confirmed that she had conducted the breath analysis and collected the saliva sample for drug analysis upon the defendant. Her interactions with the defendant during the breath analysis and saliva sample were recorded upon her police issue body worn footage. Her evidence during the course of the voir dire was:
  - a. The first breath analysis that Constable Engles conducted upon the defendant was not successful;
  - b. The second breath analysis that she had conducted upon the defendant was successful. Said analysis returned a reading of 0.053 grams of alcohol per 210 litres of breath. This breath analysis was completed at 10.08pm;<sup>4</sup>
  - c. Upon completion of the breath analysis, she informed the defendant of his breath alcohol reading, the defendant told her *I want a blood test please* and she noted this contemporaneously on the Prescribed Breath Analysis Instrument Operator's Book;<sup>5</sup>
  - d. She then obtained a sample of the defendant's saliva for a drug test. This sample was taken at 10.23pm;
  - e. The initial testing of the defendant's saliva sample returned positive results for BZO (Benzodiazepine), THC (Cannabis), AMP (Amphetamine) and MET (Methamphetamine).<sup>6</sup> When Constable Engles told the defendant of the positive

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<sup>3</sup> Exhibit P15 – statement of facts (SOF).

<sup>4</sup> Exhibit P3 – Drager Alcotest 9510 Docket dated 20.09.2023.

<sup>5</sup> Exhibit P1 – Prescribed Breath Analysis Instrument Operator's Book.

<sup>6</sup> Exhibit P6 – Drager Drug Test 5000 Docket dated 20.09.2022.

results for those drugs, the defendant said **that's bullshit, that's a lie** and she noted this contemporaneously on the Saliva Testing Operators Handbook;<sup>7</sup>

- f. This was the first time that Constable Engles had done a drug test and she had done two breath analysis previous to this;
- g. She had received training at the Police College prior to being posted to Katherine about police powers and obligations under the Traffic Act regarding the taking of breath tests, breath analysis, and saliva tests. She confirmed that this training lasted for a single day and consisted of **having a read through the legislation** and **having a shot at one test**. Under cross examination Constable Engles confirmed that she can't remember having read section 29AAL of the *Traffic Act* (Right to Communicate with Medical Practitioner) during her police recruit training or at all prior to the defendants arrest and subsequent request for a blood test;
- h. She had never had anyone ask for a blood test before the defendant's arrest and was not aware of what the protocol was when a request for a blood test was made;
- i. A/Sgt O'Keefe was present during the breath analysis and drug test procedure that she had conducted upon the defendant and was providing her with supervision and training throughout that process;
- j. When she had completed the defendant's breath analysis and drug test she thinks that she walked the defendant to the Watchhouse. She did not inform the Watchhouse keeper of the defendant's request for a blood test, nor did she take any steps to facilitate the taking of the blood test, however she was aware that someone else had done this, but gave no account of who that was or how this was done.

### The evidence of A/Sergeant Colin O'Keefe

- 6. During his testimony, A/Sgt O'Keefe confirmed that he was present at the Katherine Police station with Constable Engles whilst she had conducted the breath analysis and collected the saliva sample from the defendant. His evidence is largely consistent with Constable Engles and his presence during the breath analysis and drug test is captured on Constable Engles police issue body worn video footage. Importantly, he was present when the defendant told Constable Engles he wanted a blood test and when the defendant in response to the positive drug test results said **that's bullshit that's a lie**. During his testimony A/Sergeant O'Keefe confirmed:
  - a. At the time of this incident Constable Engles was a probationary police Constable. It was part of his duties as a senior patrol member to supervise Constable Engles and help her complete and sign off on various policing activities particularised in her probationary constable book. Those activities included successful completion of breath analysis and drug tests;

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<sup>7</sup> Exhibit P5 – Saliva Testing Operator's Handbook.

- b. As to his experience with regards conducting breath analysis and saliva tests under the *Traffic Act*, he estimated that at that time he would have conducted 400 to 500 breath analysis and 5 to 10 saliva tests;
- c. As to the training he received at the police college with regards breath analysis and drug tests, he confirmed that the training lasted for one day and consisted of reading the legislation and conducting a saliva test;
- d. He was present when the defendant asked for a blood test;
- e. No one had ever asked him whether they could have a blood test before;
- f. He was not aware of section 29AAL of the *Traffic Act* at the time that the defendant had requested a blood test, but after having received that request he looked up the *Traffic Act* and found that provision. His recollection was that he had done this following the defendant's positive drug test result however Constable Engle's body worn footage showed that he had done so following the successful breath analysis after the defendant had requested the blood test and prior to the drug test being completed. When informed of the order of events in the body worn footage, A/Sergeant O'Keefe conceded that he must have been mistaken and that the order depicted in the footage was correct;
- g. Constable Engle's body worn footage captures the following interaction between the defendant and police immediately following the completion of the second breath analysis:

From counter 16:37 to counter 17:12

*Engles*           ... zero point zero five three.

*O'Keefe*        *So just above low range OK*

*Kelly*            *So what's that mean? I'm over?*

*O'Keefe*        *Yes*

*Kelly*            *Over for what but is that what you're charging me for?*

*O'Keefe*        *Well we'll be doing you for low range drink driving as well.*

*Kelly*            *I want, I want a blood test please.*

*O'Keefe*        *Sorry?*

*Kelly*            *I want a blood test, thanks.*

*O'Keefe*        *That will probably indicate that it may be higher as well, just so you know.*

*Kelly*            *That's fine, alright, I want a blood test thanks.*

Engles            *No worries. You'll get a copy of this as well.*

Kelly             *Yeah thank you.*

Engles            *No worries.*

From counter 17:12 to counter 19:50 (approximately three minutes)  
A/Sergeant O'Keefe leaves the room.

From counter 21:23 to counter 22:16:

O'Keefe           *So the Sergeant's just finding out about your request for the blood test. And he's indicated to me that if you do want the blood test that we have to call your doctor and then it's on you and it's going to cost you your money and he has to come out here and do it.*

Kelly             *OK mate. I mean I, I, I don't care. I mean at that range I'd ring a doctor. I mean I'm not a raving drunken idiot.*

O'Keefe           *No that's all good. Just keep that in there. (it being the drug test saliva receptacle which was in the defendant's mouth)*

Kelly             *Whatever. But I'm not going to be here all night either. Unless you're going to arrest me.*

O'Keefe           *Sorry?*

Kelly             *But I'm not going to be here all night either. Unless you're going to arrest me.*

O'Keefe           *Well you're already under arrest.*

Kelly             *Then what are you arresting me for?*

O'Keefe           *Criminal damage and low range drink driving at this stage.*

Kelly             *Alright so when do I get to ring my lawyer then?*

O'Keefe           *As soon as you get to the Watchhouse.*

From counter 22:16 to 27:38 the defendant Constable Engles and A/Sergeant O'Keefe remains in the breath analysis room completing the drug test. Then at counter 27:28 the following exchange occurs:

Kelly             *Have you rang a doctor?*

O'Keefe           *I'm waiting to hear back on that one, I'll let you know. Don't worry.*

- h. He confirms having informed the Watchhouse keeper of the defendant's request for a blood test. Indeed his reference to the Sergeant in the body worn video transcribed above is a reference to the Watchhouse keeper A/Sergeant Angove.

## The evidence of A/Sergeant Robert Angove

7. A/Sergeant Angove was the Watchhouse keeper on the night of this incident. His evidence during the course of the voir dire was:
  - a. Prior to this incident he had acted at the rank of Sergeant in the Watchhouse Keeper role at the Katherine Police station for about a year;
  - b. Prior to this incident no one had ever asked him if they could contact a doctor to arrange a blood test following the police having conducted a breath analysis or saliva test upon them;
  - c. His training at the Police College with regards breath analysis and saliva testing of drivers under the *Traffic Act* consisted of **using the machine** and **filling out the paperwork**;
  - d. Prior to this incident he had not read nor was aware of section 29AAL of the *Traffic Act*;
  - e. He confirmed that each of the interactions between the Watchhouse staff and the defendant were logged on the Offender Journal.<sup>8</sup> The Offender Journal confirms:
    - i. The defendant's breath alcohol reading of 0.053%<sup>9</sup> was logged at 22.36hrs (10.36pm) on 20.09.2022;
    - ii. Log entry at 23.33hrs (11.33pm) on 20.09.2022 by officer Hughes states:
      - *Kelly out of cell to organise blood test for drug results.*
      - *Kelly arrested by members O'Keefe and Engles for low range drink driving / criminal damage and driving under the influence of a drug.*
      - *Kelly arrested 18 Usher Road at 21.23 on 20/09/2022.*
      - *Nil Concerns with Health assessment / COVID assessment. Nil injuries observed.*
    - iii. Log entry at 00.20hrs on 21.09.2022 by A/Sergeant Angove states:
      - *A/Sgt Angove reports; Kelly out of and at WHS reception. Kelly has requested he wanted bloods taken by a medical practitioner. At 23.32hrs Kelly was given the phone so he could organise a medical practitioner to take his bloods. Kelly has called Katherine Hospital ED twice, no answer.*
      - *Legislation 29AAL Right to communicate with medical practitioner section 1 and 2.*

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<sup>8</sup> Exhibit P9 – Offender Journal Entry

<sup>9</sup> NOTE: breath alcohol content is incorrectly logged as “BRAC 0.053%” (a percentage), as opposed to the correct measurement, namely 0.053 grams of alcohol per 210 litres of breath.



- iv. Log entry at 04.26hrs (4.26am) on 21.09.2022 by officer Hughes states:
  - *Kelly out of cell for charging fingerprints and photographs.*
- v. Log entry at 05.11am on 21/09/2022 states:
  - *Kelly bailed to appear by A/Sgt Angove. Property returned.*
- f. In preparing to deal with the defendant's request for a blood test, he had printed out a copy of section 29AAL of the *Traffic Act*.
- g. A/Sgt Angove's interaction with the defendant at the time of the defendant attempting to contact a medical practitioner was recorded on his police issue body worn footage. Relevantly, that footage records the following conversation as between the defendant and A/Sergeant Angove:

*At counter 00:42 to 01:48*

*Angove           Hi Daniel, how are you?*

*Kelly             Good mate what's up?*

*Angove           So you said that you wanted to have to have your bloods taken.*

*Kelly             Yeah. If I can. Yeah. Yeah like at point five two or whatever, I might as well yeah. Cause I don't think it's, it's.*

*Angove           So what's going to happen? I'm going to give you a phone, OK.*

*Kelly             Yep.*

*Angove           And then you organise your.*

*Kelly             Oh what's, the, oh just the hospital or?*

*Angove           Whichever, yeah. Yep.*

*Kelly             Oh OK what, what the. Oh, ok. Yep, Yeah. They don't have a doctor, only at the hospital aye?*

*Angove           Yep.*

*Kelly             Oh good.*

*Angove           So you organise all that via the phone. And then if you make an*

*Kelly             Uhm, just rock on up, or?*

*Angove           if you make an appointment or something then we can facilitate and take you down there.*

*Kelly Uhm just the 89 number? 8, 9, 7, 2, argh whatever it is, yeah? 7, 2, 9, 2 double one or something?*

A/Sergeant Angove then hands the defendant a mobile telephone to the defendant.

*Angove So this is our work phone OK? So you can use that to contact the medical person. Alright?*

From counter 01:48 to 03:15 the defendant is left with the telephone sitting on a bench in the reception area of the Watchhouse. No conversation occurs between A/Sergeant Angove or any Watchhouse staff and the defendant during this period. Nor is confirmation provided by police regarding the telephone number for the Katherine Hospital or any medical practitioner in the Katherine town area, or at all, or means made available by the police to the defendant to acquire said contact details.

*From counter 03:15*

*Kelly Hey. How do I do this when they don't have 24hrs? How do I do, uhm how do I get hold of a doctor if there not 24 hours in Katherine?*

*Angove You've got to organise it. You've got to ring a doctor.*

*Kelly They don't have 24hr doctors. You have to go into Emergency, an emergency centre?*

*Angove yep.*

*Kelly So I've got to ring there do I?*

At counter 03:35 A/Sergeant Angove does not answer this question and turns to face away from the defendant whilst the defendant mutters away to himself trying to memorise a number and inputting that number or numbers into the mobile phone.

From counter 03:35 to 04:23 A/Sergeant Angove walks behind the Watchhouse counter and discusses unrelated matters with Watchhouse staff, and enters another room off the Watchhouse reception area.

At counter 04:23 a ring tone can be heard from the mobile phone that the defendant is using. At counter 04:27 A/Sgt Angove re-enters the Watchhouse reception area. The ringtone from the mobile phone continues to ring from counter 4:23 to 04:41.

*From counter 04:41*

*Kelly Hello. Well what if they don't answer?*

*Angove You can try again later on if you want.*

*Kelly Yeah. Well.*

*Angove Did you want to call again? A few more attempts?*

Kelly *Well they're not going to answer at this time of night. (Handing the mobile phone back to A/Sgt Angove (at counter 04:53)).*

Angove *Yep*

Kelly *They don't have an emergency serv, uhm, (undecipherable) direct service. So I don't know.*

Angove *Did you want to try back a bit later in the morning?*

Kelly *I don't know. What do you do mate?*

Angove *Yep.*

Kelly *What time is the morning? What are you talking about here? I'll be zero in the morning. That doesn't make sense. That doesn't make sense then does it?*

Angove *Did you want to have another go?*

Kelly *Uhm, not really. They're not going to answer.*

Angove *OK.*

Kelly *They're not going to come out for a service (undecipherable). You've got to be (undecipherable). What's the option there? Invite me to bleed zero. That doesn't make sense to me there. What's the viability of that?*

Angove *So if you're requesting to have bloods taken.*

Kelly *Uhm. Well I'm requesting that, it came up with a positive result for drugs.*

Angove *Yep*

Kelly *Cannabis, I don't touch cannabis. There's a possibility of amphetamines. But I don't take cannabis mate so it's full of shit. That's what I'm disagreeing with, you know. I'm a man of my word mate, so.*

Angove *So if you want bloods taken, you've got to make the phone calls. You've got to book an appointment and then we can facilitate to take you down. We can't organise a doctor.*

Kelly *Yeah but they don't have a 24 hour service mate. So it doesn't make sense to me.*

Angove *Did you ring the ED?*

Kelly *Hey?*

Angove *Did you ring the emergency department?*

Kelly Yeah, yeah. 8, 9, 7, 2 (undecipherable). So if I don't do it, I just got to take the wrap that was, that was, had come up positive and that's it. Is that right or? Just explain that to me old mate so I can go home. It just does not make sense to me.

Angove Whilst holding an A4 piece of paper, reads from it saying,  
*So legislation. Right to communicate with a medical practitioner. So a person who is in custody after undergoing a breath analysis, saliva test or giving a sample of blood under this Act may ask to communicate with a medical practitioner for the purpose of requesting a medical prac, the medical practitioner to do the following. Examine the person or take a sample of the person's blood, arrange for a sample of the person's blood to be taken by another medical practitioner, a registered nurse or a qualified person.*

Kelly Yep

Angove OK

Kelly *So after. So uh. So yeah. So if I said whatever, I mean do I have to get that done like in, if. Do I have to get that done what, in 24 hours or something or?*

Angove Yeah, yeah. We can try again in the morning.

Kelly What do you mean try again? I want to go home mate. So I mean. Like how long does this go on for? I just want to know.

Angove Hey Luke (speaking to a Watchhouse staff member).

Kelly *Do I go home and get my medical test within 24 hours, I don't understand. I'm not being a smart arse I just thought I.*

Angove Yep

Kelly *Cannabis is not right. It's not a true reading. I don't smoke cannabis. It's true I'm not saying anything, I'm disputing (undecipherable). This aint right. Emergency services, like, as you know, are open now, so you can drive me down the road and get it. Its emergency service.*

Angove You've got to call them and organise it. Yep. So you can, I can give you a chance to call them again and see if they answer.

From counter 09:10 to the end of the body worn footage at counter 09:40, A/Sgt Angove discusses an unrelated matter with another police officer whilst the defendant is still sitting in the Watchhouse reception area.

- h. After having reviewed the body worn footage of his interactions with the defendant A/Sergeant Angove, under cross examination, confirmed:
  - i. His sole act in facilitating the defendant's attempt to contact a medical practitioner was to hand him a mobile telephone.
  - ii. As far as he knew there were no 24 hrs doctor services in Katherine save for the hospital.
  - iii. He did not give the defendant the Katherine Hospital's number but that he could have done so.
  - iv. The Watchhouse is staffed by a registered nurse but he cannot recall if the nurse was on duty at that time and he made no inquiries with the custody nurse as to any doctors that could have been contacted.
  - v. For afterhours medical emergencies at the Watchhouse he would radio through to police communications in Darwin, whom in turn would contact the relevant medical services and facilitate the appropriate medical response.
  - vi. He did not contact police communications in Darwin to obtain contact details for a medical practitioner on this occasion.
  - vii. He could have taken more steps to arrange for the defendant to contact a medical practitioner.

8. Based upon the evidence of the foregoing witnesses and exhibits tendered throughout the course of the voir dire, I find that the defendant:

- a. Was lawfully arrested and conveyed to the Katherine police station;
- b. Was lawfully subjected to two breath analysis conducted upon him by Constable Engles and that the breath alcohol reading of 0.053 grams of alcohol per 210 litres of breath acquired as a result of the second analysis was lawfully obtained;
- c. Was lawfully subjected to the drug test conducted upon him by Constable Engles and the subsequent analysis of the drug test which confirmed the presence of methylamphetamine in his body was lawfully obtained.

9. The question to be determined is whether the purported contravention of section 29AAL of the *Traffic Act* by Police renders the admissibility of the breath analysis certificate<sup>10</sup> and toxicology analysis certificate<sup>11</sup> inadmissible in this proceeding.

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<sup>10</sup> Exhibit P2 – Certificate on Performance of Breath Analysis , Brooklyn Engles, 20 September 2022.

<sup>11</sup> Exhibit P10 – Statutory declaration - Toxicology certificate of analysis, Oliver Locos, 13 March 2023.

**Did the Police contravene section 29AAL of the *Traffic Act*?**

10. 29 AAL of the *Traffic Act* states:

**Section 29AAL Right to communicate with medical practitioner**

- (1) A person who is in custody after undergoing a breath analysis, saliva test or giving a sample of blood under this Act may ask to communicate with a medical practitioner for the purpose of requesting the medical practitioner to do any of the following:
  - (a) examine the person;
  - (b) take a sample of the person's blood;
  - (c) arrange for a sample of the person's blood to be taken by another medical practitioner, a registered nurse or a qualified person.
- (2) *If a request is made under subsection (1), a police officer must make arrangements that are reasonable in the circumstances for the person to communicate with a medical practitioner.*

(my emphasis)

11. The obligation under section 29AAL(2) upon police to make reasonable arrangements for a person to communicate with a medical practitioner is predicated upon the 2 preconditions particularised under section 29AAL(1), namely:

- a. the person must be in custody after undergoing a breath analysis or saliva test; and
- b. relevantly in this case, the person must have asked to communicate with a medical practitioner, for the purpose of obtaining a blood test.

12. Both statutory pre-conditions have been met in this case. This is so as (1) the defendant had been subjected to a breath analysis by Constable Engle (2) upon being informed by Police of the breath analysis result, the defendant immediately requested a blood test and (3) rather than immediately bail the defendant or release him and proceed by way of summons or notice to appear, police chose to keep him in custody for another seven hours.<sup>12</sup>

13. Whilst the defendant did not specifically ask to communicate with a medical practitioner for the purpose of obtaining a blood test, the context in which his request for a blood test was made renders that request axiomatic with a request to communicate with a medical practitioner for that purpose. Indeed, one need only look at the conduct of A/Sergeants O'Keefe and Angove, following the defendant's request for a blood test, namely allowing him the use of a telephone to do just that, to conclude that this was the only reasonable conclusion to make.

14. The purpose of section 29AAL would be defeated if the police obligation to make arrangements that were reasonable in the circumstances for the defendant to communicate with medical practitioner was triggered only where, or if, the defendant made the request in the words of the section; that is requesting that he be able to communicate with a medical practitioner to

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<sup>12</sup> From 10.11pm on 20 September 2022 (see Exhibit P2 – Certificate on Performance of Breath Analysis – time of breath analysis completion) to 05.11am on 21 September 2022 (see Exhibit P9 – offender Journal - time of bail).

arrange for a blood test as opposed to simply requesting a blood test. The legislature cannot have supposed that a person in the position of the defendant would have the particulars of section 29AAL in mind when the defendant made it plain to police that he wanted a blood test. It is readily apparent therefore, and I do so find, that the obligation upon police under section 29AAL(2) in this case was triggered, with regards the breath analysis result, at the time of the defendant having said “*I want a blood test please*” to Constable Engles, immediately following the conclusion of the breath analysis.<sup>13</sup>

15. As to a request by the defendant to communicate with a medical practitioner with regards the saliva test results (for the drug driving charge), it is apparent from his reaction to Constable Engles when she informed him of the saliva test result (see paragraph 5.e. (above)) and later conversation with A/Sergeant Angove with regards that the positive results for drugs from the saliva test, that the defendant did not accept the accuracy of those results and that he wanted to challenge that accuracy by way of a blood test (see paragraph 7.g. (above)). It is readily apparent therefore, and I do so find, that the obligation upon police under section 29AAL(2) in this case was triggered, with regards the saliva test result, at the time of the defendant’s discussion with A/Sgt Angove in the Watchhouse.
16. As the statutory pre-conditions of section 29AAL(1) had been met, the Police were, pursuant to section 29AAL(2), under an obligation to make reasonable arrangements for the defendant to communicate with a medical practitioner for the purpose of that medical practitioner taking a sample of the defendant blood<sup>14</sup> or arranging another medical practitioner or qualified person to do so.<sup>15</sup> The question to be determined therefore, is whether any of the three police officers in this matter made those reasonable arrangements.
17. Constable Engles, whilst noting the defendant’s request for a blood test, did nothing to facilitate communication between the defendant and a medical practitioner to achieve that purpose. However, she cannot and should not be criticised for this as she understood that A/Sergeant Angove was attending to said communication.
18. A/Sergeant O’Keefe brought the defendant’s request for a blood test to the attention of the Watchhouse keeper, A/Sergeant Angove, then relayed A/Sgt Angove’s position with regards the defendant’s right to communicate with medical practitioner to the defendant, but did nothing to facilitate that right. However, he cannot and should not be criticised for this as he understood that A/Sergeant Angove was attending to said communication. He can and should be criticised however when after the defendant had requested a blood test he said to the defendant, “*That will probably indicate that it may be higher as well, just so you know.*”<sup>16</sup>
19. A/Sergeant Angove, having been informed of the defendant’s request for a blood test had printed out section 29AAL, read it, considered it and informed A/Sergeant O’Keefe of what needed to be done (in his opinion) with regards the defendant’s request for a blood test under

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<sup>13</sup> See *French v Scarman* (1979) 20 SASR 333 at 337, 340-341 wherein King CJ made the same finding for a similar provision of the *Road Traffic Act 1961* (SA).

<sup>14</sup> *Traffic Act*, section 29AAL(1)(b).

<sup>15</sup> *Traffic Act*, section 29AAL(1)(c).

<sup>16</sup> See *Director of Public Prosecutions v Moore* [2003] VSCA 90 wherein the court, disallowed breath analysis evidence where the breath analysis operator had said a similar thing to the defendant in that matter thereby dissuading the defendant from having a blood test.

that provision.<sup>17</sup> The arrangements he made thereafter to facilitate the defendant's communication with a medical practitioner consisted of:

- a. Receiving the defendant as a prisoner into the Watchhouse at 10.36pm and having him placed in a cell.<sup>18</sup>
- b. Leaving the defendant in a cell for approximately an hour prior to moving him to the Watchhouse reception area at 11.33pm.<sup>19</sup>
- c. Providing the defendant with a mobile telephone.<sup>20</sup>
- d. Then, notwithstanding the defendant's request for confirmation of the Katherine Hospital's telephone number, Sgt Angove did not provide that number to the defendant.<sup>21</sup>
- e. Asking the defendant if he would like to try and call a doctor again later in the morning. Then failing to provide a response to the defendant when the defendant asked:<sup>22</sup>

*What time is the morning? What are you talking about here? I'll be zero in the morning. That doesn't make sense. That doesn't make sense then does it?*

- f. Asking the defendant if he had telephoned the Katherine Hospital's emergency department, in circumstances where he had not provided that number to the defendant or confirmed that the number which the defendant had dialled and had rung unanswered was the correct number for the Katherine Hospital's emergency department.<sup>23</sup>
- g. Then reading section 29AAL(1) of the *Traffic Act* to the defendant, thereby confirming the defendant's right to communicate with a medical practitioner, but failing to read section 29AAL(2) of the *Traffic Act* to him, thereby depriving the defendant of knowing what the obligations of police were with regards facilitating that communication.<sup>24</sup>

20. I agree with the concession properly made by A/Sergeant Angove under cross-examination that he could have taken more steps to arrange for the defendant to have communicated with a medical practitioner.

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<sup>17</sup> Constable Engle's Body Worn footage at counter 21:23

*So the Sergeant's just finding out about your request for the blood test. And he's indicated to me that if you do want the blood test that we have to call your doctor and then it's on you and it's going to cost you you're money and he has to come out here and do it.*

<sup>18</sup> Exhibit P9 – Offender Journal.

<sup>19</sup> From 10.11pm on 20 September 2022 (see Exhibit P2 – Certificate on Performance of Breath Analysis – time of breath analysis completion) to 11.33pm on 20 September 2022 (see Exhibit P9 – offender Journal - time of removal from cell).

<sup>20</sup> A/Sergeant Angove's Police Body Worn Video as transcribed at page 9 (above).

<sup>21</sup> Ibid, as transcribed at pages 9 to 12 (above).

<sup>22</sup> Ibid, as transcribed at page 11 (above).

<sup>23</sup> Ibid, as transcribed at pages 11 to 12 (above).

<sup>24</sup> Ibid, as transcribed at page 12 (above).



21. I find that the conduct of Constable Engles, A/Sergeant O’Keefe and A/Sergeant Angove fell short of (and therefore contravened) the obligation imposed upon police under section 29AAL(2) of the *Traffic Act* to have made reasonable arrangements in the circumstances of this case for the defendant to have communicated with a medical practitioner. This is so as the circumstances relevant to the defendant’s attempted communication with a medical practitioner were that:

- a. It was 11.33pm when the defendant was provided by A/Sergeant Angove with a mobile telephone to enable him to contact a medical practitioner in circumstances where the defendant clearly did not know what medical practitioners were available in the Katherine area at that time of night. He presumed that the only doctors that would be available with be the doctors at the Katherine Hospital which was confirmed by A/Sergeant Angove. After which he asked A/Sergeant Angove for the number of Katherine Hospital and A/Sergeant Angove did not provide the defendant with that number<sup>25</sup>;

A reasonable arrangement to cater for this circumstance would have been from A/Sgt Angove to have obtained and then provided the defendant with that number;

- b. After having seen and heard the defendant dialling an unknown telephone number which rang out unanswered, A/Sergeant Angove specifically asked the defendant if he had rung the Katherine Hospital’s emergency department, but made no attempt to confirm whether the number the defendant had dialled was in fact the correct number.<sup>26</sup> Instead, when the defendant had attempted to inform A/Sergeant Angove of the telephone number he had dialled, A/Sergeant Angove ignored him, then read section 29AAL of the *Traffic Act* to the defendant and asked him whether he wanted to make another call later in the morning;

A reasonable arrangement to cater for that circumstance would have been to confirm that the number dialled by the defendant was the Katherine Hospital’s emergency department number and if not, then to provide the defendant with the emergency department’s number so that the defendant could communicate with a medical practitioner regarding a blood test.

22. In support of my determination that the police in the present case have contravened section 29AAL(2) of the *Traffic Act*, I refer to the matter of *Harrison v Wojtasik*.<sup>27</sup> *Harrison v Wojtasik* is a decision of the Supreme Court of South Australia pertaining to the obligation of police to *do all things reasonably necessary to facilitate the taking of a blood sample* under section 47f of the *Road Traffic Act 1961 (SA)* as it then was. In that case, White J referred to and summarised the authorities pertaining to that provision, ultimately ruling that the police did not comply with their statutory obligation and consequently excluded the evidence of the breath analysis reading and quashed the appellant’s conviction.

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<sup>25</sup> Ibid, as transcribed at page 9 (above).

<sup>26</sup> Ibid, as transcribed at page pages 11 to 12 (above).

<sup>27</sup> *Harrison v Wojtasik* [1988] SASC 1103

23. Whilst I accept that the obligation under section 47f of the *Road Traffic Act 1961 (SA)* as it then was, is more onerous than that prescribed under section 29AAL of the *Traffic Act*, the facts and issues in *Harrison v Wojtasik* are readily applicable to the facts and issues in the present case.

24. The facts in *Harrison v Wojtasik* are:

- a. The appellant was arrested by police for drink-driving and was subjected to a breath analysis at Mount Gambier Police Station. The breath analysis result showed that the appellant was over the prescribed alcohol limit to drive. The appellant requested a blood test. The police at approximately 11.30pm telephoned two on-duty doctors at two separate clinics and handed the phone to the defendant to speak with those doctors. For reasons unknown both doctors declined to come to the station and take a blood sample from the defendant;
- b. Following those two telephone calls, the police officer asked if the defendant wished to contact any other doctor to take a blood sample and the defendant replied "No, there's no-one I really know."

25. At pages 8 to 9, His Honour said<sup>28</sup>:

*There were, however, other doctors whom the constable "really knew" if he had been paying serious attention to his duty to do all things necessary to facilitate. It was only 11.30 p.m. Quite different considerations apply to a request made, say, at 11.30 p.m. to those made at 3.30 a.m. He knew there were more than 30 doctors in Mount Gambier. He also knew or should have known that if neither of the two duty doctors representing the two clinics could or would come, one of the other doctors might have been public-spirited enough to come. The magistrate asked the constable:*

*"Q. Have you ever in your experience had to ring a doctor who was not on duty.*

*A. Yes, I have.*

*Q. What sort Of results have you had.*

*A. Sometimes the doctor will come in, sometimes not, depending on the hour and how much sleep the doctor has had."*

*I think that is the answer in this case. The answer of the appellant "No, there's no-one I really know" was an answer of helplessness, the answer of a person in difficult circumstances in a strange town, not knowing where to turn. It was the duty of the police to facilitate his request. This constable had had experience with off-duty doctors coming in when requested. The two calls in fact made fell far short of doing all things reasonably necessary to facilitate the request. Indeed, I detect in this case, and in other cases, some "leaning back on the traces" as it were, in the performance of what must at times appear to be the unwelcome duty cast upon the police by the legislature.*

*The prosecuting authorities cannot have it both ways. If they are to have the benefit of the presumption of the results of the breathalyser test then they are to ensure that constables do in fact undertake the responsibility of properly facilitating compliance with the request for a check blood test according to the letter and the spirit of the section. There is no*

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<sup>28</sup> Ibid at pp 8 - 9.

*evidence (apart from an unanswered question by defence counsel) that the duty doctors were failing to comply with the requests because the appellant had no money or because he could not travel to their homes or consulting rooms or because of the lateness of the hour. There was a complete failure, in my opinion, on the part of the prosecution to show that the constable had done all things reasonable to comply with the request. Far from it.*

26. At page 10, His Honour said

*The test applied by the magistrate does not, in my opinion, meet the letter or the spirit of the section. Some constables in a large town like Mount Gambier may find it unpleasant or distasteful to make these arrangements late at night. It might vary from officer to officer and from hour to hour. Having regard to the policy of the section and the serious consequences for a suspect, it is not unreasonable to expect the officer in charge of the police station to establish a procedure and to make some prior arrangements with the doctors with a view to obtaining their co-operation on some sort of a roster. It is not necessary to go so far in this case. On the facts in this case far too little was done to comply with the request. The efforts at facilitation were given up much too easily.*

(my emphasis)

27. The defendant in the present case, like the appellant in *Harrison v Wojtasik*, was helpless, he did not know the telephone number of the Katherine Hospital, he asked A/Sgt Angove for that number and was ignored. Then when the defendant rang a number on the telephone which went unanswered, rather than A/Sergeant Angove confirming that the dialled number was in fact the number for the emergency department of the Katherine Hospital he asked the defendant if he had dialled the Emergency department and once again ignored the defendant when he began to say the number that he had dialled. In so doing, A/Sergeant Angove failed in his duty to make reasonable arrangements in this circumstances for the defendant to communicate with a medical practitioner, thereby contravening section 299AAL(2) of the *Traffic Act*.

### **The Court's discretion to exclude the Toxicology Analysis & Breath Analysis Certificates**

28. The Australian High Court in the matter of *Police v Dunstall*<sup>29</sup> recognised that the courts have a residual common law discretion to exclude lawfully obtained, probative, non-confessional evidence unaffected by impropriety or risk of prejudicial misuse where admission of that evidence would render the trial of the accused unfair. The plurality, in *Police v Dunstall* referred to that discretion as the *general unfairness discretion* and held that it was inappropriate in the circumstances of that case to determine the scope of the discretion.<sup>30</sup> Nettle J held:

*In this case, special leave to appeal was granted because the matter was said to raise a question of general importance of whether there is discretion to exclude evidence on the ground that its reception would be unfair. There should be no doubt that there is such discretion. It is the necessary concomitant of the obligation of a trial judge to ensure that an accused receives a fair trial according to law. The real question is as to its nature and extent and, in particular, what counts as unfair in the relevant sense.*

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<sup>29</sup> *Police v Dunstall* [2015] HCA 26 at [15]

<sup>30</sup> *Ibid* at [59].

29. In that decision, His Honour identified the Court's recognised discretions for excluding evidence. Relevant to the present case is the *Bunning v Cross* discretion, and the unfairness discretion. Relevant to both discretions is the legislative scheme with regards the detection, enforcement and prosecution of drink drivers and drug drivers under Part V the *Traffic Act*.

#### The Legislative Scheme under part V of the *Traffic Act*

30. Division 2 of the *Traffic Act* prohibits people from driving a motor vehicle when they have reached a prescribed limit of alcohol in their blood or breath regardless of whether that alcohol content impairs their ability to drive. Division 3 prohibits people from driving a motor vehicle when they have a prohibited drug in their body regardless of whether that drug impairs their ability to drive. Division 4 prohibits a person from driving a motor vehicle when they are under the influence of alcohol or a drug. Division 5 authorises police to pull a driver of a motor vehicle over at random without any suspicion of that driver having committed an offence and to subject that driver to a breath test or saliva test and makes it an offence for a driver to fail or refuse to pull over and submit to a random saliva or breath test. It compels a driver to submit to a breath analysis or blood test in certain circumstances and hold them in police custody to do so. It also makes it an offence for a driver to fail or refuse to comply with a police direction to submit to a blood test or breath analysis. Divisions 6 and 7 of the *Traffic Act* pertain to mandatory minimum licence suspensions and disqualification periods for offences under Part V.
31. Division 8 pertains to court and evidentiary matters. Sections 29AAT and 29AAU effectively reverse the onus of proof. Section 29AAU enables the prosecution to prove its case by way of certificate, the contents of which constitute a prima facie case. If a defendant wishes to challenge the contents of the certificate then he must give written notice of his intention to do so and call the author of the certificate. Section 29AAT contains statutory presumptions in favour of the prosecution. Relevantly, in this case section 29AAT(2) states:

(2) *If a breath analysis is carried out on a person in accordance with section 29AAC or 29AAD, the BrAC indicated by the analysis is taken to be the BrAC of the person at the relevant time.*

32. The *Traffic Act's* legislative scheme affects a driver's common law rights in that it abolishes the right against self-incrimination, creates a statutory presumption as to the level of a defendant's breath alcohol and presence of prohibited drug in the defendant's body, reverses the onus of proof and finally provides a prima facie presumption as to the indicated concentration of alcohol in a defendant's breath at the time of the breath analysis and presence of prohibited drug in the defendant's body at the time of the saliva test.

#### Section 29AAL – A Statutory Safeguard

33. In order to redress the significant imbalance brought about by the aforementioned statutory presumptions and abrogation of common law rights, the legislative scheme, in the form of section 29AAL, provides a single safeguard to protect the right of a prisoner who remains in police custody following a saliva test or breath analysis to contact a medical practitioner, *inter alia*, for the purpose of arranging a blood test. This legislative safeguard is critical in that it provides said prisoner with an opportunity to test the reliability of the breath analysis or saliva analysis results as particularised in the certificates sought to be tendered in this case.

## The Bunning v Cross Discretion

34. The Australian High Court in *Bunning v Cross* considered the legislative scheme concerning drink driver legislation in Western Australia. Stephen and Aickin JJ addressed the impact of such schemes saying:<sup>31</sup>

*The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be "a less evil that some criminals should escape than that the Government should play an ignoble part" - per Holmes J. in *Olmstead v. United States*. Moreover the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law. On the other hand it may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve no overt defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law.*

(my emphasis)

35. The non-compliance by police in this case with regards their obligation under section 29AAL(2)) of the *Traffic Act* are such that I am duty bound to, and I do exclude both analysis certificates from evidence in this proceeding. To do otherwise would give curial approval and even encouragement to said non-compliance and ultimately *demean the court as a tribunal whose concern is in upholding the law*. I do so for the following reasons:
- a. Section 29AAL is a statutory right, so much is clear from its heading;<sup>32</sup> *Right to communicate with a medical practitioner* (my emphasis); and its consistency with the requirement of police (see the word "must" in section 29AAL(2)) to make reasonable arrangements to facilitate that communication;
  - b. That statutory right is only available to persons who remain in custody following a saliva test or breath analysis. In this case the defendant was in police custody for seven hours following his initial request for a blood test. As a prisoner during that seven hour period he was subject to the complete control of and therefore vulnerable to A/Sergeant Angove's deliberate disregard of the defendant's exercise of that statutory right. That deliberate disregard consisted of A/Sgt Angove;
    - i. Delaying the defendant's access to a telephone for approximately an hour after he had been placed into the Watchhouse cells;

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<sup>31</sup> *Bunning v Cross* (1977) 141 CLR 54 at 77-78 (footnotes omitted).

<sup>32</sup> *Interpretation Act 1978* (NT)..

- ii. Ignoring the defendant's repeated request for the Katherine hospital's telephone number or providing confirmation that the number he had dialled was the Katherine Hospital's Emergency Department telephone number;
- iii. When asked by the defendant for an explanation as to how things worked with regards contacting a medical practitioner to arrange a blood test, he read to the defendant, section 29AAL(1) which explained the defendant's right to communicate with a medical practitioner but not 29AAL(2) which explains the police obligation with regards that right;
- iv. Suggesting to the defendant that he could try calling again in the morning but then failing to respond in any meaningful way when the defendant requested an explanation as to what the morning meant and what sense there would be in waiting until the morning when he would be zero (blood alcohol content) by that time;
- v. When asked by the defendant whether he could get the blood test done within 24 hours telling him that he could and that he could try again in the morning;

It is patently clear, in light of the foregoing points, that the mere provision of the telephone to the defendant by A/Sergeant Angove was not a *bona fide* attempt by him to meet his obligations under section 29AAL(2) of the *Traffic Act*. To the contrary, A/Sergeant Angove's conduct when viewed as a whole (see points i to v (above)) goes beyond mistake or ignorance and constitutes a deliberate course of conduct designed to hinder the defendant from exercising his statutory right;

- c. The testimonial evidence of all three police officers who were asked about police training with regards section 29AAL of the *Traffic Act* confirmed that none of those officers knew of that provision prior to the defendant requesting a blood test in this case. This inadequate training poses an ongoing high risk of systemic non-compliance as opposed to isolated non-compliance by police with regards that provision;
- d. All it would have taken for police to comply with their obligation under section 29AAL(2) of the *Traffic Act* in the circumstances of this case was to have provided the defendant with the direct number for the Katherine Hospital's Emergency Department. It beggars belief that Katherine Police would not have emergency contact numbers for facilities such as the local Hospital, all the more so in the Watchhouse given the duty of care owed to persons in custody. Nevertheless A/Sergeant Angove asserted in his evidence that he did not have that phone number but could have obtained it by contacting police communications. Notwithstanding this and his specific question to the defendant about whether he had contacted the Katherine Hospital Emergency Department, A/Sergeant Angove did not contact police communications, he did not obtain the number and he did not provide that number to the defendant. This could have been easily done, but was not;

His failure to have obtained or provided that telephone number to the defendant was not a matter of cutting corners, indeed the time spent waiting for the defendant to make the telephone call was greater than that which would have been expended in obtaining and providing that number to the defendant. No, the failure to have

provided that number to the defendant was a deliberate course of interference of the defendant's right to communicate with a medical practitioner by A/Sergeant Angove.

### **The unfairness discretion**

36. As stated above, the relevant discretions for excluding the certificates in this case are the *Bunning v Cross discretion*, and the *unfairness discretion*. I have already made my determination with regards the *Bunning v Cross discretion*, the following is my determination with regards *fairness discretion*. The fairness discretion arises where the admission of evidence in a criminal proceeding would constitute an unacceptable risk of the defendant being deprived of a fair trial according to law.<sup>33</sup> It is necessary therefore to determine the admissibility of the toxicology analysis certificate and the breath analysis certificate under the *Traffic Act*.
37. In the present case it is accepted as between the parties that both the breath analysis and saliva test were lawfully conducted upon the defendant. The results of the analysis of the defendant's breath and saliva were subsequently reduced to writing in the form of a toxicology analysis certificate<sup>34</sup> and the breath analysis certificate.<sup>35</sup>

### The toxicology analysis certificate

38. Pursuant to section 29AAU(1)(c) of the *Traffic Act*, a certificate purporting to be signed by an authorised analyst is prima facie evidence of the matters referred to in the certificate. Relevantly, the toxicology analysis certificate tendered in this proceeding purported that, at the relevant time, the defendant had methylamphetamine in his system and that Mr Brett Oliver Locos, the person who signed the certificate, was an authorised analyst under regulation 60(1) of the *Traffic Regulations* and section 3(8) of the *Misuse of Drugs Act*.
39. Pursuant to section 29AAU(1A) of the *Traffic Act*, the prosecution did not have to prove that Mr Locos was an authorised analyst. That being the case, in the absence of any evidence to the contrary, and notwithstanding that the prosecution had tendered the gazette notice in which Mr Locos was appointed as an authorised analyst under the *Misuse of Drugs Act*<sup>36</sup> but failed to tender a gazette notice confirming his appointment as an authorised analyst under the *Traffic Act*, I find that the toxicology analysis certificate to be valid.

### The breath analysis certificate

40. Pursuant to section 29AAU(1)(a) of the *Traffic Act*, a certificate purporting to be signed by a person authorised by the Commissioner to use a prescribed breath analysis instrument is prima facie evidence of the matters referred to in the certificate. Relevantly, the breath analysis certificate<sup>37</sup> tendered in this proceeding purported that, at the relevant time, the defendant had a breath alcohol concentration of 0.053 grams of alcohol per 210 litres of exhaled breath (BrAC) and that Ms Brooklyn Engles was "... authorised by the Commissioner to use a prescribed breath analysis instrument"

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<sup>33</sup> *Police v Dunstall* [2015] HCA 26 at [83] per Nettle J.

<sup>34</sup> Exhibit P10 – Statutory declaration - Toxicology Certificate of Analysis, Oliver Brett Locos 13 March 2023.

<sup>35</sup> Exhibit P2 – Certificate on Performance of Breath Analysis, Brooklyn Engles, 20 September 2022.

<sup>36</sup> Exhibit P12 – appointment of Analyst Northern Territory Government Gazette No. G43 25 October 2017.

<sup>37</sup> Exhibit P2 – Certificate on Performance of Breath Analysis, Brooklyn Engles, 20 September 2022.

41. Pursuant to section 29AAU(1A) of the *Traffic Act*, the prosecution did not have to prove that Ms Engles was so authorised. Nevertheless the prosecution tendered the gazette notice in which Ms Engles was so authorised.<sup>38</sup> That being the case and in absence of any evidence to the contrary, I find the breath analysis certificate to be valid.

Challenging the admissibility of the certificates under the *Traffic Act*

42. If the defendant wished to contest the veracity of the evidence contained within either certificate, then pursuant to section 29AAV of the *Traffic Act*, he was required to provide written notice to the prosecution and call the author of the certificate to give evidence in the proceeding. Notwithstanding this provision the defendant has not called the author of either certificate. Nor has he called any evidence at all to rebut the prima facie evidence of the matters referred to in either certificate. Instead he has chosen to proceed by way of a voir dire on the sole basis that because police have breached section 29AAL that the aforementioned certificates should be excluded under either the *Bunning v Cross* discretion or the *unfairness discretion*.

43. It is common knowledge, that in time and without replenishment, the body eliminates all alcohol and prohibited drugs from itself, and that the lower the concentration of alcohol or prohibited drug in the in the body, the shorter will be the time taken to eliminate that alcohol or prohibited drug from the body. Consequently the right to communicate with a medical practitioner to obtain a blood test is time critical. In this case the defendant was held in custody for 7 hours after his request for a blood test and due to the breach of section 29AAL by Police, he was prevented from contacting a medical practitioner to arrange for a blood test to be conducted.

44. With regards the breath analysis certificate: The standard method for rebutting a breath analysis result is for the defendant to obtain a blood test, have the blood analysed to confirm the defendant's blood alcohol content, then call expert evidence about alcohol dissipation rates ("back calculation") to show what the defendant's blood alcohol reading was at the time of the breath analysis, thereby confirming or rebutting the BrAC reading particularised in the breath analysis certificate.<sup>39</sup>

45. In circumstances where a defendant's blood alcohol rate has been reduced to zero there is no way of conducting a back calculation to determine what the blood alcohol rate was at the relevant time. Consequently too long a delay in obtaining a blood test will result in a defendant losing the opportunity to rebut the breath analysis certificate.

46. In this case the defendant called no evidence as to the defendant's alcohol dissipation rate or the average alcohol dissipation rate. Consequently the defendant has failed to show that the 7 hour delay brought about by the Police breaching section 29AAL would, as opposed to could,<sup>40</sup> have resulted in him being deprived of the opportunity to garner evidence capable of rebutting the prima facie evidence BrAC reading particularised in the breath analysis certificate. It follows therefore, that the admission of the breath analysis certificate into evidence in this case does not constitute an unacceptable risk of the defendant being deprived of a fair trial according to

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<sup>38</sup> Exhibit P4 – Northern Territory Government Gazette No. G46, 17 November 2021.

<sup>39</sup> *Police v Hall* [2006] SASC 281 at [15] per Doyle CJ. See also *The Queen v Pluto* [2020] NTSC11 and *R v McConnell* [2013] NTSC 81.

<sup>40</sup> *Police v Dunstall* [2015] HCA 26 at [81] per Nettle J.



law.<sup>41</sup> That being the case and but for the fact that I have excluded the breath analysis certificate under the *Bunning v Cross discretion*, I would have allowed the breath analysis certificate into evidence in this case.

47. With regards the toxicology analysis certificate: The toxicology analysis certificate confirms that at the time of the defendant being subjected to the saliva test he had methamphetamine in his body. It does not quantify the amount of methamphetamine that was present in the defendant's body at the relevant time. Consequently expert evidence as to back calculation based upon the defendant's methamphetamine dissipation rate or the general methamphetamine dissipation rate do not arise.
48. Indeed, even if the defendant had of obtained a blood test following the seven hour delay caused by the Police having breached section 29AAL and that blood test showed the defendant did not have methamphetamine in his body at that time, that evidence, given the 7 hours difference between the time of the saliva test and the blood test being obtained, would be incapable of rebutting the prima facie evidence particularised in the toxicology analysis certificate, namely that at the time of the saliva test (as opposed to the blood test) the defendant had methamphetamine in his body.
49. By breaching section 129AAL of the *Traffic Act*, the Police have deprived the defendant of the opportunity to garner evidence, namely a blood test acquired in a timely manner that may have been capable of rebutting the breath analysis certificate and toxicology analysis certificate. In so doing the defendant has suffered a forensic unfairness<sup>42</sup> that could not be remedied by the calling of expert evidence by the defendant regarding the defendant's methamphetamine dissipation or the methamphetamine dissipation rate generally. Consequently, the admission of the breath analysis certificate into evidence in this constitutes an unacceptable risk of the defendant being deprived of a fair trial according to law with regards the drug driving charge and I therefore exclude the toxicology analysis certificate.
50. For the aforementioned reasons I find, in the circumstances of this case, that:
  - a. The defendant was a person in custody following a breath analysis or saliva test.
  - b. The defendant asked for a blood test following the breath analysis and later the saliva test, thereby exercising his statutory right under section 29AAL(1) of the *Traffic Act* to ask to communicate with a medical practitioner for the purpose of requesting said practitioner to *inter alia* take or to arrange for another medical practitioner, registered nurse or other qualified person to take a sample of his blood.
  - c. The Police, having received the defendant's request, in contravention of section 29AAL(2) of the *Traffic Act*, failed to make arrangements that were reasonable in the circumstances for the defendant to communicate with a medical practitioner. In so doing, the Police rendered the defendant's statutory right nugatory.
  - d. The failure of A/Sergeant O'Keefe and Constable Engle to make reasonable arrangements for the defendant to communicate with a medical practitioner was

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<sup>41</sup> *Police v Dunstall* [2015] HCA 26 at [83] per Nettle J.

<sup>42</sup> *Police v Dunstall* [2015] HCA 26 at [57] per Nettle J.

inadvertent, and due in large part to the systemic failure of the Northern Territory Police Force to train its members with regards section 29AAL of the *Traffic Act*. This inadequate training poses an ongoing high risk of systemic non-compliance as opposed to isolated non-compliance by police with regards that provision an triggers the *Bunning v Cross discretion*.

- e. The failure of A/Sergeant Angove to make arrangements that were reasonable in the circumstances for the defendant to communicate with a medical practitioner was deliberate and also triggered the *Bunning v Cross discretion*.
- f. By breaching section 29AAL of the *Traffic Act* the Police deprived the defendant of the opportunity to garner evidence capable rebutting the prima facie evidence particularised in the toxicology analysis certificate, which in turn deprived the defendant of a fair trial according to law with regards the drug driving charge thus triggering the courts unfairness discretion.

51. Based upon the foregoing analysis of the facts and law, I exclude the breath analysis certificate and toxicology analysis certificate from evidence in this case.

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