

Mitchell v Verity [2011] NTSC 95

PARTIES: MITCHELL, LESLIE JOHN

v

VERITY, BRETT JUSTIN

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
APPELLATE JURISDICTION

FILE NO: JA 17 OF 2011 (21039863)

DELIVERED: 22 NOVEMBER 2011

HEARING DATES: 19 AUGUST 2011

JUDGMENT OF: KELLY J

APPEAL FROM: E MORRIS SM

REPRESENTATION:

Counsel:

Appellant: P Bellach

Respondent: D Dalrymple

Solicitors:

Appellant: North Australian Aboriginal Justice
Agency

Respondent: Office of the Director for Public
Prosecutions

Judgment category classification: C

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mitchell v Verity [2011] NTSC 95
No. JA 17 of 2011 (21039863)

BETWEEN:

LESLIE JOHN MITCHELL
Appellant

AND:

BRETT JUSTIN VERITY
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 22 November 2011)

- [1] On 5 May 2011 the appellant Leslie John Mitchell was convicted in the Court of Summary Jurisdiction of the offence of driving with a medium range blood alcohol content. He appeals against that conviction on the ground that evidence of an admission he made to police was wrongly admitted by the learned Magistrate.
- [2] At Mr Mitchell's trial, Constable First Class Toby Wilson gave evidence that at about 7:58 p.m. on 28 November 2010 he and his partner were conducting patrols in the area of the Beachfront Hotel when they saw a silver Mitsubishi Magna sedan turn left out of the Beachfront Hotel. They drove past it slowly (around 10 to 15 km per hour) in a well lit area and saw

the driver. Constable Wilson made a decision that he would like to intercept the vehicle for a random breath test given that at that time of the night there are often people affected by alcohol leaving the hotel. He did a u-turn and followed the vehicle. He lost sight of the vehicle for a time and about two minutes later caught sight of it, pulled up on the left hand side of the road. The brake lights were on when he first saw it and were then extinguished.

- [3] As he approached the vehicle he saw a man get out of the driver's side door. There was nobody else in the vehicle and no one else near the vehicle. He believed it was the vehicle that he had seen at the Beachfront Hotel. He then observed that the man who got out of the vehicle was the same man he had seen driving.
- [4] He saw the man get out of the car and walk towards the fence of a property. He then called out to the man saying words to the effect of, "Police, stop, we are going to breath test you". The man responded, "I wasn't driving. I was just locking up the vehicle".
- [5] Constable Wilson replied, "We saw you at the Beachfront. We saw you drive at the Beachfront".
- [6] Mr Mitchell said, "Okay, I won't lie. I was driving". Constable Wilson then told Mr Mitchell they were going to conduct a breath test and required him to provide a breath sample.

- [7] The breath test indicated that Mr Mitchell's concentration of alcohol in his blood may have been over the limit. He was arrested and taken to the Darwin Watch House for breath analysis.
- [8] On the basis of the breath analysis performed at the Watch House, Mr Mitchell was charged with driving with a medium range blood alcohol content.
- [9] The key pieces of evidence at the trial were:
- (a) the analysis of the breath sample;
 - (b) the evidence of Constable Wilson and his partner identifying Mr Mitchell as the driver; and
 - (c) evidence from the police as to the admission made by Mr Mitchell.
- [10] At the hearing counsel for Mr Mitchell objected to the reception of the evidence of the admission made by Mr Mitchell at the scene to the effect that he had been driving. Counsel submitted that when the conversation occurred Mr Mitchell was no longer simply under investigation; instead he had been identified by Constable Wilson as a person who was likely to have committed an offence. At that point, therefore, it was submitted that Constable Wilson had an obligation to caution Mr Mitchell and make him understand that it was his choice to speak, that he had a right to silence and that anything he said could be used in evidence against him. It was submitted that the fact that no caution had been given meant that the learned

Magistrate had a discretion to exclude evidence of the conversation and that that discretion ought to be exercised in Mr Mitchell's favour.

[11] The learned Magistrate admitted the evidence. However, she did not do so by refusing to exercise a discretion to exclude it. Rather, she expressed the view that regulation 9 of the *Traffic Regulations* applied and that that regulation abrogated a person's right to silence or privilege not to incriminate themselves. This is an appeal against Mr Mitchell's conviction on the grounds that that evidence was wrongly admitted.

[12] It is common ground between the parties that regulation 9 of the *Traffic Regulations* did not apply in the circumstances. Regulation 9 provides:

“Persons to give particulars

- (1) If an authorised person believes a driver has committed an offence against the Act or these Regulations, the authorised person may require the driver to provide his or her personal particulars.
- (2) If an authorised person believes a driver has committed an offence against the Act or these Regulations, the authorised person may require a person to provide:
 - (a) his or her personal particulars; and
 - (b) any information within the person's power that may identify the driver of the vehicle or assist in investigating the alleged offence.
- (3) If an authorised person believes a vehicle has been used in the commission of an offence against the Act or these Regulations, the authorised person may require the owner of the vehicle to provide any information within the owner's power that may

identify the driver of the vehicle or assist in investigating the alleged offence.

- (4) A driver who is required to provide his or her personal particulars must comply with the requirement and must not give false or misleading information.
- (5) A person who is required to provide his or her personal particulars or information under subregulation (2) must comply with the requirement and must not give false or misleading information.
- (6) The owner of a vehicle who is required to provide information under subregulation (3) must comply with the requirement and must not give false or misleading information.
- (7) In this regulation:

"authorised person" means a member of the Police Force, an inspector, an officer or any other person who by or under an Act is authorised to require a person to produce a driver's licence or give his or her personal particulars.

"driver" includes a person who an authorised person reasonably believes may be the driver of a vehicle.

"personal particulars", of a person, means the person's name and address, whether the person is the holder of a licence and, if so, whether the licence is provisional or a permit licence and includes providing a sample of the person's signature."

[13] The precondition for the application of regulation 9 is that an authorised person (which includes a police officer) believes a driver has committed an offence against the Act or Regulations. If that precondition is satisfied the authorised person may require the driver to provide his or her personal particulars or may require "a person" to provide his or her particulars and

any information within the person's power that may identify (*inter alia*) the driver of the vehicle.

[14] It is common ground that at the time Constable Wilson said to Mr Mitchell that he was going to give him a breath test, he did not yet believe that a driver had committed an offence against the Act or Regulations. He had simply seen a person who he later identified as Mr Mitchell driving out of the Beachfront Hotel and determined to administer a random breath test in order to find out whether that driver had committed an offence. That being the case, the precondition for the application of regulation 9 had not been met.

[15] Accordingly, the learned Magistrate failed to address her mind to the real question, namely whether she should exercise her discretion to exclude the evidence of the admission made by Mr Mitchell. That failure to exercise the discretion constitutes an error of law. Therefore, this is not a case where the principle in *House v The King*¹ applies. Rather, error has been demonstrated and this Court may exercise the powers set out in s 177(2) of the *Justices Act* including the power to affirm, quash or vary the conviction or substitute any order which ought to have been made in the first instance (s 177(2)(c)), to remit the case for hearing or further hearing before the Court of Summary Jurisdiction (s 177(2)(d)), or, notwithstanding that the Court is of the opinion that the point raised in the appeal might be decided in favour of the

¹ (1936) 55 CLR 499.

appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred (s 177(2)(f)).

[16] In this case that means that I may set aside the conviction and remit the matter to the learned Magistrate to exercise the discretion and determine the matter afresh in light of her exercise of that discretion; or I may decide whether the discretion ought to have been exercised to exclude the evidence acting on my own view as to how the discretion should be exercised. Having done so, I may either set aside the conviction *simpliciter* or, if I consider no substantial miscarriage of justice has actually occurred, I may dismiss the appeal notwithstanding that error has been demonstrated.

[17] I propose considering the question afresh and determining whether, in my view, the evidence ought to have been excluded.

[18] In my view it should not have been. I do not consider that the circumstances called for Constable Wilson to administer a caution to Mr Mitchell. Mr Mitchell was not under arrest and the requirement for a caution to be administered in accordance with s 140 of the *Police Administration Act* did not apply. He was not proposing to ask Mr Mitchell any questions designed to elicit admissions; and he did not at that point believe that an offence had been committed, he was merely wishing to administer a random breath test, believing he had the power to do so – as indeed he would have if he had arrived seconds earlier, before Mr Mitchell pulled over. Moreover, if Constable Wilson had got to the point either through observation of Mr

Mitchell or by administering a breath test where he did believe that the driver of the vehicle he had observed had committed an offence, then the provisions of regulation 9 would have come into play and he would have had the power to require Mr Mitchell to give him any information within Mr Mitchell's power that might identify the driver of the vehicle. In other words he could have asked him directly, "Were you the driver of this vehicle?" and Mr Mitchell would have been obliged to answer.

[19] It was submitted by counsel for the appellant that regulation 9 did not have that effect and that subregulation 9(2) should be construed so that the reference to the authorised person requiring a person to provide any information ... within the person's power that may identify the driver of the vehicle, that should be read as though it said "the authorised person may require any person other than the driver to provide any information within the person's power that may identify the driver of the vehicle". I do not agree with that submission. There is no warrant to read that limitation into the regulation. The purpose of the regulation is evident: if the driver is known, subregulation 9(1) allows a police officer to require that driver to provide his or her personal particulars; if the driver is unknown or there is any doubt as to who is the driver, subregulation 9(2) allows a police officer to ask anyone at the scene to identify the driver. In those circumstances it must be contemplated that at least one of the people likely to be in the vicinity, and to whom police may direct questions under subregulation 9(2), will be the driver.

[20] It was pointed out that as the car had stopped by the side of the road and Mr Mitchell had got out of the vehicle before police arrived, there was in fact no power in the police to require him to undertake a random breath test at that point (see s 29AAC(1) of the *Traffic Act*). It was put that in those circumstances Mr Mitchell had been unlawfully detained and required to undertake a breath test. That may be the case. However, in my view the only implication of that is that, if Mr Mitchell had refused to comply and had been charged with failing to provide a breath sample, he would have had a valid defence. I do not think it has the implication that Mr Mitchell's admission that he had been driving the vehicle should not have been admitted into evidence.

[21] The statement by Mr Mitchell that he had been driving the vehicle appears to me to have been voluntary. There is nothing at all to suggest that it was obtained by means of any threats or inducements which overbore Mr Mitchell's will. All Constable Wilson said was that he had seen Mr Mitchell driving at the Beachfront Hotel. He did not even ask him a question. Nor was Mr Mitchell's statement attended by any other circumstances that might cast any doubt on its reliability. In those circumstances I do not think it was unfair or would have been unfair to admit it into evidence.

[22] Had I been exercising the discretion, I would not have excluded the evidence of that admission on discretionary grounds. No substantial miscarriage of justice has actually occurred and I would dismiss the appeal.

[23] Even if the admission ought to have been excluded, I would still have been of the view that no substantial miscarriage of justice has actually occurred.

[24] It was suggested by the appellant that as a result of reception of that evidence Mr Mitchell lost a real chance of being acquitted. The learned Magistrate expressed herself in the following terms:

“If the only evidence before me was in relation to the identification there may be some doubt in my mind in relation to whether or not the defendant was driving the car. However given that evidence, despite the warnings I give myself, despite the weaknesses and possible weaknesses in that identification, given the corroboration of that identification by the confession at the scene at the time by the defendant.

I am satisfied beyond reasonable doubt that the defendant was driving the vehicle out of the Beachfront Hotel and in that vicinity on the 28th of the 11th 2010.”

[25] I have reviewed the evidence of Constable Wilson which, as set out above, includes evidence that the brake light was on when they first saw the car, that it was extinguished shortly thereafter, and that they saw Mr Mitchell get out of the driver’s side front door, I entertain no reasonable doubt that Mr Mitchell was driving the car on the night in question and that no substantial miscarriage of justice has occurred as a result of his conviction.

[26] The appeal is dismissed.